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City That Does Not Have Written Contract With Fire Company May Still Be Liable For V.F.B.L. Benefits

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In December 2005, the Appellate Division decided its second case holding that a city is liable for providing V.F.B.L. benefits for members of a fire company located in the city when the city accepts fire protection services from the member's fire company (*Seminero v. West Hamilton Beach Volunteers, Inc.* --- N.Y.S.2d ----, 2005 WL 3312764 [3rd Dept. 2005]). In July, 2005, a similar case was also decided by the same court (*Pache v. Aviation Volunteer Fire Co.*, 20 A.D.3d 731, 800 N.Y.S.2d 228 [3 Dept., 2005]). The facts of the cases are strikingly similar. The main issue in the case was that the city did not have a written contract with the volunteer fire company. The court held that a written contract was not required where a "contract in-fact" existed.

The two cases arose in New York City where F.D.N.Y. provides fire protection for the city. In both cases, a member of a volunteer fire company was injured. The fire companies were both located in the city and provided fire protection in the city, but not pursuant to a written contract for fire protection.

Section 30(2) of the Volunteer Firefighters' Benefit Law provides, in pertinent part:

"If at the time of injury the volunteer fire[fighter] was a member of [an incorporated] fire company ... and located in a city, ... protected under a contract by the fire department or fire company of which the volunteer fire [fighter] was a member, any benefit under this chapter shall be a city ... charge."

The court recognized that there was no written contract between the city and the fire company. However, the court held that there was a "contract in-fact" under the two circumstances. In the first instance, the court stated that:

"Aviation had been in existence since 1923, and that it worked 'hand in hand' with the local FDNY company to fight fires. There was evidence that the local fire company occasionally called Aviation to request its assistance. A representative of the City provided evidence that the City was aware of Aviation, and knew that it fought fires in conjunction with the FDNY. If Aviation arrived at the scene of a fire before the local FDNY company, Aviation would be in charge of a fire scene until the FDNY company arrived and would thereafter continue working under its supervision. There was no evidence that City officials or the local fire company ever objected to or rejected the services of Aviation."

Based on these facts, the court thus held that a "contract in-fact" existed between the city and the fire company in which the member was a volunteer. Thus, the city was liable for the V.F.B.L. benefits of the volunteer.

Approximately five months later, the court in *Seminero*, referring to the facts of *Pache*, held:

"We are confronted with strikingly similar proof in the instant matter. There was testimony before the Board that [the fire company] which has been in existence for over three quarters of a century--and FDNY cooperate in fighting fires in the West Hamilton Beach area and that [the fire company] has occasionally fought local fires alone with remote FDNY

assistance. [Fire company] members and FDNY firefighters have trained together in order to become familiar with each other's equipment, FDNY has supplied [fire company members] with its fire alert systems and other apparatus and [the fire company] is included in the daily FDNY role call."

Based upon these facts, the court again held that the city of New York was party to a contract in-fact with the volunteer fire company and was therefore liable for the firefighter's V.F.B.L. benefits.

Therefore, a written contract need not exist between a municipality and a volunteer fire company in order for the municipality to be liable for V.F.B.L. benefits. Instead, a "contract in-fact" satisfies the contract requirement. A contract in-fact may be established by the city's acceptance of the volunteer fire company's fire protection services on a regular basis.