To Be Argued By:
Louis D. Stober, Jr.
Time Requested: 15 Minutes

APL-2021-00078

Nassau County Clerk's Index No. 3811/17
Appellate Division, Second Department Docket No. 2018-10975

Court of Appeals

STATE OF NEW YORK

In the Matter of

CITY OF LONG BEACH,

Petitioner-Respondent,

against

THE NEW YORK STATE EMPLOYMENT RELATIONS BOARD and
LONG BEACH PROFESSIONAL FIREFIGHTERS ASSOCIATION, IAFF, LOCAL 287,

Respondents-Appellants.

REPLY BRIEF FOR RESPONDENT-APPELLANT LONG BEACH PROFESSIONAL FIREFIGHTERS ASSOCIATION, IAFF, LOCAL 287

LAW OFFICES OF
LOUIS D. STOBER, JR., L.L.C.
Attorneys for Respondent-Appellant
Long Beach Professional Firefighters
Association, IAFF, Local 287
98 Front Street
Mineola, New York 11501
516-742-6546
lstober@stoberlaw.com

Date Completed: October 6, 2021

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

PRELIMINARY STATEMENT

This brief is respectively submitted on behalf of the Appellant, Long Beach Professional Firefighters Association, IAFF, Local 287 ("LBPFFA") in further support of its Appeal of the Decision and Order of the Appellate Division, Second Department reversing the Supreme Court, Nassau County's Order confirming the final administrative decision and order of the New York State Public Employment Relations Board ("PERB") R-259[1].

ARGUMENT

As pointed out in the Respondent's brief, Section 71 CSL was enacted approximately ten years prior to the enactment of the Taylor Law, the law which first gave public sector labor unions the right to collectively bargain for its members. As such, the legislative history of Section 71 CSL will not aid in the determination of whether the pretermination procedures to be established to effectuate a termination under Section 71 CSL are mandatory subjects of negotiation. This is so because at the time Section 71 CSL was enacted, the concept of collective bargaining in the public sector was not a reality. Therefore, there would be no reason to state whether the pretermination procedures to effectuate a termination under Section 71 CSL were or were not mandatory subjects of negotiation. That is where the expertise of the New York State Public Employment Relations Board (PERB) comes into

[1] R- refers to Joint Record on Appeal

play. PERB is entrusted with the obligation of determining what are mandatory subjects of negotiation and possesses the specific expertise, honed by years of experience, to make that determination. As such, as cited in the Appellant's main brief, the black letter law in New York is that deference will be given to PERB's expertise by the Courts of New York, see: *Matter of Kent v. Lefkowitz*, 27 N.Y.3d 499, 505 [2016]; *Poughkeepsie Professional Firefighters' Association v. New York State Public Employment Relations Board*, 6 N.Y.3d 514, 522 [2006]; *Matter of Uniformed Firefighters Assn, of Greater NY v. City of New York*, 114A.D.3d 510, 514 [1st Dept 2014], *lv denied* 23 N.Y.3d 904 [2014].

In the instant circumstance, PERB determined that the pretermination procedures for implementing a termination under Section 71 CSL is a mandatory subject of negotiation. PERB cited to *Town of Cortlandt*, 30 PERB ¶ 7012, 7025, 1997 WL 34822317 which had specifically affirmed PERB's prior determination that the pretermination procedures to terminate an employee under Section 71 CSL were a mandatory subject of negotiation. As such, the City of Long Beach's (City) unilateral enactment of a procedure to terminate Mr. Gusler (and all Long Beach Professional Fire Fighters (LBPFFA) who may be out on a workers compensation injury for more than one year) was unlawful.

While the City argues that it did not create a "procedure" for implementing a Section 71 CSL termination, the facts show otherwise (R-34). It was the City, alone,

who determined that Mr. Gusler had to appear before the Fire Commissioner on a certain date and determined what information Mr. Gusler could present, the format of such presentation and that the Fire Commissioner would then make a report to the City Manager on termination (R-22-23, 34). These are all procedural steps in the termination process that PERB determined had to be negotiated with the LBPFFA. In fact, the Administrative Law Judge so ruled, a ruling that was upheld by the full PERB Board and the Supreme Court, Nassau County. "Furthermore, I find that the City did establish a procedure, albeit a limited and simple one. It established that when a CSL §71 termination is under consideration, there will be notice to the affected employee, an opportunity to be heard and, if the employee does not pursue the opportunity to be heard, automatic termination… Based on the foregoing, I find that the City unilaterally established procedures precedent to terminating an employee under CSL §71 and, as such, violated the Act."" (R116-117).

The City also attempts, in its brief to this Court, to make it appear that it will have to negotiate with the LBPFFA every single time it chooses to implement Section 71 CSL, in an attempt to make it appear that any effort to terminate a firefighter under Section 71 CSL will be stymied by the Union. This is not the case at all. The City and the LBPFFA will negotiate the procedures one time and then it will apply to all future cases unless and until the parties successfully negotiate changes to the procedure. Once negotiated, the procedure is in place. The City also

makes it appear that agreement can never be reached because a successor Collective Bargaining Agreement (CBA) has not been reached by the parties. This to is untrue. There is nothing in the law that requires the negotiations for a Section 71 CSL procedure be part of an overall CBA negotiation. The parties can separately negotiate a procedure as they have entered into many other Memoranda of Agreement on numerous issues over the years.

That the City has refused to sit down with the LBPFFA and negotiate a procedure is the cause for delay in the instant matter, not the LBPFFA. The LBPFFA immediately, after the City served Mr. Gusler with its Section 71 letter, not only tried to commence negotiations but also provided the City with a comprehensive proposal on how to deal with Section 71 terminations (R-34, 92, 114, 154). In any event, the amount of time it takes to negotiate a pretermination procedure is not the test of negotiability, rather, as the Court and PERB held in *Town of Cortlandt* (infra):

> "While an employer is permitted to terminate an employee who has been disabled… for more than one year, there is no requirement that it do so and no express prohibition against negotiation of an employer's exercise of the prerogative…
> Neither has petitioner overcome this presumption in favor of collective bargaining with respect to its unilateral implementation of the administrative procedures."

Id. at 3148 R-162.

Other than two string cites, the Respondent has not addressed the *Cortlandt* ruling at all. The City has provided no valid argument on why *Cortlandt* should be

reversed or that *City of Watertown v. PERB*, 95 N.Y.2d 73, 76-81 (2000) is not mandatory authority. The City's attempt to distinguish *Watertown* (a 21 year precedent of this Court) basically turns the "presumption in favor of bargaining may be overcome only in special circumstances where the legislative intent to remove the issue from mandatory bargaining is plain and clear, or here a specific statutory directive leaves no room for negotiation." *Id* at 78-79 completely upside down. The City is arguing, to this Court, that because Section 71 CSL is silent on negotiability, then the Legislature must have intended for it not to be negotiable. This Court has never adopted such a tortured interpretation. Silence does not equate to prohibition.

The Respondent cannot get around the fact that the decision and order of the Second Department was not supported by any caselaw and indeed, the only cases cited by the Second Department were cited with a "cf".

As demonstrated in our primary brief, the at-issue Second Department decision has destroyed decades of labor peace without even a sound reasoning for such disregard for prior precedent. The law is based on precedent, if a Court is going to change or disregard precedent, it must do so in a well-reasoned, explicit manner. This is completely lacking in the instant matter.

We therefore request this Court reverse the decision of the Appellate Division, Second Department, 187 A.D. 3d 745 and reinstate the Judgment of the Supreme Court, Nassau County, 51 PERB ¶ 7002, 2018 WL 4483105 which confirmed the

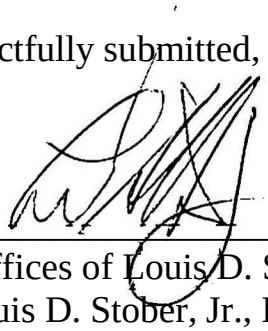
final administrative decision and order of PERB, *City of Long Beach*, 50 PERB ¶ 3036.

CONCLUSION

For all of the foregoing reasons, the LBPFFA respectfully submits that Justice R. Bruce Cozzen's Short Form Order be upheld in its entirety, that the final administrative decision of PERB be upheld in its entirety, and that the LBPFFA be awarded costs, disbursements, and such other and further relief in connection with this proceeding as this court deems just and proper.

Dated: October 6, 2021

Respectfully submitted,



Law Offices of Louis D. Stober, Jr., LLC
By: Louis D. Stober, Jr., Esq.
98 Front Street
Mineola, NY 11501
(516) 742-6546
(516) 742-8603 (fax)
Lstober@stoberlaw.com

PRINTING SPECIFICATIONS STATEMENT

Pursuant to 22 NYCRR § 1250.8(j) the foregoing brief was prepared on a computer.

Type: A proportionally spaced typeface was used as follows:

Name of typeface: Times New Roman

Point size: 14

Line spacing: Double

Word Count: The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of authorities, proof of service, printing specifications statement, or any authorized addendum containing statutes, rules, regulations, etc. is 1,336.