

¶39-7517

In the Matter of

KONDRUP,

v.

REILLY,

Case No. 06940/06

Before New York Supreme Court, Nassau  
County; October 2, 2006

INDEX NOS. 15.413, 43.1331

A county sheriff's department's decision denying a deputy sheriff's claim for GML § 207-c benefits for the period of his disability from a heart attack sustained while preparing a briefing memo on a correctional officer's suicide, was vacated and remanded for further proceedings. A trial court concluded that the department acted prematurely in denying the petition because the petitioner's Injury Sustained While on Duty Form, coupled with his cover memo clearly established that he suffered a heart attack requiring hospitalization while he was on duty and in the course of investigating the suicide of a corrections officer. Even assuming the employer lacked the doctor's report at the time of its decision, the court observed that the department issued a determination only 13 days after the petitioner's initial submission, which clearly indicated the submission was preliminary and would be followed by further medical documentation. Moreover, evidence indicated that any delay in the petitioner's forwarding of the doctor's report to the employer was de minimis and did not result in any prejudice to the employer.

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In this Article 78 proceeding petitioner seeks a judgment, reversing and annulling the determinations of respondents dated December 28, 2005 and January 19, 2006, finding and confirming that petitioner is not entitled to the benefits afforded by General Municipal Law 207-c, on the grounds that the determinations are arbitrary and capricious, and further, directing respondents to make a determination that petitioner is entitled to benefits provided for by General Municipal Law 207-c.

Petitioner became a deputy undersheriff in respondent Nassau County Sheriff's Department in September 2004. As a discretionary appointee, his position is not included in the collective bargaining unit represented by the Sheriff Officers Association. Petitioner alleges that in addition to his normal duties he prepared a voluminous response to an audit by the Nassau County Comptroller's office and was engaged in collective bargaining negotiations. Consequently, he alleges that he worked ten to twelve hour days and would come into the office on weekends. He was also "on call" one weekend a month on a 24/7 basis.

On Sunday, December 4, 2005, at approximately 10:45 PM, petitioner was notified of the suicide of a corrections officer. In his capacity as "Officer of the Day," petitioner immediately went to Nassau County Correctional Center to obtain the files of the deceased and participate in the debriefing of other corrections officers. He was then requested to proceed to the residence of the deceased to offer counseling to the deceased's spouse, children and relatives. Petitioner was then requested to return to the Correctional Center to brief Sheriff Reilly, at which time he was requested to prepare a rough draft of a memo regarding the deceased for a briefing between 7:30 and 8:00 AM the next morning.

Petitioner alleges that he returned to his residence by 2:30 AM and slept for only two hours before waking at 5:30 AM. He arrived back at the Correctional Center at 6:50 AM. He was still in the process of obtaining information regarding the deceased at 7:50 AM when he received a 911 page from Deputy Undersheriff

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Zerillo to go to the conference room for the briefing. At approximately 8:30 AM, petitioner arrived at the conference room, where he began to revise the memo. Between 8:30 and 8:50 AM he experienced chest pain, arm pain, and jaw pain. Petitioner was escorted to Nassau County Medical Center where he was diagnosed with a myocardial infarction, or a heart attack. Later he was transferred to Winthrop University Hospital.

Petitioner was initially disabled from working from December 5, 2005 to January 5, 2006. Following his return to duty, petitioner began working a schedule of restricted hours. A second period of disability from January 15, 2006, to January 30, 2006 followed. On January 31, 2006, he resumed working in a full-duty capacity.

Petitioner sought the benefits provided by General Municipal Law 207-c for the period of his disability from the heart attack. He filed both "Injury Sustained While on Duty" (Exhibit A to the petition) and "Report Form 85-1 (Exhibit B)," with a cover memorandum dated December 15, 2005 (Exhibit C), to Sheriff Reilly. In his cover memorandum, petitioner stated in part as follows:

On December 12, 2005 I was discharged from Winthrop Hospital and I am scheduled to see my attending cardiologist on December 22, 2005 when my work status may be determined.

Also attached to the memorandum were copies of medical records, including discharge records maintained by Winthrop (Exhibit D) which petitioner characterized as his "initial medical documentation."

The parties dispute the date on which the report by Dr. Leonardis, petitioner's Attending Cardiologist (Exhibit E), was provided to respondents. That report is dated December 23, 2005 and states that in Dr. Leonardis' judgment, "there was a direct causal relationship between the stressful duties performed by Mr. Kondrup and the Myocardial (sic) Infarct sustained." Petitioner argues that the report was submitted before December 28, 2005, the date

of respondent's denial of petitioner's claim. In their answer (at paragraph 54) respondents state: "The Department has no record of ever receiving this letter prior to the December 28, 2005 determination."

By letter dated December 28, 2005 (Exhibit F) and without regard to the preliminary nature of petitioner's submissions to respondent on December 15, 2005, petitioner's claim was denied based on the following:

The incident did not occur while you were in the performance of your duties.

Insufficient evidence that you sustained any injury.

Insufficient evidence that the injury you claim was sustained in the performance of your duties.

Insufficient evidence of a causal connection between the injury/injuries claimed and the incident described.

The denial is signed by Deputy Undersheriff Zerillo.

By memo dated January 2, 2006 (Exhibit G), petitioner challenged the denial on all four grounds, and expressly attached the report by Dr. Leonardis. In response, by memo dated January 19, 2006 (Exhibit H), petitioner was advised that "neither Departmental policies nor General Municipal Law 207-c provide for an interdepartmental appeal" of the denial of benefits.

Respondents allege that causal connection is lacking because of "pre-existing conditions" based on an independent medical examination dated March 16, 2006 (Exhibit 1 to the answer) by a Dr. Friedman, who diagnosed "premature coronary artery disease." Dr. Friedman's finding of causality was as follows:

If the claimant's history is correct, the stress associated with being up all night, requiring him to confront a recent widow on 12/05/2005, superimposed on obstructive coronary artery disease, in part caused the acute non-Q wave myo-

cardial infarction (emphasis omitted).

Respondents argue, ultimately, that their determinations are rational, and therefore must be upheld.

Respondents are correct that the standard for review in this case is rationality. A court may not interfere with the exercise of discretion by an administrative agency unless there is no rational basis for the exercise of discretion or the action complained of is arbitrary and capricious (*Matter of Pell v Bd. of Educ.*, 34 NY2d 222, 231 [1974]; *Cole-Hatchard v Sherwood*, 309 AD2d 933 [2nd Dept. 2003]). Administrative action is arbitrary and capricious where it is without foundation in fact (*Matter of Pell v Bd. of Educ.*).

Turning to the substantive law at issue, General Municipal Law 207-c provides for the payment of the full amount of regular salary or wages to a covered municipal employee who is injured "in the performance of his duties" or is taken ill "as a result of the performance of his duties" (General Municipal Law 207-c(1); *Theroux v Reilly*, 1 NY3d 232 [2003]). As a remedial statute, General Municipal Law 207-c should be liberally construed in favor of the injured employees the statute was designed to protect (*Matter of White v County of Cortland*, 97 NY2d 336, 339 [2002]). A qualified employee need only prove a direct causal relationship between the job duties and the resulting illness or injury; pre-existing non-work related conditions do not bar recovery where petitioner demonstrates that the job duties were a direct cause of the disability (*id.*, at 340). Nor is the employee required to show that the injuries were sustained in the performance of a task related to the heightened risks and duties inherent in law enforcement (*Theroux v Reilly* at 244).

In this case, the Injury Sustained While on Duty Form, the Report Form 85-1, and petitioner's cover memo, all clearly establish that petitioner suffered a heart attack requiring hospitalization while he was on duty and in the course of the investigation of the suicide of a corrections officer. Under these circumstances, the first three grounds for respondents' denial

of petitioner's claim for benefits have absolutely no basis in fact, and can only be viewed as irrational.

The critical issue here is the fourth ground, lack of evidence of causal connection. The allegation that respondents have no record of receiving Dr. Leonardis' report is found in the answer verified by the County Attorney. In his reply affidavit, petitioner states his recollection of handing the letter to unnamed employees of the Medical Investigations Unit sometime after December 23, 2005, and before December 28, 2005.

Assuming *arguendo* that respondents did not have Dr. Leonardis' report in their possession at the time of their decision dated December 28, 2005, it is unclear why respondents, who were in receipt of only petitioner's "initial" medical documentation and who were aware of petitioner's December 22, 2005 cardiologist appointment, nevertheless felt compelled to issue a determination only 13 days after petitioner's initial submission.

If, however, respondents were in possession of Dr. Leonardis' report, respondents' finding of no causal connection without medical basis and despite Dr. Leonardis' contrary finding appears irrational.

Here, there is no indication that petitioner's December 15, 2005 submission was intended as a final submission for GML 207-c benefits. Rather, all evidence is to the contrary—that petitioner's submission was preliminary and that further medical documentation would be forthcoming.

Moreover, petitioner acted with dispatch to obtain Dr. Leonardis' report and it was forwarded to respondents no later than January 2, 2006. Any delay in getting the Leonardis report to respondents was de minimus and respondents have shown no prejudice resulting therefrom. To the contrary, respondents themselves cite the subsequent March 16, 2006 medical examination by Dr. Friedman in opposition to the within proceeding as though both it and the December 23, 2005 report by Dr. Leonardis should be considered.

Under the circumstances, this court finds that respondents acted prematurely in denying petitioner GML 207-c benefits on December 28, 2005. A de novo determination therefore appears warranted.

Respondents' decision dated December 28, 2005 is accordingly vacated and this matter is remanded for further proceedings consistent herewith.

This decision constitutes the order of the court.

### ¶39-7518

In the Matter of

**WEINSHALL,**

v.

**MARINE ENGINEERS' BENEFICIAL ASSOCIATION,**

Case No. 404212/05

Before New York Supreme Court, New York County; September 29, 2006

**INDEX NOS. 47.62, 47.86, 47.87**

A municipal transportation department's motion to vacate an arbitration award that reinstated a ferryboat first mate who was terminated for allegedly sitting, talking to passengers, eating and using a cell phone during non-rush hour runs was denied by the Supreme Court, New York County. Citing videotaped surveillance of the employee's alleged misconduct, the city argued that the arbitrator exceeded her authority in determining that the first mate's conduct was not in violation of the department's standard operating procedures or its code of conduct. However, the court rejected that assertion, observing that it was obligated to give due deference to the

arbitrator's finding that the discharge was a wrongful disciplinary action. The court noted that arbitrator placed significant weight on the testimony of the vessel captain that the SOP's did not prohibit crew members from engaging in the cited conduct during a ferry run, and that regulations limiting the mate's breaks were not issued until several months after the employee was discharged. The court also declined to find that the ordered reinstatement was violative of public policy, concluding that the award derived its legitimacy from the parties' collective bargaining agreement. Moreover, the department's legislative authority to "manage, control, and direct" the ferry system for the convenience and safety of the public did not preclude the parties from relinquishing some of that authority over safety matters to an arbitrator within the context of employee discipline.

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*For Respondents Tabak, Mellusi & Shisha, Esqs. By: Jacob Shisha, Esq. New York, New York 10006*

Petitioners Iris Weinshall, as Commissioner of the New York City Department of Transportation (DOT), and the City of New York (City) bring this Article 75 petition to vacate an arbitration award rendered in favor of respondents Marine Engineers' Beneficial Association (MEBA) and Steven Lupo on the ground that the arbitrator exceeded her power.

#### Background

MEBA, an unincorporated labor union, is the certified bargaining representative of New York City employees in the titles of Assistant Captain, Captain, Chief Marine Engineer, Marine Engineer, and Mate. Lupo, a twenty-four year veteran of the ferry system, served as a First Mate on the Samuel I Newhouse (Newhouse), a Barberi-class ferry of the Staten Island Ferry. In April 2004, Mayor Bloomberg's office received an anonymous letter concerning