COURT OF APPEALS
STATE OF NEW YORK

In the Matter of

CITY OF LONG BEACH,

Petitioner,

v.

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

Respondents.

NOTICE OF MOTION FOR LEAVE TO APPEAL

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

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Dated: January 7, 2021

COURT OF APPEALS
STATE OF NEW YORK

In the Matter of

CITY OF LONG BEACH,

Petitioner,

- against -

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

Respondents.

For an Order and Judgment Pursuant to Article 78 Of the Civil Practice Law and Rules.

NOTICE OF MOTION FOR LEAVE TO APPEAL

Second Department
Index No.: 2018-10975

Nassau County
Index No.: 3811-17

PLEASE TAKE NOTICE that upon the annexed decision 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 [2d Dept 2020], decided October 7, 2020, and entered December 23, 2020, ("Decision") reversing a decision and order of Respondent New York State Public Employment Relations Board ("PERB"), the notice of entry thereof, the record on appeal before the Appellate Division, Second Department, the submissions to the Second Department, and PERB's Memorandum of Law in Support of this motion, submitted herewith, PERB

will move this Court at 20 Eagle Street, Albany, New York on January 25, 2021, or as soon thereafter as counsel may be heard, for an order pursuant to CPLR 5602(a)(1)(i) and section 500.22 of the Rules of this Court granting leave to appeal from the Decision, and for such other and further relief as the Court deems just and proper.

Dated: Albany, New York
January 7, 2021

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MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO APPEAL

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PRELIMINARY STATEMENT

This memorandum of law is submitted on behalf of New York State Public Employment Relations Board ("PERB") in support of its motion pursuant to CPLR 5602(a)(1)(i) and the Rules of this Court, 22 NYCRR § 500.22, for leave to appeal the decision 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 [2d Dept 2020] ("Decision") (Attached to Exhibit A). In the Decision, the Second Department reversed a final administrative decision and order of PERB, *City of Long Beach*, 50 PERB ¶ 3036 [2017] (R. 159), *affd sub nom. Matter of City of Long Beach v NYS Pub. Empl. Relations Bd.*, 51 PERB ¶ 7002, 2018 WL 4483105 [Sup Ct, Nassau County 2018], *revd* 187 AD3d 745 [2d Dept 2020] (R. 4).[1]

PERB issued *City of Long Beach* in an improper practice proceeding pursuant to the Public Employees' Fair Employment Act, Civil Service Law ("CSL") Article 14, commonly known as the "Taylor Law." PERB followed decisions of this Court and its own prior decisions, confirmed by judicial review, to find that the Taylor Law was violated by the employer's unilateral creation of 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 injury or disease.

[1] Citations to the Record on Appeal to the Appellate Division (filed herewith) are denoted "R."

The employer's right to terminate under CSL § 71 and its right to choose who decides if an employee is to be terminated are not at issue. The sole issue is whether, under the Taylor Law, an employer is required to bargain over the pre-termination procedures to implement 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. In *City of Long Beach*, PERB, following decades of its own decisions, supported by the prior holdings by this Court in analytically similar cases, held that since termination pursuant to CSL § 71 was discretionary, an employer was obligated to bargain pre-termination procedures.[2] *See* R. 164-65. Once a procedure is negotiated, no further negotiations would be required as new negotiations are not required for each termination.

In the three-page Decision, the Second Department reversed the Supreme Court, Nassau County, and annulled the PERB decision. The Second Department did not rely on or address the decisions of this Court upon which PERB based its conclusion. Indeed, the Second Department did not rely on or cite any cases in support of its holding. Instead, its rationale is based exclusively on an argument not raised before it by the parties or briefed at any point in the court proceedings or before PERB—that regulations promulgated by the New York State Department of Civil

[2] While other issues were addressed by PERB in *City of Long Beach,* 50 PERB ¶ 3036, 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. Accordingly, there are no factual disputes in this matter.

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 (citing 4 NYCRR 5.9).

In sum, the Second Department created out of whole cloth, and with no notice or opportunity to be heard, a finding that this issue was a *prohibited* subject of bargaining, despite strikingly similar cases being found by this Court to be mandatory subjects of collective negotiation. 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. *Matter of City of Watertown v State of NY Pub. Empl. Relations Bd.*, 95 NY2d 73, 78 [2000] ("*Watertown*") (citations omitted). This finding by the Second Department additionally annulled a PERB determination based upon an argument that was not raised by the employer, that neither PERB nor the union representing the affected employees ever had a chance to address, and that is in conflict with court-affirmed PERB precedent. 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 at issue here, including the opportunity to be heard pre-termination. Notably, the Second Department did not find that the employer followed the regulation it relied upon.

The Second Department did not address any of the precedent cited to it by the parties, including prior decisions by PERB, confirmed by the courts, 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 NYS Pub. Empl. Relations Bd.*, 30 PERB ¶ 7012, 1997 WL 34822317 [Sup Ct, Westchester County 1997]. The Second Department also failed to distinguish decisions of this Court cited to it holding 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. Watertown*, 95 NY2d at 78-79; *Matter of City 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 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*"). Further, the Decision is in conflict with decisions of other departments of the Appellate Division cited to the Second Department 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 Decision clearly meets the criteria for granting leave to appeal stated in 22 NYCRR § 500.22(b)(4). The public importance of the Decision is undeniable, as it may impact all municipal workers throughout the State. Although the Decision is only binding within the Second Department, PERB will have to take the Decision into consideration when addressing any and all improper practice petitions concerning CSL § 71 and analogous statutes regardless of where in the State the employer is located. 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. Further, as noted above, the Decision also conflicts with precedents of this Court as well as of other departments of the Appellate Division including *Watertown*, *Schenectady*, *Bd. of Educ.*, *Auburn*, and *Syracuse*.

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.

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, 203-214), its brief before the Second Department (filed herewith), and its post-oral argument submission to the Second Department (filed herewith).

STATEMENT OF PROCEDURAL HISTORY AND TIMELINESS

A. Procedural History

By letter dated November 10, 2015, the City of Long Beach ("City") informed a member of the Long Beach Professional Firefighters Association, IAFF, Local 287 ("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. 22, 29, 89.

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). It is undisputed that the City had never negotiated pre-termination procedures regarding CSL § 71. *See* R. 34 (¶ 12). The matter was heard by a PERB administrative law

judge ("ALJ") on a stipulated record. *See* R. 33-34. The City did not claim before the ALJ that it had followed regulations issued by the Department of Civil Service, nor did it argue that State regulations left no room for bargaining pre-termination procedures to implement CSL § 71. *See* R. 24-27, 96-109. To the contrary, the City argued that 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 because there was a local Civil Service statute requiring a hearing prior to termination pursuant to CSL § 71. *See* R. 103-04.[3]

On January 20, 2017, the ALJ found 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). Among the cases relied upon by the ALJ in so finding were *Town of Cortlandt* and *Town of Wallkill*.

The City appealed the ALJ's ruling to the full PERB Board. *See* R. 125. The City did not argue before PERB that State regulations left no room for bargaining

[3] In *Town of Wallkill*, 44 PERB ¶ 4529, the ALJ rejected that defense, holding 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 [2007], *affd* 40 PERB ¶ 7008, 2007 WL 7566462 [Sup Ct, Albany County 2007]).

pre-termination procedures to implement CSL § 71. *See* R. 125-51. In its brief to PERB, the City acknowledge 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, in *City of Long Beach*, 50 PERB ¶ 3036 (R. 159), PERB affirmed the ALJ's decision. 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 court-affirmed precedent on the bargainability of pre-termination procedures implementing CSL § 71. *See id.* at 3148-50 (R. 161-65) (discussing *Town of Cortlandt*, 30 PERB ¶ 3031). Like the instant matter, *Town of Cortlandt* concerned whether an employer is required to bargain pre-termination procedures to implement CSL § 71. PERB found in *Town of Cortlandt* that the employer had violated the Taylor Law by unilaterally instituting such 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 by failing to satisfy that bargaining obligation, the City violated the Taylor Law. *See id.*

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 did not argue before the Supreme Court that State regulations left no room for bargaining pre-termination procedures to implement

CSL § 71. *See* R. 9-18, 169-91, 233-253. Among the cases addressed in the City's briefs to the Supreme Court were *Town of Cortlandt* and *Town of Wallkill*. *See e.g.* R. 183-84, 186-87, 240-44.

PERB cross-moved to dismiss the petition. *See* R. 192.[4]

On July 16, 2018, the Supreme Court 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 did not argue before the Appellate Division that State regulations left no room for bargaining pre-termination procedures to implement CSL § 71. *See* R. 9-18. The cases discussed above relied upon by PERB were all addressed by the parties in their briefs to the Second Department. *See* City Brief to Appellate Division (filed herewith), pp. 15, 21-23, 29-31 (addressing *Town of Cortlandt* and *Town of Wallkill*); City Reply Brief to Appellate Division (filed herewith), pp. 6-10, 12, 15-16 (addressing *Watertown*, *Schenectady*, *Auburn*, and *Syracuse*, and *Town of Cortlandt*); PERB Brief to Appellate Division (filed herewith), pp. 8-13 (addressing *Watertown*, *Schenectady*, *Bd. of Educ.*, *Auburn*, *Syracuse*, and *Town of Cortlandt*);

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[4] Among the cases discussed by PERB in its brief to the Supreme Court were *Watertown*, *Schenectady*, *Bd. of Educ.*, *Auburn*, *Syracuse*, and *Town of Cortlandt*. *See* R. 204-11.

Union Brief to Appellate Division (filed herewith), pp. 10-11 (addressing *Town of Cortlandt*).

Oral argument was held on June 15, 2020.[5] The City did not argue in oral argument before the Appellate Division that State regulations left no room for bargaining pre-termination procedures to implement CSL § 71. The Second Department invited the parties to submit post-oral argument submissions because the City raised at oral argument a case not cited in its brief to the Second Department. In its post-oral argument submission (filed herewith), PERB discussed *Economico v Village of Pelham*, 50 NY2d 120 [1980], in which this Court explicitly held that public policy does not prohibit bargaining over job security provisions such as the procedures at issue in the instant matter. Civil Service regulations were not addressed in the oral argument.[6]

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

[6] Civil service regulations, while not discussed at oral argument, are addressed in a case that was discussed at oral argument. *See Matter of Cooke v City of Long Beach*, 247 AD2d 538 [3d Dept 1998], *lv denied* 96 NY2d 715 [2002]. *Cooke* involved an employee terminated under CSL § 71 who argued that they did not receive timely notice of their termination. *Cooke* does not address bargaining obligations or procedures to implement CSL § 71. According to the City, "*Cooke* deals with the completely unrelated issue of notice." City's June 22, 2020 Post-Oral Argument Submission to Second Department (filed herewith). The entirety of the pertinent language in *Cooke* reads: "The respondent failed to serve notice to the petitioner of the impending termination of her employment at least 30 days prior thereto pursuant to 4 NYCRR 5.9(c)(2). Since the respondent's notice did not comply with that regulation or the requirements of due process, the petitioner should be restored to her prior position." *Id.* at 538 (internal citations omitted). The

On October 7, 2020, the Second Department issued the Decision reversing the Supreme Court and annulling PERB's determination *City of Long Beach*. *See* 187 AD3d 745 (Attached to Exhibit A). The Second Department did not discuss or distinguish any of the precedent cited by the parties, nor did it cite any precedent 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 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.

Union raised *Cooke* in response to the Second Department's inquiry as to when the one-year period under CSL § 71 commences. *See* June 15, 2020 oral argument at 3:47.

Decision, 187 AD3d at 747-48. Notably, the Second Department did not address whether the City followed the cited regulation, 4 NYCRR 5.9.

While the Decision solely relies upon 4 NYCRR 5.9 to justify its holding, no regulations were cited by the parties in their briefs before the Second Department, the Supreme Court, or PERB; nor was the argument that State regulations left no room for collective bargaining raised at any point in the proceedings. Thus, the Decision relies solely on an argument that PERB never had an opportunity to address which conflicts with court-affirmed PERB precedent that PERB had no opportunity to raise 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).[7] In *State of New York*, 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

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[7] In so holding, PERB quoted from another of its court-affirmed precedents, *Newburgh Enlarged City Sch. Dist.*, 21 PERB ¶ 3006, 3079 [1988], *affd sub nom. Matter of Bd. of Educ. of the Newburgh Enlarged City Sch. Dist. v NYS Pub. Empl. Relations Bd.*, 22 PERB ¶ 7009, 1989 WL 1703272 [Sup Ct, Albany County 1989], *motion to appeal dismissed* 25 PERB ¶ 7008, 1992 WL 12648907 [3d Dept 1992].

Legislature, controls over a Rule promulgated by an Agency, such as the Civil Service Commission." *Id.* at 3130.[8] *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] (regulations do not supersede Taylor Law bargaining obligations).

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

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[8] PERB noted that this was the third time it had addressed this exact issue and held that regulations do not supersede Taylor Law bargaining obligations. *See State of New York*, 50 PERB ¶ 3032, 3130 & n. 41 (citing *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]).

[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 disability for reinstatement to the position if vacant, to a similar

cited regulation does not address the opportunity to be heard pre-termination, such as the meeting established by the City in this matter. The Second Department made no attempt to distinguish *Watertown* or *Bd. of Educ.* or any of the cases cited to it.

PERB now moves this Court for leave to appeal the Decision.

B. Timeliness

The Note of Entry of the Decision was filed by the City on December 23, 2020. It was served upon PERB by mail on December 28, 2020. Thus, PERB has until January 28, 2021, to file the present motion. This motion was served upon the City and the Union on January 7, 2021. Based on the foregoing, PERB's motion is timely. *See* CPLR §§ 5513(b), 5513(d), and 2103(b)(2).

JURISDICTIONAL STATEMENT

This Court has jurisdiction because the Decision was an order from the Appellate Division that finally determined the action by reversing the order and judgment of the Supreme Court 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* CPLR § 5602(a)(1)(i).

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position, or to a preferred list pursuant [CSL § 71] and subdivision (e) of this section.

ARGUMENT

Leave to appeal to this Court should be granted where the question presented is "of public importance, presents a conflict with prior decisions of this Court, or involve a conflict among the departments of the Appellate Division." 22 NYCRR § 500.22(b)(4). The Decision satisfies all three grounds.

A. The Question Presented is of Public Importance

The Decision is of public importance and has State-wide impact. It upends court-affirmed PERB precedent 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. PERB has State-wide jurisdiction and will have to take the Decision into consideration when addressing improper practice petitions concerning CSL § 71 and analogous statutes regardless of where in the State the employer is located. Several such matters are already pending before PERB.

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.

PERB respectively submits that this matter presents an issue of public importance such that this Court's review is appropriate.

B. The Decision Conflicts With Precedent of This Court

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

In *Watertown*, this Court held that where a highly analogous statutory scheme does not provide procedures associated with its implementation, such procedures are

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

mandatorily negotiable under the Taylor Law.[11] 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.*, 95 NY2d at 78 (internal quotation marks omitted) (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 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).

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 be unilaterally imposed.[12] In *Bd. of Educ.*, this Court held that the express grant of statutory discretion permitting the New York City Board of Education to require

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[11] *Watertown* involved procedures to review an employer's determinations concerning the grant of benefits required under 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. 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. *Id.*, 95 NY2d at 81.

[12] *Schenectady*, like *Watertown*, concerned a statutory obligation under GML § 207. This Court held that the employer did not have to negotiate concerning its requirement that employees execute a limited medical confidentiality waiver form that was necessary for it to determine whether they suffered an on-the-job injury or illness. *Id.*, 85 NY2d at 487.

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. *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.[13]

The Decision makes no attempt to reconcile itself with these precedents. 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. While the Second Department stated that "the specific directives of [CSL] § 71 and 4 NYCRR 5.9 leave no room for negotiation," it did not identify any language of CSL § 71 or its legislative history that explicitly or implicitly foreclosed collective bargaining over pre-termination procedures.[14] Decision, 187 AD3d at 747-48. Nor did it address precedent holding that regulations do not supersede the Taylor Law duty to bargain. *See e.g. State of New York*, 176 AD3d at 1464; *Bd. of Educ. of the Newburgh Enlarged City Sch. Dist.*, 1989 WL

[13] In *Auburn*, this Court held that alternatives to the disciplinary procedures specified in CSL §§ 75 and 76 are mandatorily negotiable under the strong and sweeping public policy favoring collective bargaining under the Taylor Law. *See Id.*, 46 NY2d at 1035; *Auburn*, 62 AD2d at 16.

[14] The City extensively argued legislative history to the Second Department. *See* City Brief to Appellate Division, pp. 4, 13-14, 27-28; City Reply Brief to Appellate Division, pp. 2-3, 11.

1703272. The regulation cited, 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 of three areas in which an employer has unilaterally instituted pre-termination procedures evinces a clear intent of the Legislature to leave no room for collective bargaining over any and all procedures used to implement the statute.

The Decision does not describe a statutory scheme intended to remove discretion from the employer. Accordingly, the instant matter was not shown by the Second Department to be analogous to *Schenectady*. Rather, since there is an absence of language in CSL § 71 itself addressing procedures, it is analogous to *Auburn*. Neither case, however, was mentioned in the Decision, even though both were discussed in depth in the briefs to the Second Department. *See e.g.* PERB Brief to Appellate Division, p. 10 (filed herewith).

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. 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, and it does not specify the procedures that the City must use in exercising its discretion to do so. The cited regulation, 4 NYCRR 5.9, does not address the

right to be heard prior to termination or the forfeiture of that right and barely addresses the procedures for notifying an employee. Therefore, 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.

C. The Decision Creates a Conflict Amongst the Departments of the Appellate Division

The Decision directly conflicts with Third and Fourth Department precedent. The Third Department decided *Auburn*, 62 AD2d 12, over 40 years ago. As discussed above, this Court adopted the Third Department's opinion in *Auburn* holding that where a statutory scheme vests employers with discretion to terminate employees, the pre-termination procedures to do so are mandatorily negotiable. *See Id.*, 62 AD2d at 16. For over 20 years, 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. The Decision also conflicts with Third Department precedent holding that regulations do not supersede Taylor Law bargaining obligations. *See State of New York*, 176 AD3d at 1464.

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. Only this Court can resolve this conflict.

CONCLUSION

For the foregoing reasons, this Court should grant PERB leave to appeal the Decision, *Matter of City of Long Beach v New York State Public Employment Relations Board*, 187 AD3d 745 [2d Dept 2020].

Respectfully submitted,

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January 7, 2021

Exhibit A

RELATIONS BOARD
RECEIVED

DEC 28 2020

COUNSEL
Index No. 17-3811

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

In the Matter of the Application of the

CITY OF LONG BEACH,

Petitioner-Appellant,

v.

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

Respondents-Respondents.

For a Judgment Pursuant to Article 78 of the CPLR.

NOTICE OF ENTRY WITH COPY OF ORDER

App. Div. Case No. 2018-10975

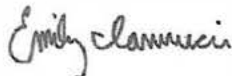
Nassau County Clerk's Index No. 3811/17

PLEASE TAKE NOTICE, that the within is a true copy of the Decision & Order of the Appellate Division, Second Department duly filed and entered in the office of the Clerk of the Appellate Division, Second Department on the 7th day of October, 2020.

Dated: Garden City, New York
December 23, 2020

Respectfully,

BOND, SCHOENECK & KING, PLLC
Attorneys for Petitioner-Appellant, City of Long Beach



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Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D64132
T/htr

____AD3d____ Argued - June 15, 2020

ALAN D. SCHEINKMAN, P.J.
RUTH C. BALKIN
JOSEPH J. MALTESE
VALERIE BRATHWAITE NELSON, JJ.

2018-10975 DECISION & ORDER

In the Matter of City of Long Beach, appellant,
v New York State Public Employment Relations Board,
et al., respondents.

(Index No. 3811/17)

Bond, Schoeneck & King, PLLC, Garden City, NY (Emily E. Iannucci and Terry O'Neil of counsel), for appellant.

David P. Quinn, General Counsel, Albany, NY (Ellen M. Mitchell of counsel), for respondent New York State Public Employment Relations Board.

Law Offices of Louis D. Stober, Jr., LLC, Mineola, NY, for respondent Long Beach Professional Firefighters Association, IAFF, Local 287.

In a proceeding pursuant to CPLR article 78 to review a determination of the New York State Public Employment Relations Board dated November 6, 2017, which determined that the petitioner violated Civil Service Law § 209-a(1)(d), the petitioner appeals from an order and judgment (one paper) of the Supreme Court, Nassau County (R. Bruce Cozzens, Jr., J.), dated July 6, 2018. The order and judgment granted the motion of the respondent New York State Public Employment Relations Board to dismiss the petition, and, in effect, denied the petition and dismissed the proceeding.

ORDERED that the order and judgment is reversed, on the law, with one bill of costs, the motion of the respondent New York State Public Employment Relations Board to dismiss the petition is denied, the petition is granted, the determination of the New York State Public Employment Relations Board dated November 6, 2017, is declared null and void, and the improper

practice charge filed by the Long Beach Professional Firefighters Association, IAFF, Local 287, against the petitioner is dismissed with prejudice.

On November 12, 2014, nonparty Jay Gusler, a member of the respondent Long Beach Professional Firefighters Association, IAFF, Local 287 (hereinafter LBPFA), was injured in the line of duty. Gusler was absent from work starting on November 13, 2014. On November 10, 2015, the petitioner sent Gusler a letter notifying him that it was evaluating whether to exercise its right to separate Gusler from his employment pursuant to Civil Service Law § 71 once Gusler had been absent from work for more than one year due to injury. The letter notified Gusler that a hearing would be held and Gusler would have the opportunity to be heard, but that if he failed to attend the hearing, it would be determined that he did not contest the termination of his employment and a recommendation for termination would be made. The record does not reflect that Gusler ever responded to the notice to appear.

Thereafter, the LBPFA requested that the petitioner negotiate the procedure for separating a member from service under Civil Service Law § 71. The petitioner refused this request, and the LBPFA filed an improper practice charge against the petitioner, alleging that the petitioner violated Civil Service Law § 209-a(1)(d) by refusing to negotiate with the LBPFA. An administrative law judge determined that the petitioner had violated Civil Service Law § 209-a(1)(d), and the petitioner appealed to the respondent New York State Public Employment Relations Board (hereinafter PERB). PERB affirmed the determination, inter alia, that the petitioner had violated Civil Service Law § 209-a(1)(d), and directed the petitioner to rescind its procedure relating to Civil Service Law § 71 terminations. The petitioner then commenced this proceeding pursuant to CPLR article 78, alleging that PERB's determination was arbitrary and capricious. PERB moved to dismiss the petition, and the Supreme Court granted its motion and, in effect, denied the petition and dismissed the proceeding. The petitioner appeals.

"It is well settled that '[t]he Taylor Law requires collective bargaining over all terms and conditions of employment'" (*Matter of New York City Tr. Auth. v New York State Pub. Empl. Relations Bd.*, 19 NY3d 876, 879, quoting *Matter of Patrolmen's Benevolent Assn. of City of N.Y., Inc. v New York State Pub. Empl. Relations Bd.*, 6 NY3d 563, 572). The Court of Appeals has "'made clear that the presumption . . . that all terms and conditions of employment are subject to mandatory bargaining cannot easily be overcome'" (*Matter of New York City Tr. Auth. v New York State Pub. Empl. Relations Bd.*, 19 NY3d at 879, quoting *Matter of Patrolmen's Benevolent Assn. of City of N.Y., Inc. v New York State Pub. Empl. Relations Bd.*, 6 NY3d at 572; *see Matter of New York City Tr. Auth. v New York State Pub. Empl. Relations Bd.*, 78 AD3d 1184, 1185, *affd* 19 NY3d 876). "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" (*Matter of City of Watertown v State of N.Y. Pub. Empl. Relations Bd.*, 95 NY2d 73, 78-79 [internal quotation marks omitted]). Additionally, "a subject that would result in [the public employer's] surrender of nondelegable statutory responsibilities cannot be negotiated" (*Matter of Board of Educ. of City School Dist. of City of N.Y. v New York State Pub. Empl. Relations Bd.* 75 NY2d 660, 667). Finally, "'some subjects are excluded from collective bargaining as a matter of policy, even where no statute explicitly says so'"

(*Matter of City of New York v Patrolmen's Benevolent Assn. of the City of N.Y., Inc.*, 14 NY3d 46, 58, quoting *Matter of Patrolmen's Benevolent Assn. of City of N.Y., Inc. v New York State Pub. Empl. Relations Bd.*, 6 NY3d at 572).

Contrary to the respondents' contentions, this Court need not defer to PERB's interpretation of Civil Service Law § 71, because "[that] question is one of pure statutory construction dependent only on accurate apprehension of legislative intent [with] little basis to rely on any special competence of PERB," and therefore this Court can address this issue de novo (*Matter of New York City Tr. Auth. v New York State Pub. Empl. Relations Bd.*, 8 NY3d 226, 231 [internal quotation marks omitted]).

Civil Service Law § 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" (Civil Service Law § 6[1]). The Department of Civil Service has promulgated implementing regulations for Civil Service Law § 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 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 Civil Service Law § 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. Matter of City of Watertown v State of N.Y. Pub. Empl. Relations Bd.*, 95 NY2d at 78-79; *Matter of Board of Educ. of City School Dist. of City of N.Y. v New York State Pub. Empl. Relations Bd.*, 75 NY2d 660). The petitioner's remaining contentions are without merit.

Accordingly, we reverse the order and judgment, grant the petition, deny PERB's motion to dismiss the petition, declare the determination of PERB dated November 6, 2017, null and void, and dismiss with prejudice the improper practice charge filed by the LBPFA against the petitioner.

SCHEINKMAN, P.J., BALKIN, MALTESE and BRATHWAITE NELSON, JJ., concur.

ENTER:

Aprilanne Agostino
Clerk of the Court

Exhibit B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

In the Matter of the Application of the

CITY OF LONG BEACH,

Petitioner,

v.

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

Respondents.

For a Judgment Pursuant to Article 78 of the CPLR.

Index No. 17-3811

NOTICE OF ENTRY
WITH COPY OF ORDER

NYS PUBLIC EMPLOYMENT
RELATIONS BOARD
RECEIVED

AUG 1 2018

COUNSEL

PLEASE TAKE NOTICE that the within is a true and correct copy of an Order duly entered in the Office of the Clerk of the within named Court on July 10, 2018.

Dated: Garden City, New York
July 31, 2018

BOND, SCHOENECK & KING, PLLC

By: ______________________

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98 Front Street
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. R. BRUCE COZZENS, JR.
Justice.

TRIAL/IAS PART 2
NASSAU COUNTY

CITY OF LONG BEACH

Petitioner,

-against-

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

Respondents.

MOTION #001,002
INDEX#3811/2017
MOTION DATE:
February 26,2018

The following papers read on this motion:

Notice of Petition..1
Notice of Cross-motion...1
Memorandum of Law..3
Reply Memorandum of Law..1

Upon the foregoing papers, it is ordered that the petitioner's application pursuant to CPLR Article 78 and respondent's motion to dismiss are determined as hereinafter set forth.

Petitioner commenced this proceeding pursuant to Article 78 seeking: (1) an order and judgement vacating and annulling a decision and order issued by the New York State Public Employment Relations Board (PERB) dated November 6, 2017; and (2) a dismissal of an improper practice charge filed by the Long Beach Professional Firefighters Association, IAFF, Local 287 (Association), on or about November 17, 2015. Respondent PERB filed a cross-motion to dismiss the petition.

It is alleged that the petitioner violated Civil Service Law §209-a.1(d) when the petitioner refused to negotiate pre-termination procedures of a public employee absent from work for more than a year while collecting worker's compensation. It is alleged that the petitioner unilaterally established procedures precedent to terminating an employee pursuant to Civil Service Law §71 by sending that employee a notice and opportunity to be heard. The decision by PERB on November 6, 2017 ordered the city to rescind its procedure

relating to CSL §71 terminations and to bargain in good faith with the Association on pre-termination procedures.

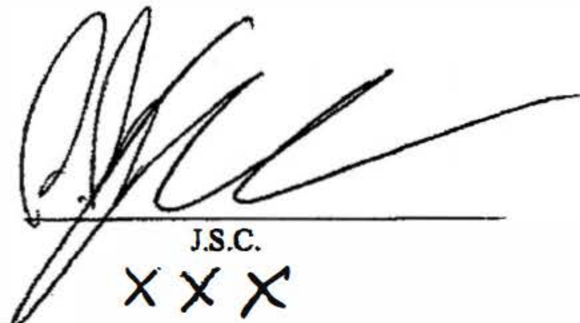
In support of the petition, the petitioner asserts that the decision rendered by PERB was arbitrary and capricious and/or affected by error of law pursuant to CPLR 7803(3). The petitioner contends that the legislative history of CSL §71 demonstrates a clear intent to let employers remove disabled employees without having to comply with any negotiated or statutorily-imposed pre-determination procedures. The petitioner contends that they provided the requisite minimal due process in its notice and opportunity to be heard and negotiating with the Associate about procedure would frustrate the public policy of efficient replacement of public employees.

In support of the motion to dismiss, the respondent contends that PERB's decision cannot be arbitrary and capricious, since they are the agency charged with implementing the fundamental policies of the Taylor Law, thus having developed an expertise in this area. The respondent further argues that since CSL §71 permits but does not require termination after one year's absence due to disability, a bargaining obligation is automatically triggered, unless the statute contains plain and clear language establishing a legislative intent to exempt an employer from a bargain concerning such terminations.

We emphasize at the outset the narrowness of our inquiry. The scope of our review of PERB's interpretation of the Civil Service Law is a limited one. Simply stated, unless the board's determination was "affected by an error of law" or was "arbitrary and capricious or an abuse of discretion", we will not interfere (CPLR 7803, subd. 3). For, "(s)o 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" *(Matter of West Irondequoit Teachers Assn. v. Helsby*, 35 N.Y.2d 46, 50, 358 N.Y.S.2d 720, 722, 315 N.E.2d 775, 777). As the agency charged with implementing the fundamental policies of the Taylor Law, the board is presumed to have developed an expertise and judgment that requires us to accept its construction if not unreasonable. *Matter of Fisher (Levine)*, 36 N.Y.2d 146, 149-150, 365 N.Y.S.2d 828, 831-832, 325 N.E.2d 151, 831-832; *Matter of West Irondequoit Teachers Assn. v. Helsby*, supra, pp. 50-51, 358 N.Y.S.2d pp. 722, 315 N.E.2d pp. 776-777; *Matter of Howard v. Wyman*, 28 N.Y.2d 434, 437-438, 322 N.Y.S.2d 683, 685, 271 N.E.2d 528, 529; Civil Service Law, ss 200, 205). *Inc. Vill. of Lynbrook v. New York State Pub. Employment Relations Bd.*, 48 N.Y.2d 398, 404–05, 399 N.E.2d 55, 58 (1979)

In the instant matter, the Court finds that the decision rendered by PERB on November 6, 2017 was not arbitrary and capricious, nor was it affected by an error in law within the meaning of CPLR 7808(3).

As such, the respondent's motion to dismiss is granted and the petition pursuant to Article 78 is dismissed.



Dated: JUL 06 2018

J.S.C.

XXX

ENTERED

JUL 10 2018

NASSAU COUNTY
COUNTY CLERK'S OFFICE

Exhibit C

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LONG BEACH PROFESSIONAL FIREFIGHTERS ASSOCIATION, IAFF, LOCAL 287,

Charging Party,

- and –

CASE NO. U-34671

CITY OF LONG BEACH,

Respondent.

LOUIS D. STOBER, ESQ., for Charging Party

BOND, SCHOENECK & KING, PLLC (TERRY O'NEIL & EMILY HARPER of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the City of Long Beach (City) to a decision and order of an Administrative Law Judge (ALJ) finding that the City violated § 209-a.1(d) of the Public Employees' Fair Employment Act (Act).[1] The ALJ found that the City violated the Act by refusing to negotiate over the applicable procedures after informing a firefighter represented by the Long Beach Professional Firefighters Association, IAFF, Local 287 (Association) that it intended to seek his termination under Civil Service Law (CSL) § 71 and providing an opportunity for the employee to be heard prior to his termination.

EXCEPTIONS

The City excepts to the ALJ's finding and argues that it has no obligation to bargain prior to terminating an employee pursuant to CSL § 71. The City also argues

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[1] 50 PERB ¶ 4503 (2017).

that the ALJ erred by finding that the charge was facially sufficient to state a claim under the Act.

The Association supports the ALJ's decision and contends that no basis has been demonstrated for reversal.

Based upon our review of the record and our consideration of the parties' arguments, we affirm the decision of the ALJ.

FACTS

The parties stipulated to the following facts. The Association and the City are parties to a collective bargaining agreement (CBA) covering the period of July 1, 2004 through June 30, 2010, the terms of which remain in effect pursuant to § 209-a(1) (e) of the Act.[2] The Association is the recognized bargaining representative "of all City employees in the following unit: paid professional members of the fire fighting force in the ranks of Fire Fighter, Lieutenant (including all specializations) and any full-time professional personnel assigned to the Fire Department as the City may deem necessary, and excluding all Volunteer members of the Fire Department."[3]

On or about November 12, 2014, Association member Jay Gusler (Gusler) reported that he was injured in the line of duty. He received Workers' Compensation benefits, and was continuously absent from work using sick leave accruals since on or about November 13, 2014.[4]

As a result of Gusler's cumulative absence from work, by letter dated November 10, 2015, the City informed Gusler that, *inter alia:* the City "is evaluating whether to

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[2] Stipulation of Facts, ¶ 1.
[3] *Id*, ¶ 4.
[4] *Id*, ¶ 3-8.

exercise its right to separate you from employment pursuant to New York Civil Service Law [CSL] § 71."[5] The letter further advised Gusler that his employment "may" be terminated. The letter stated that Gusler could meet with Fire Commissioner Scott Kemins (Kemins) and representatives of the City on November 24, 2015 if he disputed the potential termination, and that Kemins intended to recommend that his employment be terminated if he did not contest such termination.[6] The letter ended by explaining that Gusler may have an opportunity to be reemployed in the future by the City.[7]

The Association thereafter sent the City a demand to negotiate the procedure for separating a member of the Association from service under CSL § 71 and it provided the City with a proposed procedure. The City has refused to negotiate such procedure.[8]

The City did not separate Gusler from service pursuant to § 71 of the CSL.[9]

DISCUSSION

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.[10] In *Town of Cortlandt*, the Board examined whether an employer is required to bargain prior to exercising this right and found that the

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[5] *Id*, Ex 4.
[6] *Id*, ¶ 9.
[7] *Id*, Ex 4.
[8] *Id*, ¶ 10.
[9] *Id*, ¶ 11.
[10] CSL § 71 provides, inter alia, that, "[w]here an employee has been separated from the service by reason of a disability resulting from occupational injury or disease as defined in the workmen's compensation law, he shall be entitled to a leave of absence for at least one year . . . ." CSL § 71 has been interpreted to allow, but not require, an employer to terminate an employee who is absent from work for a cumulative period of one year due to an occupational injury or disease. *See Allen v Howe*, 84 NY2d 665 (1994).

employer violated § 209-a.1(d) of the Act by unilaterally adopting a policy requiring termination of employment and contractual benefits after one year of occupational disability.[11] The Board held that nothing in CSL § 71 explicitly addresses collective negotiations under the Act, "nor is there anything inescapably implicit in that statute which establishes the Legislature's plain and clear intent to exempt the [employer] from the State's strong public policy favoring the negotiation of all terms and conditions of employment."[12] The Board explained that:

> [b]y requiring the negotiation of decisions to terminate employees from employment based upon the length of time they are away from work due to occupational injuries or illnesses, and in the absence of a plain and clear legislative intent to the contrary, we give effect to the State's declared public policy favoring collective negotiations.[13]

The Board's determination was confirmed by the New York Supreme Court, Westchester County.[14] The Court agreed with the Board that:

> 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. Nor does such discretionary authority constitute a non-delegable power which, for reasons of sound public policy, is implicitly exempt from this State's strong policy in support of collective bargaining.
>
> Neither has petitioner overcome this presumption in favor of collective bargaining with respect to its unilateral implementation of the administrative procedures. The submission of said procedures to the bargaining process would not have any adverse effect upon petitioner's ability to exercise any of the rights which it is accorded under GML

[11] 30 PERB ¶ 3031, 3078 (1997).
[12] *Id.*
[13] *Id.*
[14] *Town of Cortlandt v NYS Pub Empl Relations Bd*, 30 PERB ¶ 7012 (1997).

207-c.[15]

The City argues that the instant case is distinguishable from *Town of Cortlandt*. First, the City argues that it did not establish any procedures, but instead provided a hearing to comply with constitutional due process requirements. We, like the ALJ, find this argument unpersuasive. First, we agree with the ALJ that providing notice to the affected employee, an opportunity to be heard, and an automatic recommendation of termination if the employee does not pursue the opportunity to be heard, constitute procedures for implementing a decision to terminate an employee pursuant to CSL § 71. Second, even assuming that the City's hearing was intended to provide constitutional due process safeguards, this did not relieve the City of its statutory duty to negotiate.[16] The City's statutory duties are "independent of and exceed its constitutional obligations."[17] While *Prue v Hunt*,[18] cited by the City, may speak to constitutional due process minimums, "the City is still obligated to satisfy its separate statutory duty to negotiate the procedures pursuant to which decisions are made as to whether the wages and economic benefits . . . will be paid."[19] Put another way, while the City may have a constitutional obligation to provide due process, such an obligation does not relieve the City of its separate obligation to negotiate concerning the process that is implemented.

The City also argues that the current case is distinguishable from *Town of*

[15] 30 PERB ¶ 7012, at 7025.
[16] *City of Syracuse*, 32 PERB ¶ 3029, 3062-3063 (1999), *affd City of Syracuse v NYS Pub Empl Relations Bd*, 279 AD2d 98, 33 PERB ¶ 7022 (4th Dept 2000), *lv denied* 34 PERB ¶ 7025 (2001).
[17] *Id*, at 3063.
[18] 78 NY2d 364 (1991).
[19] *City of Syracuse*, 32 PERB ¶ 3029, at 3063.

Cortlandt because the City's letter to Gusler, unlike that in *Town of Cortlandt*, did not *require* termination but simply stated that the Fire Commissioner *may* recommend termination to the City Manager (although if Gusler did not appear at the hearing, the letter stated that the Fire Commissioner would recommend termination).[20] We find this distinction to be immaterial. Although the City's letter to Gusler did not state that termination would automatically result from the hearing, it is clear that the hearing, and associated right to be heard or to forfeit that right, are steps in the City's process of terminating an employee pursuant to CSL § 71. As explained above, the City is obligated to bargain prior to imposing such steps.

Assuming that the Board finds that the current case is not distinguishable from *Town of Cortlandt*, the City argues that the Board should not follow *Town of Cortlandt*. The City argues that its exercise of the discretion to terminate employees granted by CSL § 71 is not mandatorily negotiable and that CSL § 71 exempts employers from bargaining over a decision to terminate an employee who has been absent for more than one year due to occupational injury or disease. The City argues that CSL § 71 contains extensive post-termination requirements and that if the legislature had intended for there to be pre-termination requirements, it would have provided them.

We adhere to the Board's reasoning in *Town of Cortlandt*. As the Board there explained, there is nothing inescapably implicit in CSL § 71 which establishes the Legislature's plain and clear intent to exempt employers from the State's "strong and

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[20] Stipulation of Facts, Ex. 4.

sweeping policy" to support employer-employee negotiations.[21] The absence of pre-termination procedures in the statute cannot be read as preempting an employer's duty to negotiate. As the Court of Appeals explained with regard to GML § 207-c, "the rights explicitly given to [employers] are outside the scope of mandatory bargaining," but the statute "does not remove from mandatory bargaining those other matters—such as review procedures—that the Legislature chose not to address."[22]

In its Memorandum of Law submitted to the ALJ, the City asserted that the Association proposed to have an arbitrator from the American Arbitration Association serve as a hearing officer to determine whether an employee may be separated from service under CSL § 71. The City argued that it should not be required to negotiate who will determine whether to separate an employee pursuant to CSL § 71. The ALJ found that the argument was not relevant to the issue before her. On exceptions, the City again argues that it should not have to negotiate who the decision maker would be in a hearing under CSL § 71.

We, like the ALJ, find that the City's argument is not relevant to the issue before the Board. An allegation that the Association has made a prohibited proposal in negotiations sounds in a violation of the Association's duty to bargain in good faith. There is no improper practice charge in front of us, however, concerning the Association's conduct. Rather, the only issue we decide today is that the City has an obligation to bargain prior to imposing procedures for terminating an employee pursuant

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[21] *Cohoes City School Dist v Cohoes Teachers Assn*, 40 NY2d 774, 778, 9 PERB ¶ 7529 (1976); *City of Watertown v NYS Pub Empl Relations Bd*, 95 NY2d 73, 78, 33 PERB ¶ 7007 (2000). *Compare City of Schenectady v NYS Pub Empl Relations Bd*, __ NY3d __, slip op 07210 (Oct 17, 2017) (finding police discipline to be prohibited subject of bargaining where policy favoring local control over police set forth in Second Class Cities Law prevailed over policy supporting collective bargaining embodied in the Act).

[22] *City of Watertown v NYS Pub Empl Relations Bd*, 95 NY2d, at 83, citing *City of Schenectady PBA v NYS Pub Empl Relations Bd*, 85 NY2d 480 (1995).

to CSL § 71.

Finally, the City argues that the charge is facially deficient and should not have been processed because it failed to allege that the Association was an employee organization covered by § 209-a of the Act, that the Association was the duly-recognized or certified exclusive bargaining representative of firefighters, or that the City was an employer covered by § 209-a of the Act. We find that the charge is facially sufficient to meet our pleading requirements. Section 204.1(b) of our Rules of Procedure concerns the requirements for the contents of a charge. Nothing therein requires that a charge make the specific factual allegations recited by the City. Moreover, the City stipulated to the fact that the Association is the recognized exclusive bargaining representative "of all City employees in the following unit: paid professional members of the fire fighting force in the ranks of Fire Fighter, Lieutenant . . . ."[23] The City also does not dispute that the Association is an employee organization as defined in § 201.5 of the Act or that the City is an employer as defined in § 201.6 of the Act. Thus, even assuming that there was some technical deficiency in the charge, the City has failed to show that it suffered any prejudice as a result.

IT IS, THEREFORE, ORDERED that the City forthwith:

1. rescind its procedure relating to CSL § 71 terminations; and

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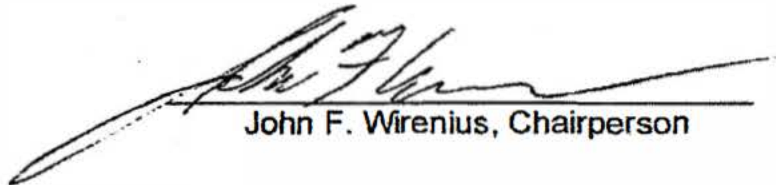
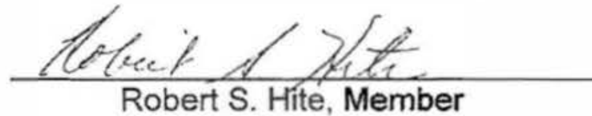
[23] Stipulation of Facts at ¶ 2.

2. sign and post the attached notice at all physical and electronic locations customarily used to post notices to unit employees.

DATED: November 6, 2017
Albany, New York



John F. Wirenius, Chairperson



Robert S. Hite, Member

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

We hereby notify all employees of the City of Long Beach in the bargaining unit represented by the Long Beach Professional Firefighters Association, IAFF, Local 287 that the City of Long Beach will:

1. rescind its procedure relating to CSL § 71 terminations.

Dated .... **By** ....

On behalf of the City of Long Beach

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

COURT OF APPEALS
STATEOF NEW YORK

In the Matter of the Application of the

CITY OF LONG BEACH,

Petitioner,

v.

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

Respondents.

AFFIDAVIT OF SERVICE

AD No.: 2018-10975

Nassau County Index No.: 3811-17

STATE OF NEW YORK)
)
COUNTY OF ALBANY)

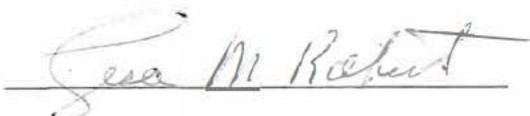
Lisa M. Robert, being duly sworn, deposes and says that deponent is over the age of 18 years and an employee of the New York State Public Employment Relations Board.

That on January 7, 2021, deponent served PERB's Notice of Motion for Leave to Appeal and Memorandum of Law in Support with exhibits, via **USPS OVERNIGHT** delivery upon:

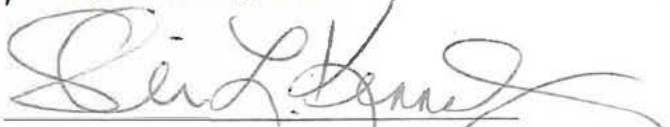
Emily E. Iannucci, Esq.
Bond, Schoeneck & King, PLLC
1010 Franklin Avenue, Suite 200
Garden City, NY 11530

Louis D. Stober, Jr., Esq.
Louis D. Stober, LLC
98 Front Street
Mineola, NY 11501

at the address(es) designated by depositing a true copy thereof enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.



Sworn to before me this
7th day of January, 2021.



SHEILA L. KENNEDY
Notary Public, State of New York
No. 01KE6231328
Qualified in Saratoga County
Commission Expires 11/22/2022