APL-2021-00078
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To Be Argued by Michael T. Fois

STATE OF NEW YORK – COURT OF APPEALS

In the Matter of

CITY OF LONG BEACH,

Respondent,

v.

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

Appellants.

BRIEF OF APPELLANT NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD

Appellate Division Docket No. 2018-10975
Nassau County Index No. 2017-3811

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PRELIMINARY STATEMENT

This Brief on appeal is submitted on behalf of Appellant New York State Public Employment Relations Board ("PERB") in support of its appeal of the decision and order of the Appellate Division, Second Department, in *Matter of City of Long Beach v New York State Public Employment Relations Board*, 187 AD3d 745 [2d Dept 2020], R. 259 ("Decision").[1] The Second Department reversed a final administrative decision and order of PERB, *City of Long Beach*, 50 PERB ¶ 3036 [2017], R. 159 ("*City of Long Beach*"), *affd sub nom. Matter of City of Long Beach v New York State Public Employment Relations Board,* 51 PERB ¶ 7002, 2018 WL 4483105 [Sup Ct, Nassau County 2018], R. 4, *revd* 187 AD3d 745 [2d Dept 2020], R. 259, *lv granted* 36 NY3d 911 [2021], R. 258.

Appellant Long Beach Professional Firefighters Association, IAFF, Local 287 ("Union"), filed an improper practice charge against Respondent City of Long Beach ("City") pursuant to the Public Employees' Fair Employment Act, Civil Service Law ("CSL") Article 14, commonly known as the "Taylor Law." *See* R. 19. The Union claimed that the City violated the Taylor Law by unilaterally creating procedures appurtenant to CSL § 71, which permits but does not require an employer to terminate an employee who has been absent from work for a cumulative period of one year due to an occupational injury or disease.

[1] Citations to the Joint Record on Appeal are denoted "R."

The employer's right to terminate under CSL § 71 and its right to choose who makes that determination are not at issue. The sole issue is whether, under the Taylor Law, an employer is required to bargain over the pre-termination procedures appurtenant to CSL § 71. It is undisputed that CSL § 71 does not contain any pre-termination procedures and does not explicitly prohibit collective bargaining over such procedures. *See e.g.* R. 140, 245. The City has acknowledged that the employer's decision to terminate an employee pursuant to CSL § 71 is discretionary. *See e.g.* R. 245.

In *City of Long Beach*, PERB followed its decades-old judicially-affirmed precedent. PERB's precedent is in accord with and supported by the prior holdings of this Court and lower courts in analytically similar cases. Consistent with that history and precedent, PERB held that since termination pursuant to CSL § 71 was discretionary, an employer was obligated to bargain pre-termination procedures.[2] *See* R. 164-65. The City has acknowledged that once a procedure is negotiated, no further negotiations would be required as new negotiations are not required for each termination. *See e.g.* R. 251.

In its three-page Decision, the Second Department reversed the Supreme Court and annulled *City of Long Beach*. *See* R. 259-261. In doing so, the Second

[2] While other issues were addressed by PERB in *City of Long Beach*, this is the only issue addressed in the Decision and therefore the only issue addressed herein. *City of Long Beach* was based on a stipulated record. *See* R. 33. Accordingly, there are no factual disputes in this matter.

Department did not address any of the precedent cited to it, including precedent of this Court upon which PERB relied. This Court's decisions have repeatedly held that where an employer has discretion under a statute and the statutory scheme does not provide procedures associated with that discretion, such procedures implementing that discretion are mandatorily negotiable under the Taylor Law. *See e.g. Matter of City of Watertown v State of NY Pub. Empl. Relations Bd.*, 95 NY2d 73, 78-79 [2000] ("*Watertown*"); *Matter of Schenectady Police Benevolent Assn. v NYS Pub. Empl. Relations Bd.*, 85 NY2d 480, 486 [1995] ("*Schenectady*"); *Matter of Bd. of Educ. of City Sch. Dist. of the City of NY v NYS Pub. Empl. Relations Bd.*, 75 NY2d 660, 667 [1990] ("*Bd. of Educ.*"); *Matter of Auburn Police Local 195, Council 82, AFSCME, AFL-CIO v Helsby*, 46 NY2d 1034 [1979] ("*Auburn*").

The Second Department also did not address a judicially-confirmed decision of PERB, directly on point, holding that pre-termination procedures to implement CSL § 71 are mandatorily bargainable. *See Town of Cortlandt*, 30 PERB ¶ 3031 [1997], *affd sub nom. Matter of Town of Cortlandt v Pub. Empl. Relations Bd.*, 30 PERB ¶ 7012, 1997 WL 34822317 [Sup Ct, Westchester County 1997]. *See also Town of Orangetown*, 40 PERB ¶ 3008, 3024 [2007], *affd sub nom. Matter of Town of Orangetown v NYS Pub. Empl. Relations Bd.*, 40 PERB ¶ 7008, 2007 WL 7566462 [Sup Ct, Albany County 2007].

Further, the Decision is in conflict with decisions of other departments of the Appellate Division holding that procedures associated with the exercise of statutory rights are mandatorily negotiable, absent plain and clear or inescapably implicit legislative intent to the contrary. *See e.g. Matter of City of Syracuse v NYS Pub. Empl. Relations Bd.*, 279 AD2d 98, 103 [4th Dept 2000], *lv denied* 96 NY2d 717 [2001] ("*Syracuse*"); *Matter of Auburn Police Local 195, Council 82, AFSCME, AFL-CIO v Helsby*, 62 AD2d 12, 16 [3d Dept 1978], *affd on opinion below* 46 NY2d 1034 [1979].

The Second Department did not rely on or even cite to any cases in support of its holding. Instead, the Decision is based exclusively on arguments not raised by the City before PERB, and therefore not preserved for appeal, nor raised by the parties or briefed at any point in the court proceedings. Specifically, the Second Department found that regulations promulgated by the New York State Department of Civil Service concerning notifying an employee of its rights under CSL § 71 left "no room for negotiation" of pre-termination procedures to implement CSL § 71. Decision, 187 AD3d at 747-78, R. 261 (citing 4 NYCRR 5.9).

The Second Department did not explain how a regulation can supersede a statute such as the Taylor Law. Nor did it address PERB's judicially-affirmed prior rulings holding that a "regulation does not supersede the Taylor Law duty to bargain, nor does it evidence a public policy which supersedes the public policy contained in the Taylor Law that encourages collective bargaining as to terms and conditions of

employment." *State of New York (Off. of Mental Health—Rochester Psychiatric Ctr.)*, 50 PERB ¶ 3032, 3130 [2017], *affd sub nom. Matter of State of New York v NYS Pub. Empl. Relations Bd.*, 176 AD3d 1460 [3d Dept 2019] (quotation marks omitted). *See also Matter of Bd. of Educ. of the Newburgh Enlarged City Sch. Dist. v NYS Pub. Empl. Relations Bd.*, 22 PERB ¶ 7009, 7015, 1989 WL 1703272 [Sup Ct, Albany County 1989], *motion to appeal dismissed* 25 PERB ¶ 7008, 1992 WL 12648907 [3d Dept 1992] ("*Newburgh*") (agency promulgated regulations do not supersede Taylor Law bargaining obligations).

Further, other than specifying when and what written notice an employer must provide in writing to an employee pre-termination, the regulation relied upon by the Second Department does not address pre-termination procedures under CSL § 71 such as those sought to be negotiated here, including the opportunity to be heard pre-termination. Notably, the Second Department did not find that the City even followed the regulation that it relied upon.

Thus, the Second Department annulled a PERB determination based upon an argument that was not raised before it, that neither PERB nor the Union ever had a chance to address, and that is in conflict with this Court's decisions and judicially-affirmed PERB precedent. In sum, the Second Department created out of whole cloth, and with no notice or opportunity for either the Union or PERB to be heard, a finding that this issue was a *prohibited* subject of bargaining, despite strikingly similar

circumstances being found by this Court to be mandatory subjects of collective negotiation.[3] As a result, a new incursion has been made absent logic or explanation into this State's "strong and sweeping" public policy in favor of collective bargaining. *Watertown*, 95 NY2d at 78 (citations omitted). The Decision effectively annuls decades of decisions issued by this Court, and creates a wholly unfounded public policy incursion in open inconsistency with the decisions of this Court in substantially identical circumstances. If not reversed, it puts in doubt pre-termination procedures that many employers and employee organization have already negotiated under CSL § 71 and analogous statutes.[4]

QUESTION PRESENTED

1. Did the Second Department err by holding that all pre-termination procedures to implement CSL § 71 are prohibited subjects of negotiation?

   Answer: Yes.[5]

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[3] "Prohibited" subjects are those forbidden by statute or otherwise from being embodied in a collective bargaining agreement because they are unenforceable by law or public policy. *Bd. of Educ.*, 75 NY2d at 666. "Mandatory" subjects are those over which employers and employee organizations have an obligation to bargain good faith. *Id.* "Permissive" or "non-mandatory" subjects are those either side may, but are not required to, bargain. *Id.*

[4] Although the Decision is only binding within the Second Department, if it is not reversed and annulled, PERB will have to take the Decision into consideration when addressing all improper practice petitions concerning CSL § 71 and analogous statutes regardless of where in the State the employer is located.

[5] PERB preserved this issue for review by raising it in the Affidavit and the Memorandum of Law submitted in support of its Cross Motion to Dismiss the Petition before the Trial Court (*See* R. 196, 203 *et seq.*) as well as its brief before the Second Department.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Improper Practice Charge and the PERB Decision

By letter dated November 10, 2015, the City informed a member of the Union, injured in the line of duty that, *inter alia*: his employment with the City could be terminated under CSL § 71 as a result of his cumulative absence from work; that he could meet with the Fire Commissioner and representatives of the City if he disputed the potential termination; and that the Fire Commissioner intended to recommend that his employment be terminated if he did not contest such termination. *See* R. 89. It is undisputed that the City had never negotiated any pre-termination procedures regarding CSL § 71 such as those specified in the letter. *See* R. 34 (¶ 12).

On November 17, 2015, the Union filed an improper practice charge alleging that the City violated Taylor Law § 209-a.1(d) by unilaterally adopting pre-termination procedures to implement CSL § 71. *See* R. 21 (¶¶ 5, 6, 8). The matter was heard by a PERB administrative law judge ("ALJ") on a stipulated record. *See* R. 33 *et seq.*

Before the ALJ, the City argued that it did not create any procedures and that it had no obligation to bargain any procedures appurtenant to CSL § 71. *See* R. 25-26. The City further argued that the legislative history of a different statute, CSL § 73, and the absence of any language in CSL § 71 regarding pre-termination procedures implicitly indicates that the Legislature intended such procedures not to

be mandatorily bargainable.[6] *See* R. 105-7. Notably, the City explicitly argued that civil service regulations were not pertinent to the instant matter. *See* R. 103-04.[7] The City did not claim before the ALJ that there are specific directives in CSL § 71 that foreclosed bargaining over pre-termination procedures or that State regulations left no room for bargaining pre-termination procedures to implement CSL § 71. *See* R. 24-27, 101-108.

On January 20, 2017, the ALJ held that the City violated the Taylor Law by unilaterally implementing procedures for terminating employees under CSL § 71. *See City of Long Beach*, 50 PERB ¶ 4503 [2017], R. 112. The ALJ found that the City unilaterally instituted pre-termination procedures related to notice, the opportunity to be heard, and the forfeiture of the right to be heard. *See id.* at 4505, R. 116-17.

The City appealed the ALJ's ruling to the full PERB Board. *See* R. 125. The City repeated the argument it raised before the ALJ. It did not argue that there are specific directives in CSL § 71 that foreclosed bargaining over pre-termination

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[6] CSL § 73 provides for the removal of employee after consecutive absence of at least a year due to a non-job-related disability.

[7] The City argued the instant matter was not analogous to *Town of Wallkill*, 44 PERB ¶ 4529 [2011], in which the employer unsuccessfully argued that it was not obligated to bargain pre-termination procedures pursuant to CSL § 71 because there was a local Civil Service statute requiring a hearing prior to termination. In rejecting that argument, the ALJ held that the "mere fact that local civil service rule [] states that a hearing must be provided does not render the procedures for that hearing non-negotiable." *Id.* at 4597 & n 33 (citing *Town of Orangetown*, 40 PERB ¶ 3008, 3024).

procedures or that State regulations left no room for bargaining pre-termination procedures to implement CSL § 71. *See* R. 125-51. In its brief to PERB, the City acknowledged that CSL § 71 does not contain any pre-termination procedures and that nothing in CSL § 71 explicitly prohibits collective bargaining over pre-termination procedures. *See* R. 141, 146.

On November 6, 2017, PERB affirmed the ALJ's decision. *See City of Long Beach*, 50 PERB ¶ 3036, R. 159. PERB found that the City had unilaterally instituted pre-termination procedures regarding providing notice, an opportunity to be heard, and an automatic recommendation of termination if the employee does not pursue the opportunity to be heard. PERB began its discussion by stating that: "It is undisputed that public employers are permitted to terminate an employee who is absent from work for a cumulative period of one year due to occupational injury or disease pursuant to CSL § 71." *Id.* at 3148, R. 161.

PERB then addressed its decades-old judicially-affirmed precedent on the negotiability of pre-termination procedures implementing CSL § 71. *See id.* at 3148-50, R. 161-65 (discussing *Town of Cortlandt*). Like the instant matter, the issue in *Town of Cortlandt* was whether an employer is required to bargain pre-termination procedures to implement CSL § 71. *Town of Cortlandt* holds that the employer violates the Taylor Law by unilaterally instituting such pre-termination procedures

without bargaining. In *City of Long Beach*, PERB quoted the Supreme Court's affirmance of *Town of Cortlandt*:

> While an employer is permitted to terminate an employee who has been disabled by an occupational injury 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 (quoting *Town of Cortlandt*, 30 PERB ¶ 7012, 7025, 1997 WL 34822317).

PERB found the legal issue in the instant matter indistinguishable from that decided in *Town of Cortlandt* and rejected the City's argument that it should not follow *Town of Cortlandt*. Relying upon this Court's precedent, PERB held that while "the rights explicitly given to [employers]" by a statute "are outside the scope of mandatory bargaining," CSL § 71 "does not remove from mandatory bargaining those other matters—such as review procedures—that the Legislature chose not to address." *Id.* at 3149, R. 165 (quoting *Watertown*, 95 NY2d at 83). Accordingly, PERB held that the City had a bargaining obligation with the Union concerning the pre-termination procedures to implement CSL § 71 and that the City violated the Taylor Law by failing to satisfy that bargaining obligation. *See id.*

B. The Article 78 Petition and Decision

On December 6, 2017, the City filed a petition pursuant to CPLR Article 78, alleging that PERB's determination was arbitrary, capricious, or affected by error of law. *See* R. 9. The City made the same arguments before the Supreme Court that it had made before PERB. It did not argue that specific directives of CSL § 71 foreclosed collective bargaining over pre-termination procedures or that State regulations left no room for bargaining pre-termination procedures to implement CSL § 71. *See e.g.* R. 16-18, 173, 178-190, 224-231, 236-252.

PERB cross-moved to dismiss the petition. *See* R. 192. On July 16, 2018, the Supreme Court, Nassau County, granted PERB's cross-motion, holding that PERB's determination was not arbitrary, capricious, or affected by error of law. *See City of Long Beach*, 51 PERB ¶ 7002, 2018 WL 4483105, R. 4.

On August 1, 2018, the City filed a Notice of Appeal. *See* R. 2. The City raised the same arguments before the Second Department that it had before PERB and the Supreme Court. It did not argue before the Appellate Division that specific directives of CSL § 71 foreclosed collective bargaining over pre-termination procedures or that State regulations did. *See* R. 16-18.

Oral argument was held on June 15, 2020.[8] At oral argument, the City did not argue that specific directives of CSL § 71 foreclosed collective bargaining over pre-termination procedures or that State regulations left no room for bargaining pre-termination procedures to implement CSL § 71. Civil Service regulations were not addressed at the oral argument.

On October 7, 2020, the Second Department issued the Decision reversing the Supreme Court and annulling PERB's determination. *See* R. 259. It made no attempt to distinguish any of the precedent cited to it, such as *Watertown*, nor did it cite any cases in support of its holding. The entirety of the pertinent language in the Decision is:

> [CSL] § 71 provides that where an employee has been separated from the service by reason of a disability resulting from occupational injury or disease as defined in the worker's compensation law, "he or she shall be entitled to a leave of absence for at least one year, unless his or her disability is of such a nature as to permanently incapacitate him or her for the performance of the duties of his or her position." The legislature provided that the state civil service commission shall "prescribe and amend suitable rules and regulations for carrying into effect the provisions of this chapter," including "rules for ... leaves of absence" ([CSL] § 6[1]). The Department of Civil Service has promulgated implementing regulations for [CSL] § 71, including detailed procedures for notifying an employee of the right to a one-year leave of absence during continued disability, and notifying an employee of an

[8] The oral argument is available on the Second Department website, *See* http://wowza.nycourts.gov/vod/vod.php?source=ad2&video=VGA.1592230005.External_(Public).mp4 (case #15, June 15, 2020, starting at around 2:47:28).

> impending termination following the expiration of that one-year period and the right to a hearing and to apply for a return to duty (*see* 4 NYCRR 5.9). Here, the specific directives of [CSL] § 71 and 4 NYCRR 5.9 leave no room for negotiation of the procedures to be followed prior to the termination of an employee's employment upon the exhaustion of the one-year period of leave. Therefore the presumption in favor of collective bargaining is overcome (*cf.* [*Watertown*, 95 NY2d at 78–79; *Bd. of Educ.*, 75 NY2d 660]). The petitioner's remaining contentions are without merit.

Decision, 187 AD3d at 747-48, R. 261.

The Second Department did not identify the "specific directives" of CSL § 71 upon which it relied. *Id.* Nor did it address the City's acknowledgement that CSL § 71 does not contain any pre-termination procedures and does not explicitly prohibit collective bargaining over such procedures. *See* R. 140, 245.

The cited regulation, 4 NYCRR 5.9, primarily addresses post-termination issues.[9] Other than specifying when and what written notice an employer must

[9] The entirety of the pertinent language in 4 NYCRR 5.9 is as follows:

> (b) Notice upon granting workers' compensation leave. After notice that payment of compensation has begun, and no later than the 21st day of absence due to an occupational injury or disease as defined in the Workers' Compensation Law, the appointing authority shall notify the employee in writing of the effective date of beginning of that leave; the right to leave of absence from the position during continued disability for one year unless extended; the right to apply to the appointing authority to return to duty pursuant to subdivision (d) of this section at any time during the leave; the right to a hearing to contest a finding of unfitness for restoration to duty; the termination of employment as a matter of law at the expiration of the workers' compensation leave; and the right thereafter to apply to the Civil Service Department within one year of the end of

provide pre-termination pursuant to CSL § 71, the cited regulation does not address pre-termination procedures such as those at issue in the instant matter. For instance, the cited regulation does not address the opportunity to be heard pre-termination, such as the meeting established by the City in this matter. Notably, the Second Department did not address whether the City followed 4 NYCRR 5.9.

No regulations were cited by the parties in their briefs before the Second Department, the Supreme Court, or PERB; nor were the arguments that CSL § 71 contains specific directives prohibiting collective bargaining and that State regulations left no room for collective bargaining raised before PERB or at any point in the court proceedings. Thus, the Decision relies solely on arguments that PERB never had an opportunity to address. These arguments conflict with judicially-affirmed PERB precedents that PERB had no opportunity to raise which hold that regulations do not supersede the Taylor Law duty to bargain. *See e.g. State of New York (Off. of Mental Health—Rochester Psychiatric Ctr.)*, 50 PERB ¶ 3032, 3130; *Newburgh*, 22 PERB ¶ 7009, 7015, 1989 WL 1703272. *See also State of New York (Dept. of Corr. Services—Downstate Corr. Facility)*, 31 PERB ¶ 3065 [1998]; *State of New York (Dept. of Corr. Services)*, 37 PERB ¶ 3023 [2004].

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disability for reinstatement to the position if vacant, to a similar position, or to a preferred list pursuant [CSL § 71] and subdivision (e) of this section.

JURISDICTIONAL STATEMENT

This Court has jurisdiction because the Decision is an order from the Appellate Division, Second Department, that: finally determined the action by reversing the order and judgment of the Supreme Court, Nassau County, in *City of Long Beach*, 51 PERB ¶ 7002, 2018 WL 4483105, R. 4; granted the City's petition; denied PERB's motion to dismiss the petition; declared the determination of PERB in *City of Long Beach*, 50 PERB ¶ 3036, R. 159, null and void; and dismissed with prejudice the improper practice charge filed by the Union against City. *See* R. 261. *See also* CPLR § 5602(a)(1)(i).

ARGUMENT

The Decision flouts this Court's decision in *Watertown* and the decisions leading up to it, and upends judicially-affirmed PERB precedent following the rationale of *Watertown*, such as *Town of Cortlandt*. By doing so, it creates immediate confusion as to the rights and obligations of employers and unions under the Taylor Law. It has the potential to significantly disrupt and otherwise adversely impact labor relations in the State, thereby impacting all municipal employers and employees in the State.

Moreover, the Decision, at a minimum, neuters the legitimate expectations of employers and employee organizations as to their bargaining obligations regarding pre-termination procedures under CSL § 71. Prior to the Decision, municipal

employers State-wide were aware that since CSL § 71 provided them the discretion whether or not to terminate an employee, employers were required to bargain over the pre-termination procedures to implement their discretion. Many have done so, such as Nassau County.[10] The Decision creates immediate confusion as to the viability of procedures that were negotiated in good faith which, in some case, have been in effect for decades. Indeed, if the Second Department's ruling that CSL § 71 pre-termination procedures are a prohibited subject of bargaining prevails, then all of these agreements are voidable at the employer's will, and the unions that have negotiated for these procedures cannot regain whatever consideration they gave the employers in return for the procedures.

A. Standard of Review

Under CPLR Article 78, judicial review of a determination by PERB regarding an improper practice claim is limited to whether the decision "was affected by an error of law or was arbitrary and capricious or an abuse of discretion." *Matter of Kent v Lefkowitz*, 27 NY3d 499, 505 [2016] (quoting CPLR 7803[3]). *Kent* is this Court's most recent pronouncement as to the standard of review of PERB

[10] Nassau County's negotiated CSL § 71 pre-termination procedures were discussed during oral argument before the Second Department on June 15, 2020, at around 3:53.14.

determinations.[11] *See also Matter of Inc Vil. of Lynbrook v NYS Pub. Empl. Relations Bd.*, 48 NY2d 398, 404 [1979].

Further, in reviewing a PERB determination, a court does not weigh the facts and merits de novo; rather, "as long as PERB's interpretation is legally permissible and so long as there is no breach of constitutional rights and protections, the courts have no power to substitute another interpretation." *Bd. of Educ.*, 75 NY2d at 666 (quoting *Matter of West Irondequoit Teachers Assn. v Helsby*, 35 NY2d 46, 50 [1989]). *See also Matter of Med. Malpractice Ins. Assn. v Supt. of Ins. of the State of NY*, 72 NY2d 753 [1988], *cert denied* 490 US 1080 [1989].

As this Court reaffirmed in *Poughkeepsie Professional Firefighters' Association v New York State Public Employment Relations Board*, 6 NY3d 514, 522 [2006]: "PERB as the agency charged with interpreting the Civil Service Law, is accorded deference in matters falling within its area of expertise, including the resolution of improper practice charges." *See also Kent*, 27 NY3d at 505 (same). Thus, it is well established that if PERB's "determination has a rational basis, [the Court] must affirm, even if [it] would have interpreted the provision differently." *Matter of Uniformed Firefighters Assn., of Greater NY v City of New York*, 114

[11] In *Kent*, a PERB Assistant Director conducted a hearing and found that the employer violated the Taylor Law. The employer appealed to PERB, which overturned the Assistant Director, and the union commenced an Article 78 action. The Supreme Court affirmed PERB but the Appellate Division reversed. The Court of Appeals applied the arbitrary and capricious standard and reversed the Appellate Division. *See id.*, 27 NY3d at 502.

AD3d 510, 514 [1st Dept 2014], *lv denied* 23 NY3d 904 [2014] (citing *Matter of Peckham v Calogero*, 12 NY3d 424, 430-31 [2009]).

B. This Court's Precedent Firmly Establishes that Procedures Associated with the Discretionary Exercise of Statutory Rights are Mandatorily Negotiable Absent Plain and Clear or Inescapably Implicit Legislative Intent to the Contrary.

The Decision below is flatly inconsistent with precedent of this Court, including *Watertown*, *Schenectady*, *Bd. of Educ.*, and *Auburn*.

Watertown concerned a highly analogous statutory scheme, General Municipal Law ("GML") § 207, which directs employers to pay police officers who are injured in the line of duty their full wages during the period of their disability.[12] In *Watertown*, this Court held that where a statutory scheme does not provide procedures associated with its implementation, such procedures are mandatorily negotiable under the Taylor Law. Because GML § 207-c is silent with respect to the procedures to be used to implement it, the Court concluded that such procedures are mandatorily negotiable. *See id.*, 95 NY2d at 81. This Court emphasized that it has "time and again underscored, the public policy of this State in favor of collective bargaining is strong and sweeping." *Id.* at 78 (internal quotation marks omitted)

[12] In its Answer to the Improper Practice petition, the City acknowledged that "Section 71 of the [CSL] is analogous to Sections 207-a and 207-c of the [GML]." R. 26.

(quoting *Bd. of Educ.*, 75 NY2d at 667; *Matter of Cohoes City Sch. Dist. v Cohoes Teachers Assn.*, 40 NY2d 774, 778 [1976]).

This Court further held in *Watertown* that 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 where a specific statutory directive leaves no room for negotiation." *Id.* at 78-79 (internal citations and quotation marks omitted) (quoting *Schenectady*, 85 NY2d at 486; *Bd. of Educ.*, 75 NY2d at 667).[13] This Court noted that, when assessing a statute, the "right to take these initial steps was a separate question from the procedures to be followed" appurtenant to the statue. *Id.* at 80 (explaining *Schenectady*). *See also Poughkeepsie Professional Firefighters' Assn.*, 6 NY3d at 522 (under GML 207-a, while the initial determination may not be bargainable, a "demand for a review procedure to contest a municipality's initial determination is, however, mandatorily negotiable").

In *Schenectady*, this Court held that where a statutory scheme expressly directs an employer to fulfill a specific statutory obligation, narrowly crafted procedures that are necessary for the employer to fulfill that statutory mandate may

[13] *See also Matter of Town of Orangetown v NYS Pub. Empl. Relations Bd.*, 40 PERB ¶ 7008, 2007 WL 7566462 [Sup Ct, Albany County 2007]). In *Town of Orangetown*, the court held that since the conditions under which the medical examinations are conducted pursuant to GML § 207-c are not specifically stated as a right in that statute they are subject to bargaining.

be unilaterally imposed.[14] In *Bd. of Educ.*, this Court held that the express grant of statutory discretion permitting the New York City Board of Education to require employees to file financial disclosure statements to ferret out official corruption did not relieve the school district of its duty to negotiate concerning the exercise of that statutory discretion. *See id.*, 75 NY2d at 667. In *Auburn*, by adoption of the Third Department opinion on appeal, this Court held that where the statutory scheme provides employers a discretionary right to terminate employees, the pre-termination and post-termination procedures are mandatorily negotiable under the Taylor Law, even where such procedures are expressly provided under the statutory scheme.[15]

The Second Department did not dispute that the City had unilaterally implemented procedures regarding pre-termination notice, opportunity to be heard, and forfeiture of the right to be heard. It made no attempt to reconcile its holding with the precedents discussed above which were cited to it.

In the Decision, the Second Department stated that "the specific directives of [CSL] § 71 and 4 NYCRR 5.9 leave no room for negotiation." 187 AD3d at 747-48, R. 261. However, it did not identify any language of CSL § 71 or its legislative

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[14] *Schenectady* also concerned a statutory obligation under GML § 207. This Court held that the employer did not have to negotiate concerning the requirement of GML § 207-c that employees execute a limited medical confidentiality waiver form that was necessary to determine whether an employee suffered an on-the-job injury or illness. *See id.*, 85 NY2d at 487.

[15] In *Auburn Police Local 195*, the Third Department held that alternatives to the disciplinary procedures specified in CSL §§ 75 and 76 are mandatorily negotiable. *See id.*, 62 AD2d at 16-18.

history that explicitly or implicitly foreclosed collective bargaining over pre-termination procedures. The City never argued that CSL § 71 contained any such specific directives. To the contrary, before PERB, the "City concede[d] that Section 71 does not contain any explicit language addressing collective bargaining." R. 146 (City Brief to PERB, p. 15).

The regulation cited by the Second Department, 4 NYCRR 5.9, primarily addresses post-termination procedures, does not address at all the pre-termination opportunity to be heard or the forfeiture of that right, and barely addresses the procedures for pre-termination notice. No explanation is provided in the Decision as to how a regulation that partially addresses one area of pre-termination procedures evinces a clear intent of the Legislature to leave no room for collective bargaining over any and all procedures appurtenant to the statute.

The Decision below does not evince a statutory scheme intended to remove discretion from the employer. Thus, the instant matter is not analogous to *Schenectady*, and the lower court's decision does not even attempt to suggest that it is. Rather, since no language in CSL § 71 itself addresses procedures, it is analogous to *Auburn* or, even more closely, to *Watertown*. Neither *Schenectady* nor *Auburn* were mentioned in the Decision, even though both were discussed in depth in the briefs to the Second Department.

The Second Department acknowledged the bare existence of *Watertown* and *Bd. of Educ.* with a "*cf*" citation but made no attempt to reconcile its holding with those authoritative precedents. *See* Decision, 187 AD3d at 748, R. 261.

It is undisputed that CSL § 71 does not compel the City to terminate employees who are absent from work for more than one year due to on-the-job injuries or disease and that it does not specify the procedures that the City must use in exercising its discretion to do so. *See* R. 140, 146, 245. No specific directives foreclosing collective bargaining were identified by the Second Department. Indeed, the Decision offers no support for its conclusion that the Legislature implicitly foreclosed collective bargaining over the procedures to implement CSL § 71. It makes no reference to any Legislative history. Thus, in CSL § 71, the "Legislature expressed no intent—let alone the required 'plain' or 'clear' intent—to remove the review procedures from mandatory bargaining." *Watertown*, 95 NY2d at 81.

Therefore, under this Court's "precedents, the strong and sweeping presumption in favor of bargaining applies." *Id.* CSL § 71 pre-termination procedures are, as a matter of law, mandatorily negotiable under the above precedent of this Court and the State's strong and sweeping public policy favoring collective

negotiations under the Taylor Law. Accordingly, the Decision conflicts with this Court's consistent precedents.[16]

C. The Decision Relies Upon Arguments Not Raised by the City Before PERB, and Thus Unpreserved, and Never Raised Before the Second Department.

It is undisputed that the City did not argue before PERB that CSL § 71 provided specific directives prohibiting collective bargaining over pre-termination procedures. To the contrary, it argued that the *absence* of language in CSL § 71 addressing pre-termination procedures evinces a legislative intent to prohibiting collective bargaining over pre-termination procedures, an argument neither endorsed nor relied upon by the Second Department. *See e.g.* R. 236, 245-6. The City also acknowledged that CSL § 71 does not contain any pre-termination procedures and that nothing in CSL § 71 explicitly prohibits collective bargaining over pre-termination procedures. *See* R. 140, 146. Nor did the City argue that State regulations left no room for bargaining pre-termination procedures to implement CSL § 71. *See e.g.* R. 25-26, 101-108.

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[16] The Decision also directly conflicts with Third and Fourth Department precedent. Over 40 years ago, the Third Department held that where a statutory scheme vests employers with discretion to terminate employees, the pre-termination procedures to do so are mandatorily negotiable. *See Auburn Police Local 195*, 62 AD2d at 16-17. Over 20 years ago, the Fourth Department has held that procedures associated with the exercise of statutory rights are mandatorily negotiable, absent plain and clear or inescapably implicit legislative intent to the contrary. *See Syracuse*, 279 AD2d at 103. As a result of the Decision, the obligations of employers and employees under the Taylor Law regarding CSL § 71 varies depending on the Appellate Department in which they are located.

Review of an administrative decision "is limited to matters included in the original charge or developed at the formal hearing." *Matter of Civ. Serv. Empl. Assn., Inc. v Pub. Empl. Relations Bd.*, 73 NY2d 796, 798 [1988] (citations omitted). In *Civil Service Employees Association*, this Court annulled a PERB decision that affirmed an ALJ decision because it was based upon an argument not raised before the ALJ. *See also Matter of NYS Corr. Officers and Police Benevolent Assn. v NYS Pub. Empl. Relations Bd.*, 309 AD2d 1118, 1120 [3d Dept. 2003] (same). Thus, had PERB ruled as the Second Department did, its decision would have been subject to annulment as arbitrary and capricious.

It is also undisputed that the City did not raise these arguments before the Supreme Court or the Second Department. Indeed, the City could not have properly raised these arguments before the lower courts because it is settled law that a petitioner in a CPLR Article 78 proceeding cannot raise new issues that were not raised in the administrative matter under review. *See e.g. Matter of Town of Islip v NYS Pub. Empl. Relations Bd.*, 23 NY3d 482, 493 n 8 [2014] (This Court refused to consider an argument "which was not presented to the ALJ and is therefore not preserved for our review."); *Matter of Klapak v Blum*, 65 NY2d 670, 672 [1985]; *Matter of Yonkers Gardens Co. v State of NY Div. of Housing & Community Renewal*, 51 NY2d 966, 967 [1980].

Because these arguments were not raised before PERB, they were not

addressed by PERB or the Supreme Court and should not have been considered by the Second Department on review of *City of Long Beach*. *See Klapak*, 65 NY2d at 672 ("The issue argued on appeal, not having been considered by the administrative agency in making its determination, may not be reviewed by the Court of Appeals."). *See also Islip*, 23 NY3d at 493 n 8; *Civ. Serv. Empls. Assn.*, 73 NY2d at 798.

D. A Regulation Cannot Supersede Taylor Law Bargaining Obligations.

The Second Department's ruling that the Civil Service regulations superseded the Taylor Law bargaining obligations contradicts precedent. *See e.g. Matter of State of New York v NYS Pub. Empl. Relations Bd.*, 176 AD3d 1460, 1464 [3d Dept 2019] (employer's reliance on regulation "entirely misplaced" as regulation "does not authorize petitioner to unilaterally alter an established past practice that is a mandatory subject of negotiation between the parties") (citing *State of New York (Dept. of Corr. Services)*, 37 PERB ¶ 3023 n 4; *State of New York (Dept. of Corr. Services—Downstate Corr. Facility)*, 31 PERB ¶ 3065 [1998]). *See also Newburgh*, 22 PERB ¶ 7009, 7015, 1989 WL 1703272 (regulations by the Commissioner of Education do not supersede Taylor Law bargaining obligations).[17]

[17] In *Newburgh*, the Commissioner of Education tried to remove performance evaluations from mandatory bargaining. The court held that if the Commissioner "wishes to remove the procedures for the annual evaluation of teacher performance from mandated collective bargaining, his remedy is to convince the Legislature and the Governor of this State that amendment of the statute is in the best interests of our educational system." *Id.*, 22 PERB ¶ 7009, 7015, 1989 WL 1703272.

Thus, a "regulation does not supersede the Taylor Law duty to bargain, nor does it evidence a public policy which supersedes the public policy contained in the Taylor Law that encourages collective bargaining as to terms and conditions of employment." *State of New York (Off. of Mental Health—Rochester Psychiatric Ctr.)*, 50 PERB ¶ 3032, 3130 (quotation marks and citations omitted) (quoting *Newburgh Enlarged City School District*, 21 PERB ¶ 3036, 3079 [1988], *affm sub nom. Newburgh*, 22 PERB ¶ 7009, 7015, 1989 WL 1703272).

In *State of New York (Off. of Mental Health—Rochester Psychiatric Ctr.)*, PERB rejected the argument that a State Civil Service Commission Rule codified in the NYCRR relieved an employer of its obligation to bargain procedures because the Taylor Law as "a statute enacted by the Legislature, controls over a Rule promulgated by an Agency, such as the Civil Service Commission." *Id.*

Further, the 4 NYCRR 5.9 does not even address two of the procedures created by the City (opportunity to be heard and forfeiture of the right to be heard) and only barely touches upon the third (pre-termination notice). The City never claimed before PERB or the lower courts to have followed 4 NYCRR 5.9. Accordingly, even were this Court to consider the unpreserved argument that a regulation can supersede the bargaining obligations of the Taylor Law, nothing in the Decision supports holding that 4 NYCRR 5.9 does so.

CONCLUSION

For the foregoing reasons, this Court should reverse the Memorandum and Order of the Appellate Division, Second Department, *Matter of City of Long Beach v New York State Public Employment Relations Board*, 187 AD3d 745, R. 259; reinstate the Judgment of the Supreme Court, Nassau County, *City of Long Beach*, 51 PERB ¶ 7002, 2018 WL 4483105, R. 4; and confirm the final administrative decision and order of PERB, *City of Long Beach*, 50 PERB ¶ 3036, R. 159.

Respectfully submitted,

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July 28, 2021

CERTIFICATE OF COMPLIANCE

IT IS hereby certified pursuant to 22 NYCRR § 500.13 (c)(1) that the foregoing brief was prepared on a computer using Microsoft Word. A serifed, proportionally spaced typeface was used, as follows:

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Dated: July 28, 2021
Albany, New York

COURT OF APPEALS
STATEOF NEW YORK

In the Matter of the Application of the

CITY OF LONG BEACH,

Respondent,

v.

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

Appellants.

AFFIDAVIT OF SERVICE

COA APL-2021-00078
AD No.: 2018-10975

STATE OF NEW YORK)
)
COUNTY OF ALBANY)

Lisa M. Robert, being duly sworn, deposes and says that deponent is over the age of 18 years and an employee of the New York State Public Employment Relations Board.

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Lisa M. Robert

Sworn to before me this
28th day of July, 2021.

SHEILA L. KENNEDY
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Qualified in Saratoga County
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