**STATE OF NEW YORK – COURT OF APPEALS**

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**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.**

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# REPLY BRIEF OF APPELLANT NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD

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**Court of Appeals APL-2021-00078**
**Appellate Division Docket No. 2018-10975**
**Nassau County Index No. 2017-3811**

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**Dated: October 12, 2021**

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## PRELIMINARY STATEMENT

This Reply Brief on appeal is submitted on behalf of Appellant the New York State Public Employment Relations Board ("PERB") in further 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 court below reversed *City of Long Beach*, 50 PERB ¶ 3036 [2017], R. 159, *affd sub nom. Matter of City of Long Beach v New York State Public Employment Relations Board,* 51 PERB ¶ 7002 [Sup Ct, Nassau County 2018], R. 4, *revd* 187 AD3d 745 [2d Dept 2020], R. 259, *lv granted* 36 NY3d 911 [2021], R. 258.

The Decision conflicts with this Court's precedents that 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]; *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*

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

*Educ.*"); *Matter of Auburn Police Local 195, Council 82, AFSCME, AFL-CIO v Helsby*, 46 NY2d 1034 [1979] ("*Auburn*").

This matter concerns Civil Service Law ("CSL") § 71, which permits, but does not require, an employer to terminate an employee who has been absent from work for a period of one year due to an occupational injury or disease. It is undisputed that the employer has the discretion whether or not to terminate and the right to determine who makes that decision. *See e.g.* R. 245. Respondent City of Long Beach ("City") has acknowledged that pre-termination procedures need be negotiated only once, not every time an employee is terminated under CSL § 71. *See e.g.* R. 251.

This matter concerns the pre-termination procedures specified by Respondent City in its letter to the firefighter it seeks to terminate (R. 89) that are the "procedural formality" this Court mandated in *Matter of Prue v Hunt*, 78 NY2d 364, 370 [1991], *i.e.*, notice and the opportunity to be heard. This Court, as has ever other reviewer of this matter, should reject the City's irrational claim that these are not procedures.

The court below held that "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." R. 261. It is undisputed that the court below did not identify the

specific directives of CSL § 71 it relied upon. Nor does the City identify any such specific directives. Thus, the Decision relies exclusively upon 4 NYCRR § 5.9.

Respondent City acknowledges that the Decision cannot be upheld based upon 4 NYCRR 5.9. Indeed, it spends a significant amount of its brief arguing that the court below "erroneously relied" upon 4 NYCRR § 5.9 as that provision, according to the City, does not apply to it. Respondent Br. at 3.[2] According to the City, the only part of the Decision that this Court can uphold is its reference to the "specific directives" of CSL § 71. Respondent Br. at 45 (quoting Decision at R. 261). As no such specific directives were identified by either the court below or the City, there is nothing left of the Decision for this Court to affirm.

Respondent City acknowledges the State's "strong and sweeping" public policy in favor of collective bargaining codified in the Public Employees' Fair Employment Act, Civil Service Law ("CSL") Article 14, commonly known as the "Taylor Law." *Watertown*, 95 NY2d at 78. It further acknowledges that it can only overcome the State's strong public policy in favor of collective bargaining by showing of Legislative intent to do so that is "plain and clear" and, where not explicit, "inescapably implicit." Respondent Br. at 12 (quoting *Matter of Cohoes*

[2] Appellant PERB does not opine on Respondent City's expansive argument as to why it is not required to provide its employees the protections of 4 NYCRR § 5.9; for the reasons contained in its Brief to the court, PERB's position is that 4 NYCRR § 5.9 does not evince an intent by the Legislature to preclude bargaining on pre-termination procedures appurtenant to CSL § 71.

*City Sch. Dist. v Cohoes Teachers Assn.*, 40 NY2d 774, 778 [1976]; *Matter of Webster Ctr. Sch. Dist. v Pub. Empl. Relations Bd.*, 75 NY2d 619, 626 [1990]). Notably, the City refuses to address precedent directly on point holding that pre-termination procedures appurtenant to CSL § 71 are bargainable. *See Matter of Town of Cortlandt v Pub. Empl. Relations Bd.*, 30 PERB ¶ 7012 [Sup Ct, Westchester County 1997].

This Court's own precedents hold that the intent of the Legislature in enacting CSL § 71 was to eliminate the need for discipline, including disciplinary hearings, in order to replace an employee unable to perform their duties for over a year due to a medical leave. *See e.g. Matter of Jordan v NYC Hous. Auth.*, 33 NY3d 408, 412 [2019]; *Matter of Allen v Howe*, 84 NY2d 665, 671 [1994]. The pre-termination procedures at issue herein concern pre-termination notice, the opportunity to be heard, and forfeiture of the right to be heard. These pre-termination procedures do not entail discipline or related hearings. The opportunity to be heard at issue here is that mandated by this Court in *Prue*. There is nothing in the language of the statute, its Legislative history, or the caselaw explicitly or implicitly suggesting, let alone stating, that the Legislature intended to foreclose collective bargaining over the procedures appurtenant to it.

As to statutory language, Respondent City does not identify any explicit language in CSL § 71 indicating that the Legislature intended to prohibit bargaining

appurtenant to procedures to implement CSL § 71. Instead, the City relies upon a perverse argument—that the absence of specific directives regarding pre-termination procedures in a statute that contains some post-termination procedures mandates that the former is a prohibited subject of bargaining. The City provides nothing in support of this unique analytical approach. If silence could be found as implicit evidence of a Legislative intent to prohibit, the analytical framework created by this Court would be meaningless. Under the City's proposed approach, all procedures are prohibited subjects of bargaining unless the Legislature in the statute expressly states that they are negotiable. Understandably, the City cites no cases in support of its proposed analysis. Such an approach is especially perverse when analyzing a statute such as CSL § 71 that pre-dates the Taylor Law and this Court's precedents regarding the State's strong and sweeping policy in favor of collective bargaining. Further, it conflicts with this Court's analysis in *Watertown*; that case concerned a statute that said "nothing about the procedures" and so this Court held that the "Legislature expressed no intent—let alone the required 'plain' or 'clear' intent—to remove the review procedures from mandatory bargaining. Thus, under our precedents, the strong and sweeping presumption in favor of bargaining applies." *Id.*, 95 NY2d at 81.

The Legislative history argument of Respondent City is farcical on its face. As CSL § 71 predates the Taylor Law and the State's public policy in favor of

collective bargaining, its Legislative history is understandably silent in the issue. *See 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] (where statute pre-dated the Taylor Law "it cannot be concluded that there was originally any intent on the part of the Legislature to exclude or preclude bargaining.").

Indeed, Respondent City does not argue that there is anything in the Legislative history of CSL § 71 that explicitly or implicitly prohibits bargaining over pre-termination procedures. Its Legislative history argument is based on the Legislative history of CSL § 73. While CSL § 73 is analogous to CSL § 71, this Court has noted that "to the extent that the two statutes differ, it appears that [CSL §] 71 has provisions more beneficial to the employee." *Matter of Duncan v NYS Dev. Ctr.*, 63 NY2d 128, 135 [1984]. Further, the City does not argue that the Legislative history of CSL § 73 addresses collective bargaining. Instead, it argues that the Legislative history of CSL § 73 establishes that it (and by extension CSL § 71) was drafted to allow for a non-disciplinary or "no-fault" reason for terminating employees on medical leave and to allow for the efficient replacement of employees so terminated. Respondent Br. at 1. These goals, however, do not conflict with the State's public policy in favor of collective negotiations. Pre-termination procedures address the mechanics of termination, not the reasons for termination, and thus are not in conflict with discretionary no-fault termination.

Nor will collective bargaining defeat any efficiencies provided by the statute. These efficiencies stem from eliminating the disciplinary process, which is not impacted by the pre-termination procedures at issue here. *See Jordan*, 33 NY3d at 412; ***Allen***, 84 NY2d at 671. Since pre-termination procedures need only be negotiated once (not every time an employee is terminated) and can be negotiated prior to any employee being subject to termination, even their one-time negotiation does not impact the efficiencies that the statute sought to create. Notably, in this instant matter, any delay in terminating the injured firefighter at the heart of this matter cannot be blamed upon the collective bargaining process, since it is undisputed that Respondent City refused to bargain. It is also undisputed that Nassau County has negotiated CSL § 71 pre-termination procedures, and the City has not claimed Nassau County has or is suffering any inefficiencies as a result.

The court below, on grounds acknowledged by Respondent City to be baseless, found pre-termination procedures at issue in this matter a prohibited subject of bargaining, despite strikingly similar circumstances being found by this Court to be mandatory subjects of collective negotiation. This incursion into this State's "strong and sweeping" public policy in favor of collective bargaining conflicts with decisions issued by this Court. *Watertown*, 95 NY2d at 78 (citations omitted). Accordingly, the Decision must be reversed.

## STANDARD OF REVIEW

Respondent City does not dispute that, 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 determinations. *See also Matter of Inc Vil. of Lynbrook v NYS Pub. Empl. Relations Bd.*, 48 NY2d 398, 404 [1979]. Nor does the City dispute that, generally, 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].

Instead, Respondent City argues that this case is one of pure statutory interpretation for which *de novo* review is appropriate. Respondent City inaccurately states that "[o]ne may reasonably infer that no such cases exist" where a court applied a reasonableness standard and not *de novo* review to a case in which PERB had to interpret another statute. This Court, however, adopted an opinion of

the Third Department which applied the arbitrary and capricious standard of review to PERB's interpretation of CSL §§ 75 and 76. *See Auburn Police Local 195*, 62 AD2d at 15, *affd on opinion below* 46 NY2d 1034. Further, the instant matter is not a case of pure statutory interpretation as it involves PERB's application of its court-affirmed precedent. *See Cortlandt, infra.*

## ARGUMENT

### Point I: Public Policy Does Not Prohibit Bargaining Over the Pre-Termination Procedures at Issue in the Instant Matter as they do Not Concern Discipline or Hearings Related Thereto

The pre-termination procedures at issue here are those contained in Respondent City's letter to the firefighter it seeks to terminate providing him notice of his potential termination, an opportunity to be heard, and informing him of the consequences of failing to avail himself of the opportunity to be heard. *See* Respondent Br. at 5-6 (quoting R. 89-90). The City's irrational claims that these are not procedures at all, an argument rejected in all prior reviews of this matter and which is in conflict with *Prue*.[3] *Prue* requires minimal due process, which it

[3] Respondent City does not dispute that employees facing termination are entitled to notice but questions "whether those facing discharge pursuant to [CSL §§ 71 or 73] (whose interest in their jobs is 'inferior to a full property right') are even entitled to the second prong of minimal due process, *i.e.*, an opportunity to be heard, prior to being terminated." Respondent Br. at 27 (citing pre-*Prue* cases). It spends several pages arguing that hearings are not required. This case, however, is not about hearings, nor has it ever been claimed that the firefighter in danger of losing his livelihood under CSL § 71 has a right to a hearing. This case concerns pre-termination procedures of notice and an opportunity to be heard required by *Prue* and referenced in the letter the City sent to the firefighter on medical leave about losing his job. *See* R. 89.

described as "procedural formality" no greater than that required to meet Federal due process standards. *Id.*, 78 NY2d at 371. The City acknowledges offering "minimal due process." Respondent Br. at 34. Its attempts to deny that such are procedures should be rejected by this Court as it has at every other level of review.

The numerous cases cited by Respondent City regarding discipline are irrelevant to the issue before this court. This case does not concern discipline, or whether the firefighter who has been on medical leave can be terminated, or why they are being terminated, or who makes the decision to terminate them. It concerns procedures required by this court in *Prue*—notice and a pre-termination opportunity to be heard. *See also Watertown*, 95 NY2d at 801 (the "right to take these initial steps was a separate question from the procedures to be followed" appurtenant to the statue); *Bd. of Educ.*, 75 NY2d at 667 (an express grant of statutory discretion permitting employer 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).

Accordingly, Respondent City's reliance on *Matter of Economico v Village of Pelham*, 50 NY2d 120 [1980], *abrogated by Prue*, 78 NY2d 364 [1991], is misplaced. The City cites *Economico* for the premise "that, notwithstanding the presumption in favor of bargaining, 'public policy prohibits an employer from bargaining away its right to remove those employees satisfying the plain and clear

statutory requisites for termination [CSL § 73].'" Respondent Br. at 12-13 (quoting *Economico*, 50 NY2d at 129). That issue—an employer's right to terminate—is not raised by this matter. It is, in fact, undisputed.[4]

Further, Respondent City misleadingly edits its *Economico* quote, omitting the first half of the sentence, that reads: "Similarly, whereas there is no prohibition against the establishment of a limited job security clause in a collective bargaining agreement ...." *Economico*, 50 NY2d at 129 (citing *Matter of Bd. of Ed. of Yonkers City Sch. Dist. v Yonkers Fedn. of Teachers*, 40 NY2d 268, 271 [1976]). *Bd. of Ed. of Yonkers City Sch. Dist.* held that job security provisions may be bargained in a collective agreement as such "is not prohibited by any statute or controlling decisional law and is not contrary to public policy." *Id.*, 40 NY2d at 271.

Clearly, if an employer can negotiate job security provisions without infringing on its discretion to terminate an employee under CSL § 73, an employer can negotiate pre-termination procedures under CSL § 71.

The instant matter is analogous to *Cohoes City Sch. Dist.*, which concerned a probationary teacher fired in violation of both of the procedures negotiated by the parties regarding tenure and the clause in the parties' collective bargaining

[4] The other case relied upon by Respondent City for its argument that public policy prohibits bargaining over pre-termination procedures is similarly unavailing. It merely follows *Economico* for the point that "the abrogation of the authority granted to a public employer by the statute to terminate the employee" is against public policy. *Matter of Enlarged City Sch. Dist. of Middletown NY v Civ. Serv. Empl. Assn., Inc.*, 148 AD3d 1146, 1148 [2d Dept 2017]. Since the discretion to terminate is not at issue in the instant matter, there is no abrogation of the authority to do so.

agreement limiting termination to just cause. An arbitrator ruled in favor of the union on both issues, neither of which were explicitly addressed by the Education Law. This Court held that several provisions of the Education Law clearly implied that the ultimate decision on tenure must resided with the employer and was not subject to negotiation. Accordingly, that part of the arbitration award was vacated. However, the Court found no infirmity presented by the procedures negotiated by the parties and instructed the employer to reinstate the employee "without tenure for one additional year to enable the board to re-evaluate his performance in accordance with the procedures specified in the agreement." *Id.*, 40 NY2d at 778 (citation omitted).

Similarly here, the ultimate decision as to continued employment or termination under CSL § 71 resides with the employer. However, just as in *Cohoes City Sch. Dist.*, the procedures related to the exercise of the employer's discretion are bargainable.

**Point II: There is Nothing or the Statute or Its Legislative History Explicitly or Implicitly Demonstrating a Legislative Intent to Prohibit Bargaining Over Pre-Termination Procedures**

The parties agree that for Respondent City to overcome the State's strong public policy in favor of collective bargaining, the Legislative intent to do so must be "plain and clear" and, where not explicit, "inescapably implicit." Respondent Br.

at 12 (quoting *Cohoes City Sch. Dist.*, 40 NY2d at 778; *Webster Ctr. Sch. Dist.*, 75 NY2d at 626).

Respondent City does not argue that there is any caselaw holding that the bargaining of pre-termination procedures appurtenant to CSL § 71 has been foreclosed by the Legislature. It also fails to address the case holding the opposite—that bargaining over pre-termination procedures appurtenant to CSL § 71 is mandatory. *See Cortlandt, infra*.

Respondent City also does not argue that there is anything explicit in CSL § 71 or its Legislative history indicating that the Legislature intended pre-termination procedures appurtenant to CSL § 71 to be a prohibited subject of bargaining.

Instead, Respondent City's entire argument is that it is implicit in CSL § 71 and the Legislative history of a similar statute that the Legislature intended to prohibit bargaining over pre-termination procedures appurtenant to CSL § 71. The City's arguments do not pass muster.

**A. This Court Should Not Infer From the Lack of Pre-Termination Procedures in the Statute an Intent to Prohibit Bargaining Over Pre-Termination Procedures.**

The entirety of Respondent City's statutory language argument is that the absence of pre-termination procedures in CSL § 71 when compared to the post-termination provisions in the statute indicates a Legislative intent to prohibit bargaining over the former. *See* Respondent Br. at 14-16. The analytical perversity

of this argument is obvious on its face. If silence implies a Legislative intent to prohibit, this Court would not require a demonstration of plain and clear Legislative intent and an analytical framework that first looks for explicit evidence of intent before determining if there is anything establishing an inescapably implicit intent. Understandably, Respondent City cites no cases in support of its proposed analysis.

Nor has Respondent City explained why the presence of post-termination provisions implies that pre-termination procedures are a prohibited subject of bargaining. Surely, the presence of procedures in the statute established that when the Legislature wanted control over the procedures to implement the statute, it knew how to craft such. Thus, it is far more reasonable to conclude that the silence as to pre-termination procedures implies that the Legislature intended to leave pre-termination procedures to the parties to work out, while the presence of post-termination procedures implies that some such procedures are not expected to be negotiated. This was the conclusion this Court reached in *Watertown*, where the statute under review said "nothing about the procedures" and so this Court concluded that the "Legislature expressed no intent—let alone the required 'plain' or 'clear' intent—to remove the review procedures from mandatory bargaining. Thus, under our precedents, the strong and sweeping presumption in favor of bargaining applies." *Id.*, 95 NY2d at 81. The presence of some post-termination does not alter this analysis. *See Auburn*, 46 NY2d 1034 (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 bargainable under the Taylor Law, even where such procedures are expressly provided under the statutory scheme).

**B. The Legislative History Does Not Indicate a Legislative Intent To Prohibit Bargaining Over Pre-Termination Procedures.**

Appellant PERB acknowledges that CSL §§ 71 and 73 are similar statutes. But they are not identical, and, as this Court has noted, "to the extent that the two statutes differ, it appears that [CSL §] 71 has provisions more beneficial to the employee." *Duncan*, 63 NY2d at 135. The Legislative history of these statues do not address collective bargaining, which is not surprising considering that they pre-date the Taylor Law and this Court's numerous declarations as to the State's strong and sweeping public policy in favor of collective negotiations. *See Auburn Police Local 195*, 62 AD2d at 16, *affd on opinion below* 46 NY2d 1034 (where statute pre-dated the Taylor Law "it cannot be concluded that there was originally any intent on the part of the Legislature to exclude or preclude bargaining.").

This Court has noted that "[p]rior to the enactment of [CSL §§ 71 and 73], a civil service employer was unable to fill the vacancy created by the absent, disabled employee, short of the employee's resignation, unless the employer instituted a disciplinary proceeding alleging incompetency or incapacity to perform, and the

employee was dismissed after a hearing adjudging such 'incompetency.'" *Allen*, 84 NY2d at 670; *see also Jordan*, 33 NY3d at 412. CSL § 71 addresses that concern.

The negotiation of pre-termination procedures in no way interferes with the goals of CSL § 71. The pre-termination procedures at issue herein concern pre-termination notice, the opportunity to be heard, and forfeiture of the right to be heard. These pre-termination procedures do not entail discipline or hearings; the opportunity to be heard at issue here is that mandated by this Court in *Prue*, 78 NY2d 364. Such procedures also do not impact the discretion whether or not to terminate; thus, they do not impact any efficiency or goal related to filing places vacant due to an employee being on extended medical leave.

Respondent City's Legislative history argument is based solely of on its characterization of the goals of the statute as allowing for a non-disciplinary or "no-fault" termination of employees on medical leave and to allow for their efficient replacement. Respondent Br. at 1. Even phrased as such, the goals of CSL § 71 do not conflict with the State's public policy in favor of collective negotiations and therefore do not imply a Legislative intent to prohibit collective bargaining over pre-termination procedures. Pre-termination procedures address the mechanics of termination, not the reasons for termination, and thus are not in conflict with the goal of creating a discretionary no-fault means of termination.

Respondent City's reliance on cases regarding delay or inefficiency are misplaced as those cases addressed discipline and related hearings, not pre-termination procedures such as notice and opportunity to be heard. *See e.g.* Respondent Br. at 22 (acknowledging that "the 'procedural hurdle' referenced by the Court in *Jordan* [, 33 NY3d 408,] was having to follow the disciplinary procedures."). The City has cited no cases holding that the Legislature intended CSL § 71 to eliminate procedures unrelated to discipline.

Respondent City cites no case, nor is Appellant PERB aware of any, holding that the time it takes to negotiate constitutes undue delay that somehow violates public policy. Pre-termination procedures need only be negotiated once, not every time an individual employee is terminated, and can be negotiated prior to any employee being subject to termination. Accordingly, negotiating over such procedures does not impact any efficiencies that the statute sought to create. It is undisputed that at least one employer, Nassau County, has successfully negotiated CSL § 71 pre-termination procedures, and the City has not claimed Nassau County has or is suffering any inefficiencies as a result. Indeed, the City has not identified any employer in the State suffering from any such inefficiencies.

**Point III: Respondent City Fails to Distinguish This Court's Precedents**

In its Brief, Appellant PERB details the numerous precedents of this Court that the court below failed to consider and which conflicted with the Decision. Respondent City addressed some of these precedents but fails to distinguish them.

As to *Watertown*, Respondent City merely (incorrectly) claims that in the instant matter there is "clear evidence" of Legislative intent to foreclose collective bargaining over pre-termination procedures and thus *Watertown* is inapplicable. Respondent Br. at 30. It ignores *Watertown's* guidance that silence in a statute as to procedures indicates a Legislative intent that the procedures are bargainable. *See id.*, 95 NY2d at 81.

Respondent City also argues that *Watertown* is distinguishable because it concerns post-termination procedures that the negotiation over which would not delay terminating the employee. As discussed earlier, the City had failed to cite any case supporting its position that the time it takes to negotiate procedures is a factor in whether those procedures are bargainable. Nothing in *Watertown* supports such an argument. Further, as noted earlier, nothing required the City to wait until it wanted to terminate a firefighter on medical leave before addressing the pre-termination procedures to do so. It is only the City's refusal to bargain that has delayed its ability to terminate this firefighter on medical leave.

Respondent City focuses the majority of its brief on its right to terminate the firefighter on medical leave but fails to address that in *Watertown* this Court noted that, when assessing the bargainability of procedures appurtenant to a statute, the "right to take these initial steps was a separate question from the procedures to be followed" appurtenant to the statue. *Id.*, 95 NY2d at 80.

In *Schenectady Police Benevolent Assn.*, 85 NY2d 480, 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. Respondent City argues that "*Schenectady* is not applicable." Respondent Br. at 31. Appellant PERB agrees with the City that the instant matter is not analogous to a situation where the statutory scheme allows an employee to unilaterally impose procedures.

Respondent City attempts to distinguish *Bd. of Educ.* by claiming that the statute at issue in that case, and its Legislative history, are not comparable to the that of CSL §§ 71 or 73. *See* Respondent Br. at 31. 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 the instant matter, the authority to terminate provided employers by CSL § 71 does not

relieve the City of its responsibility to negotiate procedures appurtenant to the exercise of that discretion.

Respondent City attempts to distinguish *Auburn* by arguing that the statutory language and Legislative history of the statutes at issue in that case, CSL §§ 75 and 76, are not comparable to that of CSL §§ 71 or 73. Yet, the City itself made such a comparison in its brief section arguing that by including post-termination procedures in CSL § 71 the Legislature intended to prohibit bargaining over pre-termination procedures. *See* Respondent Br. at 15. The statutory scheme at issue in *Auburn* expressly provided for some pre- and post-termination procedures, and is in that way is analogous to CSL § 71, which provides some post-termination procedures. This Court, by adoption of the Third Department opinion on appeal, 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. *See Auburn Police Local 195*, 62 AD2d 12, *affd on opinion below* 46 NY2d 1034.

Respondent City further tries to distinguish *Auburn* because it "did not deprive employers of their statutory right to discipline employees." Respondent Br. at 33. However, discipline is not an issue in this case and negotiation pre-termination procedures does not deprive the City of its authority to discipline its employees.

Thus, the City and the employer in *Auburn* are analogous. The City argues that negotiating pre-termination would deprive of it of its ability to terminate employees after one year. But the City cannot honestly claim that any delays are due to the time it takes to collective bargain when it refuses to bargain. Further, the City is only in this situation because it chose not to negotiate procedures before desiring to terminate a specific firefighter on medical leave. Finally, the City has cited no case holding that the time it takes to negotiate procedures is a factor in determining whether the procedures are a mandatory, permissive, or prohibited subject of bargaining.

## 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, R. 4; and confirm the final administrative decision and order of Appellant PERB, *City of Long Beach*, 50 PERB ¶ 3036, R. 159.

Respectfully submitted,

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October 12, 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:

| | |
|---|---|
| Name of typeface: | Times New Roman |
| Point Size: | 14 |
| Line spacing: | Double |

The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of authorities, proof of service, printing specifications statement, or any authorized addendum containing statutes, rules, regulations, etc., is 5, 219 words.

Dated: October 12, 2021
Albany, New York

COURT OF APPEALS
STATEOF NEW YORK

In the Matter of the Application of the

CITY OF LONG BEACH,

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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.

That on October 12, 2021, deponent served three copies of PERB's Reply Brief, via **USPS OVERNIGHT** delivery upon:

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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
12th day of October, 2021.

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