

App. Div. 873, 16 N.Y.S. 2d 1018 [1939], aff'd 282 N.Y. 762, 27 N.E. 2d 46 [1940].

¶ 2. Application for injunction restraining former Surrogate from hearing disciplinary charges against members of the Police Department on ground his appointment as Third Deputy Police Commissioner for purpose of hearing the charges was invalid as Admin. Code § B3-38.0 required the consent of the Board of Estimate to validate appointment to City service of a person over 70 years of age, was denied, where the Corporation Counsel, while not conceding that approval of the Board of Estimate was required, had nevertheless obtained the approval of the Board prior to final argument on the application.—*Evans v. Monaghan*, 115 N.Y.S. 2d 511 [1952].

¶ 3. A former Surrogate of New York County, retired in 1948, could properly be appointed as a 3rd Deputy Police Commissioner in 1952 at which time he was 73 years of age for the purpose of presiding at a police departmental trial.—*In re Delehanty (Sullivan)*, 202 Misc. 33, 115 N.Y.S. 2d 602 [1952], aff'd 280 App. Div. 542, 115 N.Y.S. 2d 614 [1952], aff'd 304 N.Y. 725, 108 N.E. 2d 46 [1953].

¶ 4. Where a contract between the city and petitioner union provided that the mandatory retirement age for members of the Career Pension Plan shall be 65 and that for members in civil service titles which are certified by the city civil service commission as shortage area shall be 70, petition of union seeking judgment directing the Director of the Office of Labor Relations to certify those city service titles which are in shortage areas was denied as certifications are not frozen and under this section any list promulgated is not final. *Baker v. Lindsay*, 160 (63) N.Y.L.J. (9-27-68) 16, Col. 5 T.

¶ 5. The determination of Civil Service Commission in 1968 that there were then no titles of position for which it would be advantageous to the public service to permit the incumbents to remain in public service until age 70 was not arbitrary even though no hearing had been held and no inquiry made by it as to each title of position when its decision was based primarily upon consultation with the various department heads. *Dollard v. Civil Service Commission*, 29 N.Y. 2d 542, 272, N.E. 2d 580, 324 N.Y.S. 2d 89 [1971].

§ 13-167 **Retirement; for ordinary disability.** a. Medical examination of a member in city service for ordinary disability shall be made upon the application of the head of the agency in which such member is employed, or upon the application of such member or of a person acting in his or her behalf, stating that such member is physically or mentally incapacitated for the performance of duty and ought to be retired, provided:

(1) that such member has had ten or more years of city-service and was a member or otherwise in city-service in each of the ten years next preceding his or her retirement; or

(2) that such member (a) is a sanitation member at the time of his or her retirement, and (b) has had five or more years of allowable service as a sanitation member and (c) was a member or otherwise in city-service in each of the five years next preceding his or her retirement.

b. If such medical examination shows that any such member referred to in subdivision a of this section is physically or mentally incapacitated for the performance of duty and ought to be retired,

the medical board shall so report and the board shall retire such member for ordinary disability not less than thirty nor more than ninety days after the execution and filing of application therefor with the retirement system.

c. Death of applicant before effective date of retirement. Upon the death of an applicant, other than an applicant whose city service was as a police officer or firefighter, who has had ten or more years of city service and was a member or otherwise in city service in each of the ten years next preceding the date of his application for ordinary disability retirement, and the medical board reports that at the time of the filing of the application such member was physically or mentally incapacitated for the performance of duty and ought to be retired, and that such member's subsequent death in the interval between the filing of the application and the action of the board thereon was directly related to such physical or mental incapacity, the board shall retire such member effective not later than one day before the date of the applicant's death.

HISTORICAL NOTE

Section added chap 907/1985 § 1
Subd. c added chap 765/1989 § 1

DERIVATION

Formerly § B3-39.0 added chap 929/1937 § 1
Amended chap 331/1969 § 2
Amended chap 866/1969 § 14

CASE NOTES FROM FORMER SECTION

¶ 1. Board of Estimate could act on application for retirement within 30 days of the filing thereof and provide for the retirement to become effective after the 30 day period.—*Zeiser v. N.Y. City Employees' Retirement System*, 131 (114) N.Y.L.J. (6-15-54) 7, Col. 6 F.

¶ 2. An employee who was in City service for more than 10 years prior to his application for retirement but who was not a member of the retirement system for 10 years next preceding the retirement, was not entitled to be retired for ordinary disability.—*Manieri v. Wagner*, 33 Misc. 2d 163, 224 N.Y.S. 2d 152 [1961], aff'd 239 N.Y.S. 2d 1022 [1963].

¶ 3. Under this section, a City employee is eligible for ordinary disability retirement only if he has had 10 years of City service and has been a member of the retirement system for 10 years. An employee who was a City employee for more than 10 years but had not joined the retirement system until 1958 was not entitled to ordinary disability retirement.—*Matter of Manieri*, 33 Misc. 2d 163, 224 N.Y.S. 2d 152 [1961], aff'd 239 N.Y.S. 2d 1022 [1963].

§ 13-168 **Retirement; for accident disability.** a. Medical examination of a member in city-service for accident disability and investigation of all statements and certifications by him or her or on his behalf in connection therewith shall be made upon the application of the head of the agency in which the member is employed, or upon the application of a member or of a person acting in his or her behalf, stating that such member is physically or mentally incapacitated for the performance of city-service, as a natural

and proximate result of such city-service, and certifying the time, place and conditions of such city-service performed by such member resulting in such alleged disability and that such alleged disability was not the result of wilful negligence on the part of such member and that such member should, therefore, be retired. Such application shall be filed within two years from the happening of such accident, except, however, that such requirement as to time of filing shall not apply to any such application which (1) is filed by or with respect to a member who is a member of the uniformed force of the department of sanitation (as such force is defined in subdivision a of section 13-154 of this chapter) and (2) is based on an accident occurring wholly on or after July first, nineteen hundred sixty-three. If such medical examination and investigation shows that any member, by whom or with respect to whom an application is filed under this section, is physically or mentally incapacitated for the performance of city-service as a natural and proximate result of an accidental injury received in such city-service while a member, and that such disability was not the result of wilful negligence on the part of such member and that such member should be retired, the medical board shall so certify to the board stating the time, place and conditions of such city-service performed by such member resulting in such disability. The board shall review such certification with respect to any issues other than the existence or non-existence of physical or mental incapacitation and shall determine the member's eligibility with respect to any such issues. Upon such certification by the medical board of the member's physical or mental incapacitation and a determination by the board finding the member otherwise eligible, such member shall be retired for accident disability effective the date the application is filed or the date immediately following the last date the member was on the payroll, whichever is later.

b. 1. If such application is denied solely on the ground that such member is not, at the time of such examination, physically or mentally incapacitated for the performance of city-service, such application may thereafter be renewed during such member's city-service at any time within five years from the happening of the accident but preceding the date on which such member shall have reached his or her minimum service retirement age, provided he or she submits himself or herself to such further examinations as the medical board may require.

2. Such further application or applications shall be considered on the same basis as the original application.

3. The medical board may at any time within five years of the happening of the accident, upon findings that such member is eligible for and should be retired for accident disability in accordance with the provisions of this section, certify to the board said fact. The board shall review such certification with respect to any issues

other than the existence or non-existence of physical or mental incapacitation and shall determine the member's eligibility with respect to any such issues. Upon such certification by the medical board of the member's physical or mental incapacitation and a determination by the board finding the member otherwise eligible, such member shall be retired for accident disability forthwith.

4. The provisions of paragraphs one, two and three of this subdivision b shall not apply in the case of any member who is a member of the uniformed force of the department of sanitation and who files an application under subdivision a of this section based on an accident occurring wholly on or after July first, nineteen hundred sixty-three.

HISTORICAL NOTE

Section amended ch. 785/1986 § 4
added chap 907/1985 § 1
Subd. a amended ch. 271/1989 § 1

DERIVATION

Formerly § B3-40.0 added chap 929/1937 § 1
Amended chap 373/1940 § 1
Amended chap 637/1946 § 1
Amended chap 380/1965 § 1
Amended chap 785/1986 § 1

CASE NOTES FROM FORMER SECTION

¶ 1. Member of Employees' Retirement System was not obliged to await a confirmation by the Board of Estimate of the determination of the Medical Board denying her application for accident disability retirement before suing for an order annulling the Medical Board's determination, and declaring her entitled to accident disability retirement.—*Rosenberg v. Bd. of Estimate*, 170 Misc. 800, 10 N.Y.S. 124 [1938]; rev'd 257 App. Div. 839, 12 N.Y.S. 2d 215 [1939] on ground the Medical Board was not shown to have abused its discretion and therefore no issue was presented for the jury; aff'd without opinion 281 N.Y. 835, 24 N.E. 2d 493 [1939].

¶ 2. Plaintiff applied for accidental disability retirement as the result of an alleged heart attack induced by his work. Upon recommendation of the Medical Board, the Board of Estimate rejected the application. Petitioner made successive applications for reconsideration and offered new evidence, which was considered; but in each case the application was rejected. Within four months after the last rejection, but over 17 months after the first determination, petitioner commenced an Article 78 proceeding to review the last determination of the Board of Estimate. His petition was held timely over the contention that he was really seeking to review the original determination.—*Matter of Feller v. Wagner*, 7 A.D. 2d 126, 180 N.Y.S. 2d 748 [1958].

¶ 3. Application for retirement must be made within two years from the date of the accident, and this is not affected by the provision allowing the Medical Board to certify eligibility for retirement at any time within five years. The City was in no way estopped by the fact that its compensation doctor advised plaintiff that her health had improved, which may have induced her to neglect filing her application.—*Neary v. Wagner*, 155 N.Y.S. 2d 259 [1956].

¶ 4. Under Admin. Code § B3-40.0, an application for accident disability must be filed within two years after the accident, and

court was without power to extend time for filing of claim by petitioner whose application indicated that the accident occurred over seven years ago.—*Bross v. N.Y. City Employees' Retirement System*, 120 (29) N.Y.L.J. (8-11-48) 232, Col. 6 F.

¶ 5. Petitioner, who was injured on April 1, 1942, and first applied on April 5, 1945, for retirement on basis of an injury which was neither a recurrence nor reoccurrence of the original injury, *held* entitled to a trial, pursuant to C.P.A. § 1295, in connection with his application for an order requiring respondents to retire him for accident disability. Even though the application was not filed within two years of the injury as allegedly required by Admin. Code § B3-40.0, the incapacity obviously may not come to pass until over two years have elapsed since the accident and this was apparently contemplated by a provision in the statute for examination by the Medical Board within five years after the accident. Furthermore, petitioner allegedly had been assured by respondent's doctors that he would not be incapacitated and if he was thus lulled into delaying his action beyond the statutory period respondent should not be permitted to interpose the bar of the statute.—*In re Schaffer (O'Dwyer)*, 117 (15) N.Y.L.J. (1-18-47) 242, Col. 6 M.

¶ 6. Where conclusion of Medical Board that member of Employees' Retirement System was not disabled as result of an accidental injury received in the City's service was amply supported by competent evidence adduced before that Board, the determination of the Board of Estimate based upon the Medical Board's report might not be disturbed by the court. A mere difference in medical opinion among physicians produced by the member on the one hand, and physicians of the Medical Board on the other, as to the nature and cause of the member's disability, did not justify a conclusion that the decision made by the Board of Estimate acting on advice of its own Medical Board was arbitrary or unreasonable.—*Nilsson v. La Guardia*, 259 App. Div. 145, 18 N.Y.S. 2d 502 [1940].

¶ 7. The statutory provisions governing accidental disability retirements are radically different from the provisions controlling an application for accidental death benefits and decisions under Admin. Code § B3-40.0 relative to disability retirement applications may not be regarded as prescribing the effect to be given to a certification made by the Medical Board as to a death benefit claim.—*Daley v. Board of Estimate*, 267 App. Div. 592, 49 N.Y.S. 2d 139 [1944].

¶ 7.1. Because Board of Estimate is bound by determination of its own medical board its adoption of that board's opinion in regard to petitioner's application for accident disability retirement was not arbitrary or illegal.—*Albano v. Wagner*, 155 (43) N.Y.L.J. (3-3-66) 16, Col. 1 F.

¶ 8. Where the papers disclosed that the Medical Board of the N.Y.C. Employees' Retirement System disregarded the finding of the hospital where petitioner had been confined and treated, and that their determination denying petitioner's application for accidental disability retirement was not predicated upon all the available records, petitioner *held* entitled to an opportunity to establish that there was ample evidence to sustain the conclusion that he was disabled as result of the accident or that there was insufficient basis for the adverse findings of the Medical Board. The conclusion of the hospital and the attending doctors should not have been brushed aside by the Medical Board merely because petitioner failed to make a prompt complaint.—*Epstein v. Board of Estimate*, 128 (109) N.Y.L.J. (12-8-52) 1411, Col. 2 F.

¶ 9. A denial of accident retirement disability was affirmed where there was no proof of a heart ailment causally related to petitioner's employment, notwithstanding the contrary evidence of petitioner's doctors.—*In re Milchman*, 31 Misc. 2d 483, 221 N.Y.S. 2d 591 [1961].

¶ 10. A disability retirement retroactive to a date prior to his discharge could not be granted to petitioner who was dismissed from his job by the Transit Authority because of absence from duty. Such a retirement can only be granted to an employee in the City's service at the time the request is made. Reinstatement can only be effected by a direct attack on the dismissal in an Article 78 proceeding but such action would have to be taken within four months of the dismissal.—*Matter of Smith (New York City Employees' Retirement System)*, 145 (11) N.Y.L.J. (1-7-61) 12, Col. 4 M.

¶ 11. Petitioner was not precluded from claiming accident disability retirement although she had previously applied for and been awarded ordinary retirement disability.—*In re Milchman*, 31 Misc. 2d 483, 221 N.Y.S. 2d 591 [1961].

¶ 12. A policewoman who had entered the city's service in 1918 and had joined the retirement system in 1934, having at that time applied for and received "prior service" credit for the period from 1918 to 1934 and having paid into the annuity fund a sum equivalent to the amount she would have been required to pay had she been a member since 1918 was vested with all rights of membership, including the right to apply for accidental disability retirement even though her injury was received in 1924.—*Rosenberg v. Board of Estimate*, 170 Misc. 800, 10 N.Y.S. 2d 124 [1938], *rev'd on other grounds*, 257 App. Div. 839, 12 N.Y.S. 2d 215 [1939], *aff'd* 281 N.Y. 835, 24 N.E. 2d 493 [1939].

¶ 13. Trustee of New York City Employees' Retirement System *held* to have properly started employee's accident disability retirement payments at a date 30 days after filing of application for retirement, rather than at date of the accident (Greater New York Charter §§ 1710, 1712). Greater New York Charter § 1714, providing that retirement allowance should be paid as soon as the medical board should have found that total disability resulted from an accident, was inapplicable, since in present case the board had not approved the retirement.—*Matter of Wargo (La Guardia)*, 100 (1) N.Y.L.J. (7-1-38) 5, Col. 7 F.

¶ 14. Plaintiff, a civil service employee of the City of New York attached to the Department of Sanitation, who had applied for and received workmen's compensation for a long period of time, *held* not entitled, upon the City finally dismissing him on ground he was permanently physically incapacitated, to then insist that during such period he was able to work and had tendered his services, and was therefore entitled to receive the difference between the compensation payments and his regular salary. Plaintiff, if he believed he could perform his duties, should not have accepted compensation but should have taken the unequivocal position that he wished to work and would have no workmen's compensation benefits.—*Gress v. City of N.Y.*, 100 (101) N.Y.L.J. (10-29-38) 1374, Col. 2 F.

¶ 15. Denial of service-connected accident disability resulting from alleged personal injuries sustained by falling down stairs of subway station while employed as a transit patrolman was not arbitrary where medical board found that accident did not contribute to recurrence of petitioner's chronic ulcerative colitis. *Lambardio v. N.Y.C. Employees' Retirement System*, 167 (71) N.Y.L.J. (4-12-72) 17, Col. 3 M.

¶ 16. Fact that petitioner seeking retirement on ground of accidental disability submitted conflicting medical evidence did not suffice for judicial interference in respondent's determination where record contained medical evidence and opinion to support the administrative determination attacked. *Banigan v. N.Y.C. Employees' Retirement System*, 166 (39) N.Y.L.J. (8-25-71) 2, Col. 5 T.

¶ 17. City was not liable in damages for terminal leave and accrued vacation allowance to former city sanitation worker who

was involuntarily retired for accident disability and who because he was notified of his retirement just before its effective date was unable to use the time owed him for vacation and terminal leave since this would violate the constitutional requirement against gifts of public funds and the collective bargaining agreement did not provide for payment of a substitute in the form of cash.—*Coates v. City of N.Y.*, 49 A.D. 2d 565, 370 N.Y.S. 2d 628 [1975].

¶ 18. Petitioner who worked for Sanitation Department for 7 years was entitled to an opportunity through oral testimony to attempt to establish that his cancerous lung condition resulted from continuous exposure to fumes from the incineration of garbage and waste materials at the facility where he worked.—*Gibbs v. N.Y.C. Employees' Retirement System*, 176 (96) N.Y.L.J. (11-18-76) 10, Col. 47.

¶ 19. Application to retire on accident disability benefits was properly denied where petitioner, a caseworker for the department of social services, was assaulted on the job by a public assistance client where application had not been filed within two years after the accident as required by statute and petitioner could not rely on general equity principles to cure the defect.—*Matter of Randall (N.Y.C. Employees' Retirement System)*, 178 (13) N.Y.L.J. (7-20-77) 11, Col. 2 T.

¶ 20. To qualify for accident disability under this section it is not necessary that an accident in fact has occurred, but the disability may result from continuous use of toxic chemicals.—*Matter of Rinaldi (Board of Trustees of the New York City Employees' Retirement System)*, 180 (89) N.Y.L.J. (11-8-78) 10, Col. 4 M.

¶ 21. Application of new narrower definition of accident rather than definition in effect on January 11, 1979 and September 18, 1979, the respective dates of accident and petitioner's application for accident disability retirement was arbitrary, capricious and contrary to law since retroactive revision of the definition of accident might have impaired petitioner's constitutionally vested interest.—*Matter of Menna v. N.Y.C. Employees' Retirement System*, 110 Misc. 2d 1065 [1981].

¶ 22. Where nervous breakdown of petitioner, a uniformed transit police officer, was the natural and proximate result of an emotional trauma caused by uncertainty regarding the compensability of a job-related hearing loss, and denial of petitioner's claim, court would not dismiss his petition since petitioner could be entitled to compensation under the concept of "compensation neurosis".—*Goode v. N.Y.C. Transit Police Dept.*, 115 Misc. 2d 541 [1982].

¶ 23. Petitioner who hurt his back while lifting a heavy can of garbage was not entitled to accident disability retirement because his injury was not caused by an "accident" which requires the intervention of an "external, unexpected and unusual fortuitous event".—*Shannon v. Bd. of Trustees of N.Y.C. Employees' Retirement System*, 92 App. Div. 2d 528 [1983].

¶ 24. An accident which precipitates the development of a latent condition or aggravates a preexisting condition is a cause of disability within the meaning of this section.—*Matter of Tobin v. Steisel*, 64 N.Y. 2d 254 [1985].

CASE NOTES

¶ 1. Petitioner, a Rikers Island correction officer, who was injured in the process of leaving the premises on a Correction Department bus which transported employees to and from Rikers Island control building, was not entitled to accident disability retirement pension pursuant to Ad Code § 13-168 because his injuries had not occurred in the actual performance of city service.

Further, petitioner's eligibility for worker's compensation benefits was not dispositive of his eligibility for accident retirement benefits because section 13-176(c) of the Ad Code specifically provides that a decision of the Workers' Compensation Board is not binding on the Medical Board of the NY City Employees' Retirement System in determining the eligibility of a claimant for accident disability benefits. *Towes v. NYC Employees' Retirement System*, 160 AD2d 578.

§ 13-169 **Medical review in member disability cases.** a. As used in this section, the following terms shall mean and include:

(1) "Bargaining representative". The public employee organization which is authorized to represent a member for purposes of collective bargaining with the city.

(2) "Panel of medical experts". Those physicians whose names are set forth in a list of medical experts prepared annually by the commissioner of health and filed in his or her office and with the executive director of the retirement system on or before July first. The experts so designated shall be physicians having qualifications as specialists in such fields of medicine as such commissioner deems an essential background (i) for ascertaining, in cases where an application for disability retirement is filed by or with respect to a member, whether such member is physically or mentally incapacitated for the performance of city-service, and (ii) for rendering of reports or certifications as to diagnosis and issues of causal relationship with respect to such applications. Each of such physicians shall have had, prior to his or her designation, at least ten years of practice in the field with respect to which he or she is designated. The names of such physicians shall be separately grouped in such list, according to the fields of medicine in which they are expert, and the names in each group shall be consecutively numbered.

(3) "Party entitled to review". Either of the following:

- (i) the bargaining representative of such member; or
- (ii) the appropriate agency head.

b. (1) In any case where an application for retirement of a member for disability has been filed pursuant to section 13-167 or 13-168 of this chapter, the executive director of the retirement system, promptly after the board constituting the head of the retirement system acts on the report or certification of the medical board with respect to such application, shall give notice of such action by the board constituting such head to such member and to the appropriate agency head. Within fifteen days after such notification, any party entitled to review may file with the executive director a written request that a special medical committee, as provided for in this section, shall review the conclusions and recommendations of the medical board set forth in its report or certification and the determination of the board of trustees made pursuant to section 13-168 of this chapter.

(2) (i) Any request for review filed by a bargaining representative with respect to such application for disability retirement shall be void and of no effect unless such request includes a waiver, as hereinafter provided, duly executed and acknowledged by the member or by a person acting in his or her behalf as hereinafter provided. Such waiver may be executed by a person acting in behalf of such member in any case where, at the time of the execution of such waiver by such person, the circumstances are such that if such application for disability retirement had not been previously filed by or with respect to such member, such person would at such time of execution be authorized under the provisions of section 13-167 or 13-168 of this chapter, as the case may be, to file, as a person acting in behalf of such member, an application for disability retirement of such member.

(ii) Such waiver shall provide that the execution thereof by such member or by a person acting in his or her behalf as hereinabove authorized shall constitute an agreement by such member that his or her application for disability retirement under section 13-167 or 13-168 of this chapter, as the case may be, shall be disposed of by action of the board constituting the head of the retirement system pursuant to the provisions of this section, that such action shall be final and conclusive, and that he or she waives any and all rights which he or she might otherwise have to seek or obtain any other disposition of such application for disability retirement by court or administrative proceedings or otherwise. A waiver so executed and filed shall be effective and binding upon such member, in accordance with its terms.

c. Promptly after the filing of a request for review to be made by a special medical committee, the executive director shall transmit a copy of such request and of the report or certification of the medical board to the commissioner of health.

d. The commissioner, upon receipt of such report or certification and request, shall promptly designate three of the physicians on the panel of medical experts as a special medical committee for the purpose of reviewing the recommendations and conclusions of the medical board in such case. Such physicians shall be selected by him or her from the panel group possessing the specialist qualifications deemed essential by him or her for such review. All selections of physicians pursuant to this subdivision d shall be made in order of numerical standing in the group from which selection is to be made, and on the basis of continuous rotation within the group.

e. (1) Promptly after making the selection prescribed by subdivision d of this section, the commissioner of health shall notify the selected physicians and the executive director thereof.

(2) Such special medical committee shall, within thirty days after such notification to the physicians constituting such committee

is completed, perform, with respect to the application for retirement of such member for disability, the same functions of medical examination or otherwise as are prescribed by applicable provisions of law for performance by the medical board with respect to such application, and shall within such period adopt by majority vote and file with the executive director a report or certification, as the case may be, stating the conclusions and recommendations of such committee concerning the matters required to be reported on or certified by the medical board, pursuant to such applicable provisions of law, with respect to such application.

f. The conclusions and recommendations of the special medical committee shall supersede those of the medical board.

g. (1) Each physician who serves as a member of a special medical committee shall receive a fee for such service, to be determined by the comptroller of the city.

(2) With respect to each case in which a special medical committee acts, one-half of the fees of the members of such committee shall be paid by the city. The other half of such fees shall be paid by the bargaining representative of the member concerned in such case.

h. (1) Within forty-five days after the filing of the report or certification of the special medical committee, the board constituting the head of the retirement system shall act on such report or certification as hereinafter provided in this subdivision h.

(2) If the application is for retirement of the member pursuant to section 13-167 of this chapter, and if the medical examination by the special medical committee shows that such member is physically or mentally incapacitated for the performance of duty and ought to be retired, such committee shall so report and such board constituting such head shall retire such member for ordinary disability as of the date on which such board constituting such head acted on the report of the medical board with respect to such application, or as of the date ninety days after the filing of such application for such retirement, whichever is earlier.

(3) If the application is for retirement of the member pursuant to section 13-168 of this chapter and if the medical examination and investigation of the special medical committee shows that such member is physically or mentally incapacitated for the performance of city-service as a natural and proximate result of an accidental injury received in such city-service while a member, and that such disability was not the result of wilful negligence on the part of such member and that such member should be retired, the special medical committee shall so certify to such board constituting such head stating the time, place and conditions of such city-service performed by such member resulting in such disability, and such board constituting such head shall retire such member for accident dis-

ability as of the date on which such board acted on the report of the medical board with respect to such application.

i. In any case where a request for review by a special medical committee is filed pursuant to the provisions of this section, the provisions of sections 13-167 and 13-168 of this chapter shall be superseded by the provisions of this section to the extent that the provisions of this section are inconsistent therewith.

j. (1) In any case where the provisions of this section require the executive director to give notice to a member, the executive director may give such notice by delivery to such member personally or by mailing same to his or her last known address, as shown by the records of the department of sanitation.

(2) In any case where the provisions of this section require the giving of notice or the transmission of papers to any other person, such notice may be given or transmission effected by delivery to such person, by delivery at his or her office to any of his or her employees, or by mailing to the office address of such person.

(3) In any case where notice is given by mail pursuant to this subdivision j, such notice shall be deemed to be given on the date of mailing.

HISTORICAL NOTE

Section added chap 907/1985 § 1
Subd. b par 1 amended chap 785/1986 § 5

DERIVATION

Formerly § B3-40.1 added chap 986/1969 § 2
Sub b par 1 amended chap 888/1973 § 6
Sub c amended chap 888/1973 § 6
Sub e pars 1, 2 amended chap 888/1973 § 7
Sub j par 1 amended chap 888/1973 § 8
Section heading, subs a, b amended chap 855/1980 § 1
Sub g par 2 amended chap 855/1980 § 1
Sub j par 1 amended chap 855/1980 § 1
Sub b par 1 amended chap 785/1986 § 2

CASE NOTES

¶ 1. Petitioner injured his lower back after falling from a stool at work. Subsequently his application for accidental disability retirement was denied by the Board of Trustees and petitioner requested that the Board's decision be reviewed by a special medical committee designated by the Commissioner of Health. As required for such review under Ad Code § 13-169(b)(2)(i) petitioner waived any right to further administrative or judicial review of the Board of Trustees' determination. Therefore, it is, in effect, a form of binding arbitration. *McEwan v. NYC Employees' Retirement System*, 159 AD2d 238.

§ 13-170 **Medical review in housing police member disability cases.** a. As used in this section, the following terms shall mean and include:

(1) "Bargaining representative". The public employee organization which is authorized to represent a housing police member

one of this subdivision, such election, except as otherwise provided in subparagraph (c) of this paragraph.

(c) Any member referred to in subparagraph (a) or subparagraph (b) of this paragraph shall be eligible to file an election or a withdrawal, as the case may be, provided (i) such member files an application for service retirement no more than thirty days after the filing of such election or withdrawal and retires pursuant to such application or (ii) such member, under circumstances qualifying him or her for a vested rights retirement allowance, discontinues city-service no more than thirty days after the filing of such election or withdrawal.

c-1. In any case where any member, at the time of making any election or filing any withdrawal authorized by the preceding provisions of this section, is a Tier II member, and in any case where a Tier II member becomes subject to the provisions of paragraph three of subdivision c of this section, the making of such election or the filing of such withdrawal or the status of such member as subject to such paragraph three shall not change, alter or affect the applicability of article eleven of the retirement and social security law to such member and nothing contained in such preceding provisions or such paragraph three shall be construed as changing, altering or affecting the applicability of such article to such member.

HISTORICAL NOTE

Subd. b-1 added chap 96/1995 § 14, eff. June 28, 1995.

Subd. c pars (1), (2) amended chap 96/1995 § 15, eff. June 28, 1995.

Subd. c par (4) open par amended chap 96/1995 § 16, eff. June 28, 1995.

Subd. c par 5 added chap 96/1995 § 17, eff. June 28, 1995.

Subd. c-1 added chap 96/1995 § 18, eff. June 28, 1995.

§ 13-165 Election and assignment of retirement plans with respect to certain members.

f. Status as a fifty-five-year-increased-service-fraction member acquired under this section shall be subject to change at the election of the member as provided for by the applicable provisions of section 13-162 of this chapter.

HISTORICAL NOTE

Subd. f added chap 96/1995 § 19, eff. June 28, 1995.

§ 13-167 Retirement; for ordinary disability.

CASE NOTES

¶ 1. Section 13-167(a) provides for ordinary disability retirement after 10 years of service with the City. This pension is payable without regard to when or how the employee became disabled. Since one must have accumulated 10 years of service with the City to qualify for an ordinary disability pension, payments thereunder are not solely compensation for injuries but are in part an award for length of service. Thus, although compensation for personal injuries constitutes separate property not subject to equitable distribution in divorce cases, the pension payments in question here are subject to equitable distribution. *Dolan v. Dolan*, 167 A.D.2d 654, 562 N.Y.S.2d 875 (3rd Dept. 1990), aff'd 78 N.Y.2d 463, 577 N.Y.S.2d 195 (1991).

¶ 2. The Medical Board of the New York City Employees Retirement

retirement system or its affiliated local public employee organizations, shall have his or her retirement allowance recomputed as follows:

(a) If his retirement allowance was determined pursuant to the provisions of subdivision a of section 13-150 of the administrative code of the city of New York, it shall be recomputed pursuant to the provisions of subdivisions e, f and g of section 13-162 of such code, as though he had satisfied the eligibility requirements set forth in paragraph 2 of subdivision d of such section 13-162.

(b) If his retirement allowance was determined pursuant to the provisions of paragraph 7 of subdivision a of section 13-172 of such code, it shall be recomputed pursuant to the provisions of subdivisions e, f and g of section 13-162 of such code, as though he had satisfied the eligibility requirements set forth in paragraph 2 of subdivision d of such section 13-162.

(c) The recomputations set forth above shall be performed as of the date of the member's retirement.

§ 2. The recomputed retirement allowance shall be payable as of July 1, 1995.

§ 3. This act shall take effect immediately.

§ 13-173 **Vested retirement rights.** a. Any member who:

(1) discontinues city-service on or after July first, nineteen hundred sixty-eight, other than by death, retirement or dismissal; and

(2) is a fifty-five-year-increased-service-fraction member at the time of such discontinuance; and

(3) prior to such discontinuance, completed five years of allowable service; and

(4) does not withdraw his or her accumulated deductions in whole or in part;

shall have a vested right to receive a deferred retirement allowance as provided in this section.

i. Notwithstanding any other provision of law, a discontinued member with ten or more years of credited service in the retirement system who dies before a retirement benefit becomes payable and who is otherwise not entitled to a death benefit from the retirement system shall be deemed to have died on the last day that he or she was in service upon which his or her membership was based for purposes of eligibility for the payment of a death benefit pursuant to the provisions of section 13-148 of this title. The death benefit payable in such case shall be one-half of that which would have been payable had such member died on the last day that service was rendered.

HISTORICAL NOTE

Subd. a amended chap 659/1999 § 1, eff. Feb. 4, 2000 and deemed in effect on and after July 17, 1998.

Subd. i added chap 659/1999 § 2, eff. Feb. 4, 2000 and applicable to the death of any member occurring on or after Jan. 1, 1997.

§ 13-173.1 **Vested retirement rights; sanitation members.** a. Any member, other than a member who is subject to article fifteen of the retirement and social security law, who:

(1) on or after July first, nineteen hundred eighty-four, discontinues sanitation service other than by death; retirement or dismissal; and

(2) is a sanitation member at the time of such discontinuance; and

(3) prior to such discontinuance, completed five or more years of allowable sanitation service; and

System (NYCERS) determines whether a member is disabled. The Board of Trustees of NYCERS is bound by the Medical Board's determination that an applicant is or is not disabled. Thus, the Medical Board's determination is conclusive if it is supported by some credible evidence and is not irrational. Even if the medical conclusions of the member's treating physicians differ from those of the Medical Board, the resolution of those conflicts is the sole province of the Medical Board. *Drew v. New York City Employees' Retirement System*, 758 N.Y.S.2d 500 (App.Div. 2d Dept. 2003).

§ 13-168 **Retirement; for accident disability.**

CASE NOTES

¶ 2. A claimant under this section has the burden of establishing proximate cause between the accident and the specific injuries. The city is entitled to rely on its medical board's findings in a matter of pure medical judgment. *Carney v. New York City Employees Retirement System*, 162 A.D.2d 382, 557 N.Y.S.2d 38 (1st Dept. 1990).

¶ 3. The cleaning of the hopper of a truck was part of a sanitation worker's routine duties. Thus, an injury sustained during the course of this work was not deemed a "sudden and unexpected event," and the worker was not entitled to accidental disability retirement. *Matter of Kehoe v. City of New York*, 186 A.D.2d 376, 588 N.Y.S.2d 172 (1st Dept. 1992).

¶ 4. A police officer who slipped and fell on an icy surface in front of his precinct house was held to have suffered an injury on the way to work and thus was not entitled to accidental disability retirement based on an incurred sustained during City service. *Alessio v. New York City Employees' Retirement System*, 67 N.Y.2d 978, 502 N.Y.S.2d 992 (1986).

§ 13-169 **Medical review in member disability cases.**

k. Notwithstanding any other provision of law to the contrary, the board of trustees may adopt rules and regulations to provide that the executive director, rather than the commissioner of health, shall establish the list of the panel of medical experts, designate physicians as special medical committees and administer the medical review process. Any rules and regulations so adopted shall be substantially similar to the provisions set forth in this section.

HISTORICAL NOTE

Subd. k added chap 607/1998 § 2, eff. Sept. 30, 1998.

§ 13-172 **Retirement allowances; for service.**

NOTE

Provisions of Chap 678/1995, eff. Aug. 9, 1995.

AN ACT in relation to the reduction to retirement benefits received by long-term New York city employees who retired upon separation from service without fault or delinquency.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Notwithstanding any other provision of law, a member of the New York city employees' retirement system who retired in 1991 pursuant to section 13-150 of the administrative code of the city of New York, and who, at the time of retirement, was serving in a title certified to be represented in collective bargaining by the public employee organization with the largest number of employees who are members of the