COURT OF APPEALS
STATE OF NEW YORK

In the Matter of

CITY OF LONG BEACH,

Petitioner-Appellant-Respondent,

v.

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

Respondents-Respondents-Appellants.

MEMORANDUM OF LAW IN OPPOSITION TO MOTIONS FOR LEAVE TO APPEAL

Court of Appeals Mo. No. 2021-59
Appellate Division Docket No. 2018-10975
Nassau County Index No. 2017-3811

BOND, SCHOENECK & KING, PLLC
Terry O'Neil
Emily Iannucci
Attorneys for Petitioner-Appellant-Respondent City of Long Beach
1010 Franklin Avenue, Suite 200
Garden City, New York 11530
T: (516) 267-6310
F: (516) 267-6301

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PRELIMINARY STATEMENT

This memorandum of law is submitted by the Petitioner, the City of Long Beach ("City"), in opposition to the motions for leave to appeal filed by the Respondents, the New York State Public Employment Relations Board ("PERB") and the Long Beach Professional Firefighters Association, IAFF, Local 287 ("Union").

By decision and order dated November 6, 2017, PERB determined that the City of Long Beach ("City") violated Section 209-a.1(d) of the Civil Service Law ("CSL") when it unilaterally informed an employee that it was contemplating his termination pursuant to Section 71 of the CSL ("Section 71") and offered him an opportunity to be heard on that issue. (R. 159-68).[1] PERB's decision was arbitrary and capricious and/or affected by error of law since it was inconsistent with and frustrated the legislative intent of Section 71, as interpreted by this Court.[2] (*See* R. 16).

As explained *infra*, Section 71 provides public employers with a no-fault means of efficiently terminating employees after they have been absent for more than a year due to an occupational injury. *See* Civ. Serv. Law § 71. While the

[1] References to the Record on Appeal will be designated as "R. __," followed by the applicable page number.

[2] The City also argued that PERB's decision was arbitrary and capricious and/or affected by error of law because the improper practice charge filed by the Long Beach Professional Firefighters Association, IAFF, Local 287, was facially deficient. However, the Appellate Division, Second Department, did not address that argument and it is not at issue in this appeal.

statute sets forth extensive post-termination procedures for reinstatement, it does not contain any pre-termination procedures. *See id.*

The instant dispute arose when the City informed a member of the Union who had been absent for over a year due to an occupational injury that it tentatively planned to terminate him pursuant to Section 71. (R. 19-23). The City provided the member with pre-termination minimal due process (i.e., notice and an opportunity to be heard).

Shortly thereafter, the Union demanded to negotiate pre-termination "procedures" for separating the member from service. (R. 21). The specific "procedures" the Union wanted to negotiate are not in the Record, but the City took the position that it did not have to negotiate any "procedures."

The Union then filed an improper practice charge at PERB ("Charge") alleging that the City violated Section 209-a.1(d) of the CSL by refusing to bargain Section 71 pre-termination procedures with the Union. (*See* R. 12, 19-23). By Decision and Order dated January 20, 2017, a PERB administrative law judge ("ALJ") sustained the Charge ("ALJ Decision"). (R. 13, 112-124).

The City appealed the ALJ Decision by filing exceptions with PERB. (R. 14, 125-128). By Decision and Order dated November 6, 2017, PERB affirmed the ALJ Decision ("PERB Decision") and ordered the City to rescind the alleged pre-termination "procedures" and negotiate same with the Union. (R. 15, 159-68).

The City then filed a Petition pursuant to Article 78 of the New York Civil Practice Law and Rules ("CPLR") seeking: (1) an order and judgment vacating and annulling the PERB Decision on the ground that it was arbitrary and capricious and/or affected by error of law; and (2) dismissal of the Charge. (R. 16). By Decision and Order dated July 6, 2018, the lower court held that the PERB Decision was *not* arbitrary and capricious and/or affected by error of law and dismissed the Petition ("Lower Court Decision"). (R. 4-5).

Most recently, by Decision and Order dated October 7, 2020 ("Decision"), the Appellate Division, Second Department, unanimously reversed the Lower Court Decision, granted the City's Petition and declared PERB's Decision null and void, thereby dismissing the Charge. (Decision at 3) (attached hereto as Exhibit "1").

In so doing, the Second Department aptly explained that it did not owe PERB any deference regarding whether public employers must negotiate Section 71 procedures because "that question [was] one of pure statutory construction dependent only on accurate apprehension of legislative intent [with] little basis to rely on any special competence of PERB[.]" *Id.* (quoting *New York City Tr. Auth. v. New York State Pub. Empl. Rels. Bd.*, 8 N.Y.3d 226 (2007)).

In its Decision, the Second Department explained that there is "no room for negotiation of procedures to be followed prior to the termination of an employee's

employment upon the exhaustion of the one-year period[, and, t]herefore, the presumption in favor of collective bargaining is overcome." (*Id.*). Consequently, public employers need not negotiate pre-termination procedures before separating employees from service pursuant to Section 71 or 73 of the CSL.[3]

PERB and the Union now seek leave to appeal the Decision. There is, however, no basis for granting either PERB or the Union leave to appeal. The matter: is not of public importance; does not conflict with prior decisions of this Court; and does not involve a conflict among the departments of the Appellate Division.

If the Court grants either or both of their motions for leave to appeal and ultimately overturns the Decision, every public employer in New York State will have to negotiate agreements with their employees' unions concerning the means by which they exercise their statutory right to terminate employees pursuant to Sections 71 and 73. If they already have such procedures in place, they will have to negotiate changes to such procedures. Such a result would frustrate the legislative intent to provide public employers with an efficient means of replacing

[3] Section 73 is Section 71's companion statute for non-occupational injuries / illnesses. *Compare* Civ. Serv. Law § 71 (allowing removal of employee after cumulative absence of at least a year due to an occupational disability covered by the Workers' Compensation Law) *with* Civ. Serv. Law § 73 (allowing removal of employee after consecutive absence of at least a year due to a non-job-related disability). The interests served by Section 73 are consistent with, if not identical to, those served by Section 71.

employees who have been out for at least *a year* due to a qualified disability without having to prove the employees are at fault. *See Economico v. Village of Pelham*, 67 A.D.2d 272, 276-77 (2d Dep't 1979) (quoting Section 73's legislative history), *aff'd*, 50 N.Y.2d 120 (1980).

This means that unions will be able to delay the no-fault termination of their members and require employers to maintain their members on sick leave (paid or unpaid) and provide benefits (*e.g.*, health insurance) by drawing out negotiations of pre-termination procedures for months to years. In this case, for example, were it not for the Union's demand to negotiate and related litigation, the City could have terminated the employee at issue more than five (5) years ago. (R. 89-90). As explained by the City during oral argument, there is no reason to believe that negotiating pre-termination procedures with the Union would be an easy, or quick, process. (*See* June 15, 2020 Oral Argument at 2:56 *available at* http://wowza.nycourts.gov/vod/vod.php?source=ad2&video=VGA.1592230005.External_(Public).mp4). Indeed, the parties' contract expired on June 30, 2010, and efforts to reach a successor agreement in the ten and a half (10.5) years since then have been unsuccessful. *See id.* Moreover, the Union has not pursued the impasse to compulsory interest arbitration.

To further complicate matters, employers who are unable to negotiate pre-termination procedures with their police and firefighter unions will have to

participate in mediation. If unsuccessful, compulsory interest arbitration would be the next step. *See* Civ. Serv. Law § 209. Surely, this is not what the Legislature had in mind when it enacted Section 71 to provide public employers with an efficient, no-fault means to remove disabled employees so their vacant, but encumbered, positions could be filled by workers capable of working.

For these reasons, as set forth more fully *infra*, PERB and the Union's motions for leave to appeal should be denied and the Second Department's Decision should stand.

QUESTIONS PRESENTED

Q1: Should the Court grant the New York State Public Employment Relations Board's motion for leave to appeal?

A1: No.

Q2: Should the Court grant the Long Beach Professional Firefighters Association, IAFF, Local 287's motion for leave to appeal?

A2: No.

STATEMENT OF FACTS

On or about November 12, 2014, Union member Jay Gusler reported that he was injured in the line of duty. (R. 10, 33). Mr. Gusler did not work from November 12, 2014 through at least June 29, 2016 (i.e., over a year and a half). (R. 10, 34).

On or about October 16, 2015, a workers' compensation law judge issued a decision granting Mr. Gusler benefits for the injury he allegedly sustained on November 12, 2014. (R. 33). That decision was affirmed by the State of New York Workers' Compensation Board on February 18, 2016. (R. 11, 33, 73-88).

Given the fact that Mr. Gusler was soon to be absent from work for over a year due to what had been found to be an occupational injury or disease as defined in the Workers' Compensation Law, the City considered separating Mr. Gusler from service pursuant to Section 71. (*See* R. 11, 34, 89-90). By letter dated November 10, 2015, the City informed Mr. Gusler that his employment could be terminated under Section 71. (R. 11, 34, 89-90).

> As you are aware, you have been absent from work since on or about November 16, 2014, through the present, due to a disability from a work-related injury. As you also know, the State of New York Workers' Compensation Board found your disability compensable under the New York State Workers' Compensation Law (WCB Case No. G1230186).
>
> The City is evaluating whether to exercise its right to separate you from employment pursuant to New York Civil Service Law § 71 because of your cumulative absence from work. Under New York Civil Service Law, Section 71, the City has the right to terminate your employment because you will have been cumulatively absent from work for more than one (1) year due to a Workers' Compensation compensable injury.
>
> You are hereby notified that your employment with the City may be terminated under Section 71 of the New York State Civil Service Law as a result of your

cumulative absence from work. The primary bases for this tentative decision are the City's attendance records and the State of New York Workers' Compensation Board's decision.

As Fire Commissioner, I may recommend to the City Manager that you be separated from employment based on the length of your continued absence. If you dispute this potential termination, I will provide you with an opportunity to be heard on this issue and to present information that will assist the City Manager in making his determination. On Tuesday, November 24, 2015 at 9:30 a.m., you may meet with me and representatives of the City in Room 402 of City Hall to discuss the reasons you are disputing this potential termination. You may bring a representative to this meeting. Additionally, you are directed to notify me in writing by November 18, 2015, if you plan to attend this meeting. You may include in your written response a statement specifying why you believe termination is improper along with any evidence that supports your position. If you choose not to respond to this letter, and neither you nor your representative appear at this meeting on November 24, 2015, I will find that you are not contesting your termination and recommend to the City Manager that your employment be terminated pursuant to New York Civil Service Law § 71.

You may have an opportunity to be re-employed in the future by the City. New York Civil Service Law § 71 provides that you may apply to the City of Long Beach Civil Service Commission, 1 West Chester Street, Long Beach, NY 11561, for a medical examination by a medical officer selected by the Commission. If the medical officer certifies that you are physically and mentally fit to perform the full duties of Firefighter, you will be reinstated by the City, if there is a vacancy available as a Firefighter at that time. If no vacancy exists at that time, or the workload does not warrant the filling of such vacancy, you will be placed on a preferred

> eligible list for a position as a Firefighter, and will remain on that list for a period of up to four (4) years.

(R. 11, 89-90).

Although Mr. Gusler never met with representatives of the City to discuss the letter, the City did not separate Mr. Gusler from service pursuant to Section 71. (R. 11, 34).

Sometime after the Fire Commissioner sent Mr. Gusler the above-referenced letter, the Union asked the City to negotiate the procedures for separating a member from service under Section 71. (R. 11, 34). When the City refused to do so, the Union filed the Charge alleging that the City violated Section 209-a.1(d) of the CSL by unilaterally implementing a "procedure" for separating Union members from service pursuant to Section 71 and refusing to negotiate such "procedure" with the Union. (*See* R. 11-12, 19-23, 34).

ARGUMENT

POINT I

PERB'S MOTION FOR LEAVE TO APPEAL SHOULD BE DENIED

As noted by PERB, leave to appeal may be granted where the issue: is of public importance; presents a conflict with prior decisions of this Court; or involves a conflict among the departments of the Appellate Division. (PERB Brief at 16) (citing 22 N.Y.C.R.R. § 500.22(b)(4)). As explained *infra*, PERB has not shown that any of those criteria exist here. Therefore, its motion should be denied.

A. Whether Public Employers Must Negotiate Procedures Before Terminating Employees Under Section 71 Of The Civil Service Law Is NOT An Issue Of Public Importance

Since the Decision affects all public employers in New York State with unionized employees, it clearly has State-wide impact. However, having State-wide impact does not necessarily render something a matter "of public importance." *See City of Yonkers v. New York Cent. & H.R.R. Co.*, 159 N.Y.572 (1899) (denying motion for leave to appeal where movant unsuccessfully argued that meaning of statute regarding the construction and maintenance of railroads, which had State-wide impact, was of public importance). Indeed, PERB's claim that the Decision "is of public importance and has State-wide impact" constitutes an acknowledgement that these are two (2) different concepts. (PERB Brief at 16) (emphasis added).

PERB attempts to establish that the issue of whether public employers must negotiate procedures before terminating employees under Section 71 is of public importance by arguing that "[i]t has the potential to significantly disrupt and otherwise adversely impact labor negotiations in the State. . . ." (PERB Brief at 16). Interestingly, however, the Decision has the exact opposite effect.

As explained *supra* and *infra*, the Decision clarified that public employers need not negotiate procedures for terminating employees pursuant to Section 71.

Consequently, employers and unions will have more time to focus on other issues of concern, which could positively impact labor relations.

If, on the other hand, employers did have to negotiate such procedures, there could be lengthy delays in replacing injured employees pending such negotiations, which would increase other employees' workloads. In addition to negatively impacting morale among the employees who are actually working, such a result could significantly disrupt and adversely affect labor relations if an employer believes a union is deliberately protracting negotiations to delay a member's removal pursuant to Section 71.

PERB's concern that it will "have to take the Decision into consideration when addressing improper practice petitions" about Section "71 and analogous statutes regardless of where in the State the employer is located" is irrelevant. (*See* PERB Brief at 16). Whether PERB would feel compelled to consider relevant case law which it might disagree with has no bearing on whether this is a matter "of public importance."

Similarly, the fact that the Decision could create confusion among bargaining representatives regarding the viability of previously-negotiated Section 71 procedures has no bearing on whether this is a matter "of public importance." (*See* PERB Brief at 17). If the Decision generates such confusion, union representatives can simply seek clarification from employer representatives to

determine whether the employer plans to change the previously-negotiated procedures.

In addition, the argument that unions might have made concessions while negotiating Section 71 procedures, and would now be deprived of the benefit of their bargain, does not render this a matter "of public importance."

First, there is nothing in the Record showing how many employers have already negotiated Section 71 procedures and/or how many have not.

Second, there is no reason to believe that every employer which previously negotiated Section 71 procedures will declare such procedures null and void.

Third, this is not the first time the courts have deemed something a prohibited subject of bargaining. For example, in 2006, this Court held that police discipline is a prohibited subject of bargaining. *Patrolmen's Benev. Assn. v. New York State Pub. Empl. Rels. Bd.*, 6 N.Y.3d 563 (2006). The fact that police unions might have made concessions when they negotiated contract clauses regarding police discipline did not prevent this Court from concluding that police discipline was a prohibited subject of bargaining. *See Town of Wallkill v. Civil Serv. Empls. Ass'n*, 19 N.Y.3d 1066 (2012) (holding that police discipline is a prohibited subject of bargaining and, therefore, previously-negotiated police disciplinary procedure was null and void where local law concerning police discipline was passed). *See also Town of Goshen v. Town of Goshen Police Benev. Ass'n*, 42 Misc. 3d 236

(Sup. Ct. Orange Co. 2013) (holding that provision in collective bargaining agreement regarding police discipline was null and void and the procedures set forth in a recently-enacted local law governed police discipline). The risk of unions losing the benefit of their bargain is simply not relevant to whether something should be deemed a prohibited subject of bargaining.

While the issue of whether public employers must bargain procedures before terminating employees under Section 71 clearly has State-wide implications, it is not a matter "of public importance." The Decision did not change the criteria which must be met before a public employer can separate an employee from service pursuant to Section 71. Disabled public employees still have the same statutory rights they had prior to the Decision. The only change is that public employers need not negotiate procedures before doing so – something the "public" probably did not even realize was ever required by PERB.

B. The Decision Does NOT Present A Conflict With Prior Decisions Of This Court

1. The Decision Is Consistent With This Court's Prior Decisions

a) The Decision Is Consistent With This Court's Interpretation Of Section 71's Legislative Intent

PERB argues that the "Decision effectively annuls decades of decisions issued by this Court. . . ." (PERB Brief at 5). However, that could not be farther from the truth. Quite the contrary, the Second Department's holding that public

employers need not negotiate procedures for terminating employees under Section 71 is consistent with this Court's interpretation of Section 71's legislative intent.

Section 71 is a no-fault statute which provides, in relevant part:

> Where 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 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. . . .

Civ. Serv. Law § 71 (emphasis added). Thus, when an employee has been absent due to an injury or illness which qualifies for benefits under the Workers' Compensation Law, he or she is entitled to a leave of absence for at least a year, unless he or she is permanently incapacitated (in which case the employee may be terminated earlier). *See id.*

An employer's decision to separate an employee from service at the end of his/her one (1)-year absence is discretionary. The employer need not show any fault on the employee's part.

As explained in the legislative history for Section 73 of the CSL (Section 71's companion statute for non-occupational disabilities):[4]

[4] *Compare* Civ. Serv. Law § 71 (allowing removal of employee after cumulative absence of at least a year due to an occupational disability covered by the Workers' Compensation Law) *with* Civ. Serv. Law § 73 (allowing removal of employee after consecutive absence of at least a year due to a non-job-related disability). The interests served by Section 73 are consistent with, if not identical to, those served by Section 71.

The purpose of the bill is to enable department and agency heads, without resort to disciplinary charges and hearings, to terminate the employment status of employees who have been absent and disabled from the performance of their duties for prolonged periods of time. . . .

One of the most knotty personnel problems which plague department and agency heads is the problem of what to do about an employee who has been absent and disabled from the performance of his duties for a prolonged period of time. . . . It is difficult to get temporary replacements and, more often than not, the remaining staff has to absorb an additional work load necessitated by the absence of the disabled employee. Over a prolonged period this can have a serious, adverse effect on the work of an office or agency. * * *

Under the provisions of the Civil Service Law [pre-Section 71 and 73], the only means available to free the encumbrance of such a position (unless the absent employee resigns) is to bring charges of incompetency under Section 75 of the Civil Service Law and dismiss the employee on that basis after a hearing. This obviously is not a practical or appropriate solution to the problem. A disciplinary proceeding in most cases prejudices an employee's future or may carry a stigma of incompetency or worse. Appointing officers are, therefore, most reluctant to commence disciplinary proceedings against employees who are ill. . . .

The bill proposes a solution of this dilemma. Under its terms if an employee is . . . absent and disabled for one year, his position may be filled on a permanent basis. . . .

N.Y. Legis. Ann., 1965, pp. 91-92 (emphasis added).[5] *See also Economico v. Village of Pelham*, 67 A.D.2d 272, 276-77 (2d Dep't 1979) (quoting *id.*), *aff'd*, 50 N.Y.2d 120 (1980).

As set forth in the legislative history, and recognized by this Court, Sections 71 and 73 were enacted to allow employers to terminate employees who had been absent for a significant period of time through no fault of their own without having to pursue disciplinary action under Section 75 of the CSL. *See Allen v. Howe*, 84 N.Y.2d 665, 669 (1994) (recognizing public employers' "substantial interest in the productive and economically efficient operation of its civil service" and explaining that "Sections 71 and 73 strike a balance between the recognized substantial interest in an efficient civil service and the interest of the civil servant in continued employment in the event of a disability.") (emphasis added); *Economico v. Village of Pelham*, 50 N.Y.2d 120, 126 (1980).

On the one hand, the law recognizes employees' interest in continued employment and relieves affected employees of the stigma they might otherwise

[5] While not addressed in the legislative history, Sections 71 and 73 also help employers recruit more qualified candidates. Before the enactment of Sections 71 and 73, an employer had to tell a candidate for a vacant, but encumbered, position that his or her appointment would only be temporary. The opportunity for permanent appointment would not be available until the incumbent was separated from service in a Section 75 disciplinary proceeding. There was no way of knowing when that would be. When Sections 71 and 73 were enacted, an employer could (at last) inform a desirable candidate that the incumbent was only entitled to a one (1)-year leave of absence and, therefore, there could be an opportunity for permanent appointment within a year or so.

face if they were terminated for cause pursuant to Section 75 of the CSL (a disciplinary statute). *See* N.Y. Legis. Ann., 1965, pp. 91-92. This Court referenced that stigma in *Economico v. Village of Pelham*, 50 N.Y.2d 120, 126 (1980) and *Allen v. Howe*, 84 N.Y.2d 665, 671 (1994).

On the other hand, the law allows employers to fill vacant but previously-encumbered positions which had not been filled for a period of at least a year. As explained by this Court:

> [T]he interest of the State in maintaining the efficiency and continuity of its civil service is a substantial one. In its capacity as an employer, therefore, the government must have broad discretion and control over the management of its personnel and internal affairs. The absence of a public employee from his position for a prolonged period unduly impairs the efficiency of an office or agency. In many cases, the duties of the absent employee must be absorbed by the remaining staff because temporary replacements are difficult to obtain. Continued performance of the business of government necessitates that there be a point at which the disabled officer may be replaced [1 year]. These considerations were the practical impetus behind enactment of section 73 of the Civil Service Law.

Economico, 50 N.Y.2d at 126 (emphasis added) (internal citations omitted). *See also Jordan v. New York City Hous. Auth.*, 33 N.Y.3d 408, 412-13 (2019); *Allen v. Howe*, 84 N.Y.2d 665, 671 (1994); Duncan *v. New York State Dev. Ctr.*, 63 N.Y.2d 128, 135 (1984) (quoting *Economico*, 50 N.Y.2d at 126); *Town of Cortlandt*, 33

PERB ¶ 3031 (1997), *conf'd sub nom*, *Town of Cortland v. New York State Public Employment Relations Board*, 30 PERB ¶ 7012 (Sup. Ct. Westchester Co. 1997).

As most recently summarized by this Court in 2019, "**Section 71 was designed to remove the procedural hurdle**" which delayed employers' ability to replace disabled employees. *Jordan v. New York City Hous. Auth.*, 33 N.Y.3d 408, 412-13 (2019). While the "procedural hurdle" which the Court referred to in *Jordan* was having to follow the disciplinary procedures set forth in Section 75, requiring employers to negotiate and follow procedures before removing employees pursuant to Section 71 (or 73) would obviously present another "procedural hurdle" which would delay employers' ability to replace disabled employees, thereby frustrating Section 71's legislative intent.

Thus, in holding that public employers need not negotiate procedures for terminating employees pursuant to Section 71, the Second Department followed this Court's prior decisions interpreting Section 71's intent. *See Jordan*, 33 N.Y.3d at 412-13; *Economico*, 50 N.Y.2d at 126; *Allen*, 84 N.Y.2d at 671. Specifically, the Second Department's holding reinforced employers' ability to replace disabled employees after a year without subjecting them to a stigmatizing disciplinary proceeding.

Public employers have the right to terminate disabled employees after they are out a year, not after a year *plus* whatever time it takes to negotiate such procedures. Period.

Requiring employers to negotiate procedures before terminating employees pursuant to Section 71 would effectively force employers to bargain away their right to terminate disabled employees after a year. And as explained by this Court, "public policy prohibits an employer from bargaining away its right to remove those employees satisfying the plain and clear statutory requisites for termination" under Section 73 (or 71). *Economico*, 50 N.Y.2d at 129. *See also Enlarged City Sch. Dist. of Middletown New York v. Civ. Serv. Empls. Assn.*, 148 A.D.3d 1146 (2d Dep't 2017) (quoting *Economico* and holding that public policy prohibited an arbitrator from enforcing a contract clause which limited a public employer's right to terminate an employee under Section 71).

Thus, the Decision was consistent with this Court's prior holdings.

b) The Decision Is Consistent With This Court's Determination That Employees Do Not Need More Than Minimal Due Process Before Being Terminated Pursuant To Section 71

Sections 71 and 73 provide ample protection for employees terminated thereunder. Both statutes (entitled "Reinstatement after separation for disability" and "Separation for ordinary disability; reinstatement") set forth detailed

procedures for reinstating those whose disability ceases after they have been terminated, through no fault of their own.

Ordinarily, public employees are entitled to minimal due process (i.e., notice and an opportunity to be heard) before being terminated since they have a property interest in their public employment. *See Gudema v. Nassau County*, 163 F.3d 717, 724 (2d Cir. 1998). However, as explained *infra*, it is unclear whether public employees are in fact entitled to minimal due process before being terminated pursuant to Section 71 (as opposed to being terminated for cause).

Given public employers' "substantial" interest in maintaining efficiency, and the availability of post-termination reinstatement protections, the Court of Appeals has described employees' rights under Sections 71 and 73 as "inferior to a full property right." *See Economico*, 50 N.Y.2d at 126:

> Once it [is] demonstrated that [the employee's] condition satisfied the objective criteria triggering application of section 73, [the employee's] property interest in the position could be extinguished in the sound discretion of the appointing authority.

Id.

When considering whether to terminate an employee pursuant to Section 71, the employer need only determine: (1) whether the employee has been absent for a year; and (2) and whether the absence was due to an injury or illness covered by the Workers' Compensation Law. *See id.* at 127-28 (noting that an employee may

only dispute the operative facts triggering his/her removal under the statute – i.e., whether the employee's disability arose in the course of his/her employment and the length of the employee's absence). These two (2) issues do not lend themselves to the need for a "hearing" or procedure. They can be resolved by simply reviewing the employee's attendance records and documentation regarding the employee's workers' compensation benefits status. *See id.* at 128 (describing the issues as "sharply focused, easily documented and amenable to prompt resolution[,]" and noting that "when the operative facts are not in dispute, a hearing is unnecessary.") (emphasis added).

For these reasons, this Court held that if there is a dispute over such issues, the matter can be addressed in a post-termination hearing. *See id.* (reiterating that "the interest of the governmental employer in being able to act expeditiously to remove an absent employee is substantial."); *see also Leonard v. Regan*, 143 Misc. 2d 574, 576-77 (Sup. Ct. Albany Co. 1989) (citing *Economico* in holding that "section 71 . . . does not require a pretermination notice and hearing."), *aff'd*, 167 A.D.2d 790 (3d Dep't 1990).

After *Economico*, however, this Court held that a termination pursuant to Section 73 (or 71) must be accompanied by *pre*-termination notice and a minimal opportunity to be heard. *See Prue v. Hunt*, 78 N.Y.2d 364, 370 (1991) (noting that

to the extent the Court's prior holding in *Economico* permits a Section 73 discharge with only a post-termination hearing, it is superseded).

Notwithstanding its holding in *Prue v. Hunt*, however, this Court subsequently upheld the Section 71 termination of an employee who had not been offered a pre-termination hearing. *See Allen v. Howe*, 84 N.Y.2d 665, 670 (1994) (upholding termination pursuant to Section 71 where employee only received a letter advising him that he would be discharged upon the completion of his one (1)-year absence).

Thus, it is unclear whether those facing discharge pursuant to Section 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. *See id.*; *Economico*, 50 N.Y.2d at 126. At the most, such employees are entitled to pre-termination notice and an opportunity to be heard, which is precisely what the City offered the employee at issue in this case. (*See* R. 11, 34, 89-90).

Citing *Allen v. Howe*, the Southern District of New York held that employers need not offer employees a hearing prior to terminating them pursuant to Section 71. *See Santiago v. Newburgh Enlarged City Sch. Dist.*, 434 F. Supp. 2d 193, 195 (S.D.N.Y. 2006). According to the court in *Santiago*:

> It is well settled that a civil service employee is not deprived of due process if the employee is terminated

> without a pre-termination hearing pursuant to Section 71 of the Civil Service Law. *Allen v. Howe,* 84 N.Y.2d 665 (1994); *Johnson v. Doe*, 2001 U.S. Dist. LEXIS 2447, *8 (S.D.N.Y. 2001).
>
> Because the Civil Service Law gave plaintiff post-termination due process (i.e., the right to demand to return to work, and to contest any determination that she was not fit to return to work), the Fourteenth Amendment requirement is fully satisfied.

Id. at 198. In other words, once an employer decides to terminate an employee pursuant to Section 71 or 73, it need only provide notice of such decision.

Several courts have followed *Santiago* in holding that employers need not offer employees hearings prior to terminating them pursuant to Section 71. *See, e.g.*, *O'Leary v. Town of Huntington*, 2012 U.S. Dist. LEXIS 126086 at *8, 37-40 (E.D.N.Y. 2012) (employer did not violate due process when it separated plaintiff from service pursuant to Section 71 without providing pre-termination hearing because the "procedures under Article 78 are more than adequate post-deprivation remedies for purposes of due process. . . .") (emphasis added); *Gentile v. Nulty*, 2006 U.S. Dist. LEXIS 101081, *26-27 (S.D.N.Y. 2006) ("Even if Plaintiff had not been afforded . . . a pre-termination hearing, his termination would not have violated the requirements of due process. . . [since] a pre-termination hearing is not required before a civil service employee may have his employment terminated under § 71.") (emphasis added); *Johnson v. Doe*, 2001 U.S. Dist. LEXIS 2447, *8 (S.D.N.Y. 2001) ("no due process right is implicated when the employment of a

civil servant is terminated under [Section 71] without affording the civil servant a pretermination hearing."). *See also Holmes v. Gaynor*, 313 F. Supp. 2d 345, 359 (S.D.N.Y. 2004) (". . . Plaintiff was not entitled to a pretermination hearing before being discharged pursuant to Section 71. . . .").

Such case law reinforces the Legislature's recognition of a public employer's overriding, "substantial" interest in being able to remove disabled employees after a certain period to maintain efficient government operations.

In this case, however, the City took a conservative approach and offered Mr. Gusler *more* than what is required based on *Allen*, *Santiago*, *O'Leary*, *Gentile, Johnson* and *Holmes*, all of which were decided after *Prue v. Hunt*. Indeed, the City provided Mr. Gusler with not only notice of his potential separation from service pursuant to Section 71, but also offered him a pre-termination opportunity to be heard. (R. 89-90). Specifically, by letter dated November 10, 2015, the City's Fire Commissioner notified Mr. Gusler that: (1) the Commissioner might be recommending to the City Manager that Mr. Gusler be separated pursuant to Section 71 since Mr. Gusler had been out for more than a year due to an injury for which he was granted workers' compensation benefits; (2) he would provide Mr. Gusler with an opportunity to be heard and to present information (at City Hall on a date two weeks in the future) to assist the City Manager in making his determination; and (3) if Mr. Gusler did not respond to the Fire Commissioner's

November 10th letter and/or take advantage of his opportunity to be heard, the Fire Commissioner would recommend to the City Manager that Mr. Gusler be terminated. (R. 89-90).

PERB determined that the notice and opportunity to be heard which the City provided Mr. Gusler constituted mandatorily-negotiable pre-termination "procedures." (*See* R. 163).

Preliminarily, the City disagrees with PERB's finding that giving employees notice and an (arguably unnecessary) opportunity to be heard amounts to a "procedure."

Unlike other cases where employers unilaterally imposed detailed hearing procedures to be followed when terminating employees pursuant to Section 71, all the City did here was let Mr. Gusler know that he would have a chance to dispute his potential termination and present information that would assist the City Manager in making his determination. *Compare* R. 89-90 *with Town of Wallkill*, 44 PERB ¶ 4529 (ALJ Burritt, 2011) (employer's attempt to unilaterally impose detailed disciplinary hearing procedures applicable to Section 71 pre-termination hearings violated Section 209-a.1(d) of the CSL). Letting an employee know the date, time and place where he/she will have an (arguably unnecessary) opportunity to be heard on the issues of the length of his absence and whether such absence

was due to an injury or illness covered by the Workers' Compensation Law does not constitute a "procedure."

Furthermore, even if, *arguendo*, the City's letter did constitute a pre-termination "procedure," requiring employers to negotiate such "procedures" is at odds with the legislative intent of Sections 71 and 73. The adequacy of such "procedures" may be addressed post-termination by commencing an Article 78 proceeding. *See Gentile*, 2006 U.S. Dist. LEXIS 101081 at *31 (the ability to file an Article 78 petition to challenge the adequacy of the employer's pre-termination procedures and the sufficiency of the medical reports on which the employer based its decision satisfies due process requirements).

Employee organizations should not be permitted to challenge *pre-*termination procedures when the courts have deemed Section 71 and 73's *post-*termination protections to be sufficient time and time again. *See id.*; *O'Leary*, 2012 U.S. Dist. LEXIS 126086 at *8, 37-40 (E.D.N.Y. 2012) (noting that the "procedures under Article 78 are more than adequate post-deprivation remedies for purposes of due process. . . ."); *Johnson*, 2001 U.S. Dist. LEXIS 2447 at *10 (plaintiff was not entitled to a pre-termination hearing before being terminated under Section 71 since she could have challenged her employer's alleged failure to consider relevant medical records in an Article 78 proceeding).

Thus, in holding that the City did not have to do more than it did (i.e., provide notice and opportunity to be heard), the Second Department's Decision was consistent with this Court's holding in *Prue v. Hunt*. At most, employees are arguably entitled to notice and an opportunity to be heard prior to being terminated under Section 71. *See Prue*, 78 N.Y.2d at 370. And given *Allen v. Howe*, which was decided after *Prue v. Hunt*, employers arguably only need to provide employees with notice before terminating them under Section 71. *See Allen*, 84 N.Y.2d at 670 (upholding an employee's termination pursuant to Section 71 even though he was not offered a pre-termination opportunity to be heard).

Thus, the Decision was consistent with this Court's prior holdings.

c) *Town Of Cortlandt* Is Not Controlling

At all times relevant herein, PERB has primarily relied on its holding in *Town of Cortlandt*, which, although affirmed by the Supreme Court, Westchester County, was never affirmed by the Appellate Division. *Town of Cortlandt*, 30 PERB ¶ 3031, *confirmed sub nom*, *Town of Cortlandt v. NYS Pub. Empl. Rels. Bd.*, 30 PERB ¶ 7012 (Sup. Ct. Westchester Co. 1997).

In *Town of Cortlandt*, PERB held that an employer must negotiate the right to exercise the discretion granted to it to terminate employees pursuant to Section 71. Since *Town of Cortlandt* frustrates the legislative intent of Section 71, as interpreted by this Court, it should be afforded no weight.

Town of Cortlandt does nothing more than demonstrate PERB's flawed understanding of Section 71's purpose. Indeed, according to PERB:

> Whether or not disciplinary in nature, the grounds upon which an employee is discharged from employment are necessarily mandatory subjects of bargaining because termination from employment on any ground occasions the loss of all terms and conditions of employment. Changes in the grounds for termination from employment are mandatorily negotiable unless termination is required by law or controlling provisions of law establish a legislative intent to exempt an employer from a duty to bargain the decision to terminate.

Id. (emphasis added). PERB's reference to "changes in the grounds for termination" in the context of Section 71 demonstrates its lack of understanding of the statute. As explained *supra*, Section 71 is a no-fault statute. There are no grounds. There is only one ground to terminate.

An employer does not change the grounds for termination by exercising its statutory right to remove employees pursuant to Section 71. Prior to the enactment of Section 71, an employer could exercise its right to remove an employee pursuant to Section 75 of the CSL for being absent a significant period of time. Section 71 similarly allows an employer to exercise its discretion to remove an employee for a prolonged absence. Section 71 merely provides a more efficient option for employers to remove such employees (since proving fault is not necessary under Section 71). *Compare* Civ. Serv. Law § 71 (permitting separation based on employee's one-year absence due to occupational disability) *with* Civ.

Serv. Law § 75 (permitting termination upon proof of misconduct or incompetency).

The City has not "changed the grounds" for terminating employees, nor has it changed any other mandatorily-negotiable term and condition of employment. PERB's blind reliance on *Town of Cortlandt* to find that the City violated Section 209-a.1(d) of the CSL was therefore irrational and erroneous, as ultimately determined by the Second Department.

Moreover, PERB's *Town of Cortlandt* decision pre-dates an entire line of cases holding that employees are not entitled to a hearing before being terminated pursuant to Section 71. *See Cortlandt*, 30 PERB ¶ 3031, *confirmed sub nom*, *Town of Cortlandt v. NYS Pub. Empl. Rels. Bd.*, 30 PERB ¶ 7012 (Sup. Ct. Westchester Co. 1997); *O'Leary*, 2012 U.S. Dist. LEXIS 126086 at *8, 37-40 (E.D.N.Y. 2012); *Santiago*, 434 F. Supp. 2d 193, 195 (S.D.N.Y. 2006); *Gentile*, 2006 U.S. Dist. LEXIS 101081 at *26-27 (S.D.N.Y. 2006); *Johnson*, 2001 U.S. Dist. LEXIS 2447 at *8 (S.D.N.Y. 2001); *Holmes*, 313 F. Supp. 2d at 359 (S.D.N.Y. 2004). Requiring employers to negotiate pre-termination procedures (including hearing procedures) when a hearing is, based on this line of cases, not even required prior to terminating someone pursuant to Section 71 would frustrate the statute's legislative intent and be inconsistent with cases interpreting same.

In brief, requiring the City (and all public employers in New York) to negotiate the right to terminate employees pursuant to Section 71 (and replace them with employees capable of working) would be inconsistent with the public policy expressed by this Court and frustrate Section 71's legislative intent. *See Jordan*, 33 N.Y.3d at 412-13; *Economico*, 50 N.Y.2d at 126; *Allen*, 84 N.Y.2d at 671. Indeed, if employers are required to negotiate their statutory right to remove employees pursuant to Section 71, unions will be able to postpone employees' terminations for months or years while negotiations (and potentially mediation, fact-finding, legislative determinations and/or interest arbitration) run their course. Such delay is clearly at odds with the legislative intent to provide a prompt, no-fault way to expeditiously remove disabled employees and fill their vacant yet encumbered positions after they have already been out a year.

In brief, unlike *Town of Cortalndt*, the Second Department's Decision is consistent with this Court's prior holdings.

2. The Decision Is Not Inconsistent With This Court's Holdings In *Watertown*, *Schenectady*, *Syracuse*, *Board of Education* And *Auburn*

PERB argues that the Decision is inconsistent with this Court's decisions in *Watertown*, *Schenectady*, *Syracuse*, *Board of Education* and *Auburn*. Significantly, not one of those cases concerned, let alone cited, Section 71 or 73. (PERB Brief at 17-21). PERB nonetheless claims they are relevant because they

hold that the "procedures associated with the discretionary exercise of statutory rights are mandatorily negotiable, absent plain and clear or inescapably implicit legislative intent to the contrary." *Id.*

It is undisputed that public policy generally supports employer-employee negotiations, but "[t]he presumption in favor of bargaining may be overcome . . . in 'special circumstances' where the legislative intent to remove the issue from mandatory bargaining is 'plain' and 'clear.'" *City of Watertown v. N.Y.S. Pub. Empl. Rels. Bd.*, 95 N.Y.2d 73, 78-79 (2000) (quoting *Schenectady Police Benev. Assn. v. NYS Pub. Empl. Rels. Bd.*, 85 N.Y.2d 480, 486 (1995)).

While Section 71 does not *explicitly* exempt employers from the State's public policy favoring the negotiation of terms and conditions of employment, Section 71 was enacted before public employers had *any* obligation to collectively bargain employees' terms and conditions of employment so there was no reason for the Legislature to draft such an exemption. *See* R. 162 (citing *Town of Cortlandt v. NYS Pub. Empl. Rels. Bd.*, 30 PERB ¶ 7012 (Sup. Ct. Westchester Co. 1997)); Civ. Serv. Law § 71 (enacted in 1958); Civ. Serv. Law § 209-a ("Taylor Law") (enacted in 1969).

The City is aware of only one statute – Section 470 of the New York Retirement and Social Security Law ("RSSL") – which does explicitly exempt employers from the public policy in favor of collective bargaining. *See* Ret. Soc.

Sec. Law § 470 ("Changes negotiated between any public employer and public employee, as such terms are defined in section two hundred one of the civil service law, with respect to any benefit provided by or to be provided by a public retirement system, or payments to a fund or insurer to provide an income for retirees or payment to retirees or their beneficiaries, shall be prohibited.").

Unlike Sections 71 and 73, Section 470 of the RSSL was enacted *after* the Taylor Law imposed a duty on public employers to collectively bargain employees' terms and conditions of employment. *See* Civ. Serv. Law § 71(enacted in 1958); Civ. Serv. Law §73 (enacted in 1965); Civ. Serv. Law § 209-a (enacted in 1969); Ret. Soc. Sec. Law § 470) (enacted in 1973). In contrast, Sections 71 and 73 were enacted *before* the Taylor Law, so there was no reason for the Legislature to explicitly exempt public employers from any bargaining obligations relating to Sections 71 and 73. Consequently, no inference can therefore be drawn from the absence of express language granting such an exemption.

Notwithstanding the absence of any explicit exemption from the duty to bargain procedures for terminating employees under Section 71, there are several indicators of the Legislature's plain and clear intent to exempt employers from the State's 'strong and sweeping policy' to support employer-employee negotiations." (*See* R. 165-66).

For example, while Sections 71 and 73 contain extensive post-termination procedures, they do not set forth any pre-termination procedures. *See* Civ. Serv. Law §§ 71, 73. With regard to post-termination procedures, Section 71 provides:

> Such employee may, within one year after the termination of such disability, make application to the civil service department or municipal commission having jurisdiction over the position last held by such employee for a medical examination to be conducted by a medical officer selected for that purpose by such department or commission. If, upon such medical examination, such medical officer shall certify that such person is physically and mentally fit to perform the duties of his or her former position, he or she shall be reinstated to his or her former position, if vacant, or to a vacancy in a similar position or a position in a lower grade in the same occupational field, or to a vacant position for which he or she was eligible for transfer. If no appropriate vacancy shall exist to which reinstatement may be made, or if the work load does not warrant the filling of such vacancy, the name of such person shall be placed upon a preferred list for his or her former position, and he or she shall be eligible for reinstatement from such preferred list for a period of four years. . . .

Civ. Serv. Law § 71.[6]

The goal of these statutes was to "enable department and agency heads, without resort to . . . hearings, to terminate. . . ." employees who had: (1) been absent more than a year; (2) due to an occupational disability. *See* N.Y. Legis. Ann., 1965, pp. 91-92 (emphasis added). Forcing employers to bargain procedures

[6] The post-termination procedures set forth in Section 73 are nearly identical with just a few minor variations. See Civ. Serv. Law §73.

to determine these two (2) non-controversial issues (length of absence and whether the disability qualifies for benefits under the Workers' Compensation Law) frustrates the legislative intent to allow employers to maintain efficiency by quickly filling vacancies on a permanent basis after a year. This is especially true given that employees who, after being terminated under Section 71, recover from their injury and are deemed medically fit to perform the duties of their former position can be apply for reinstatement within one (1) year of when their disability ceases. Civ. Serv. Law § 71. If there is no vacancy at that time, the employee is placed on a preferred eligible list for four (4) years so that he/she receives preference if a position becomes available.

If the Legislature intended for employers to follow certain procedures *before* terminating employees pursuant to Section 71, it would have drafted language reflecting such intent as it did with the post-termination procedures and/or as it has done in other sections of the CSL (which have fewer post-termination protections).[7] *See, e.g.*, Civ. Serv. Law § 75 (before disciplining an employee, an employer must: give the employee the right to have representation present at any questioning which might lead to discipline; give the employee notice of the

[7] Unlike an employee who is terminated under Section 71 (who need only obtain certification from a medical officer that he/she is fit to perform the duties of his/her former position), one who is terminated pursuant to Section 75 must commence an Article 78 proceeding to annul his/her termination and achieve reinstatement.

proposed discipline and the reasons therefor; provide the employee with a copy of the charges preferred against him/her; give the employee at least eight (8) days to answer the charges in writing; give the employee a hearing, of which a record shall be made, and at which the employee will have the right to be represented by counsel or a union representative and summon witnesses on his/her behalf; and not suspend the employee without pay for more than thirty (30) days pending the determination of the charges).

The legislative history demonstrates a clear intent to let employers remove disabled employees without having to comply with any negotiated or statutorily-imposed pre-termination procedures like those set forth in Section 75. *See* N.Y. Legis. Ann., 1965, pp. 91-92 ("The purpose of the bill is to enable department and agency heads[] without resort to disciplinary charges and[,] hearings, to terminate the employment status of employees who have been absent and disabled from the performance of their duties for prolonged periods of time.") (emphasis added).

In light of the absence of pre-termination procedures in Sections 71 and 73 (in conjunction with: the explicit, detailed language therein regarding post-termination procedures; and the option of commencing a post-termination Article 78 proceeding), the Legislature clearly believed that those separated from service pursuant to Section 71 / 73 have sufficient post-termination protection and did not intend for employers to have to bargain any pre-termination protections. In fact,

one could argue that Section 71, entitled "Reinstatement after Separation for Disability," was really designed to give employees post-termination rights after they have, through no fault of their own, been separated from service.

Any suggestion that the Legislature intended for employers to have to negotiate procedures for terminating employees under Section 71 or 73 is simply unfounded. The Court of Appeals has expressly held that "public policy prohibits an employer from bargaining away its right to remove those employees satisfying the plain and clear statutory requisites for termination." *Economico*, 50 N.Y.2d at 129. Requiring employers to negotiate pre-termination procedures would, as a practical matter, force employers to bargain away their right to maintain efficiency by *promptly removing and replacing* covered employees after a year. Indeed, the time spent bargaining such procedures would inevitably extend the leave of absence well beyond the period set forth in the statute (i.e., one year). Unsuccessful negotiations often lead to mediation, fact-finding, and legislative hearings. Civ. Serv. Law 209. In addition, employers who are unable to negotiate such procedures with their police and firefighter unions have to participate in mediation and, potentially, compulsory interest arbitration which could take more than an additional year past the one (1) year provided under Section 71. *See* Civ. Serv. Law § 209. Such a result is contrary to public policy. *See id.*

The Second Department's conclusion that the Legislature did not intend for employers to have to bargain procedures before terminating employees under Section 71 is not inconsistent with any of this Court's prior decisions. Indeed, all of the cases cited by PERB are distinguishable.

For example, in *Watertown*, this Court analyzed whether public employers must negotiate procedures for contesting employers' decisions regarding police officers' eligibility for benefits under Section 207-c of the General Municipal Law ("Section 207-c"). *See City of Watertown v. N.Y.S. Pub. Empl. Rels. Bd.*, 95 N.Y.2d 73, 76-81 (2000). The Court ultimately answered that question in the affirmative. However, its holding is not inconsistent with the Second Department's Decision. Indeed, having to negotiate the procedures at issue in *Watertown* would not delay an employer's ability to exercise its statutory right to deny an employee's application for Section 207-c benefits. The procedures at issue in *Watertown* related to what happens after the employer exercises its statutory right to deny an employee Section 207-c benefits. The duty to negotiate such post-action procedures did not impede or delay the employer's ability to exercise its statutory right to deny an employee's application for Section 207-c benefits.

Unlike the procedures at issue in *Watertown*, if employers were required to negotiate procedures before terminating employees under Section 71, the delay

caused by such negotiations would obstruct employers' ability to exercise their statutory right to replace such employees after a year.

In addition, neither Section 207-c nor its legislative history demonstrated any intent to exempt employers from having to negotiate procedures for contesting employers' determination of police officers' eligibility for Section 207-c benefits. In contrast, both Section 71's legislative history and its provision of detailed *post*-termination procedures make clear the Legislature's intent to exempt employers from having to negotiate procedures before terminating employees under Section 71.

The Decision is similarly not inconsistent with *Schenectady*. Indeed, in *Schenectady*, this Court held that employers need not negotiate the ability to require police officers to work light duty or undergo surgery as a condition of receiving Section 207-c benefits. *City of Schenectady v. N.Y.S. Pub. Empl. Rels. Bd.*, 85 N.Y.2d 480 (1995). In other words, special circumstances negated the policy in favor of collective bargaining.

Nor is the Decision inconsistent with *City of Syracuse*. *See City of Syracuse v. N.Y.S. Pub. Empl. Rels. Bd.*, 279 A.D.2d 98 (2000). In that case, this Court held that employers must negotiate procedures before terminating firefighters' receipt of benefits pursuant to Section 207-a of the General Municipal Law ("Section 207-a"). *Id.* Significantly, however, unlike Section 71, which expressly allows

employers to terminate employees who meet certain criteria, Section 207-a does not explicitly grant employers the right to terminate firefighters' Section 207-a benefits. Gen. Mun. Law § 207-a. Thus, *Syracuse* is not applicable.

The Decision is not inconsistent with *Board of Education* either. *See Bd. of Educ. of the City Sch. Dist. of the City of New York v. N.Y.S. Pub. Empl. Rels. Bd.*, 75 N.Y.2d 660 (1990). In that case, this Court held that there was no evidence that the Legislature intended to exempt employers from having to negotiate a requirement that employees disclose certain financial information pursuant to Section 2590-g(14) of the Education Law. *Id.* Neither the Court's opinion nor PERB's papers suggest that Section 2590-g(14)'s language or legislative history is comparable to that of Section 71. *See id.*; PERB Brief at 18-19. Thus, there is no basis to conclude that the Second Department's Decision is inconsistent with *Board of Education of the City of New York.*

PERB's claim that the Decision is inconsistent with *County of Auburn* is similarly unfounded. (*See* PERB Brief at 19) (citing *County of Auburn*, 46 N.Y.2d 1034 (1978)). In *County of Auburn*, this Court held that employers and unions can negotiate alternatives to the disciplinary procedures set forth in Sections 75 and 76 of the CSL. *County of Auburn*, 46 N.Y.2d at 1035. The Court's holding did not deprive employers of their statutory right to discipline employees. If an employer negotiated and agreed upon alternative procedures to those set forth in Sections 75

and 76, then it would follow those alternative procedures. In the meantime, pending such negotiations, the employer still had the ability to discipline employees pursuant to the procedures set forth in Sections 75 and 76. Thus, allowing employers to negotiate alternatives to the procedures set forth in Sections 75 and 76 did not frustrate either section's legislative intent.

Unlike the disciplinary procedures set forth in Sections 75 and 76 of the CSL and those at issue in *County of Auburn*, the issues involved in terminating someone pursuant to Section 71 (i.e.: 1) absent a year; and 2) due to an occupational injury or illness as defined in the Workmen's Compensation Law) do not lend themselves to the need for a hearing or procedures.

If the Court were to find that the procedures at issue here must be negotiated, then employers would not be able to exercise their statutory right to terminate an employee pursuant to Section 71 until such procedures are negotiated – not after one (1) year of absence. As discussed *supra*, this would frustrate Section 71's legislative intent.

In brief, the Decision is not inconsistent with the cases cited by PERB.

C. The Decision Does Not Generate A Conflict Among The Departments Of The Appellate Division

Contrary to what PERB claims, the Decision does not generate a conflict among the departments of the Appellate Division. No other department has addressed the issue of whether public employers must negotiate procedures for

terminating employees under Section 71 (or 73). Therefore, the Decision did not create a conflict among the departments.

PERB's reliance on *County of Auburn* is misplaced. (*See* PERB Brief at 21) (citing *Auburn Police v. County of Auburn*, 62 A.D.2d 12 (3d Dep't 1978)). The court in that case did not, as PERB suggests, hold that "where a statutory scheme vests employers with discretion to terminate employees, the pre-termination procedures to do so are mandatorily negotiable." (PERB Brief at 21). Rather, as discussed *supra*, the Third Department held that public employers could negotiate alternatives to the disciplinary procedures set forth in Section 75 and 76 of the CSL. *County of Auburn*, 62 A.D.2d at 14 & 17. The court did not make any references to, let alone discuss, Section 71 (or 73).

Moreover, there is no reason to believe that the legislative intent of Sections 75 and 76 is similar to that of Sections 71 and 73. Thus, the Third Department's holding in *County of Auburn* is inapplicable and is *not* in conflict with the Second Department's Decision.

PERB's argument that the Decision conflicts with *State of New York* is similarly misplaced. (*See* PERB Brief at 21) (citing *State of New York v. New York State Pub. Empl. Rels. Bd.*, 176 A.D.3d 1460, 1464 (3d Dep't 2019)). In that case, a union alleged that the Rochester Psychiatric Center violated Section 209-a.1(d) of the CSL by unilaterally imposing a requirement that all employees provide

medical documentation for unscheduled absences during the holiday season. *State of New York*, 176 A.D.3d at 1461.

In its defense, the Rochester Psychiatric Center argued that Section 21.3(d) of the New York State Civil Service Department's regulations allowed it to implement the change at issue. *Id.* at 1464. However, the Third Department rejected that argument, explaining: ". . . petitioner's reliance on 4 N.Y.C.R.R. 21.3(d) is entirely misplaced and contrary to the facts of this case, as it does not authorize petitioner to unilaterally alter an established past practice that is a mandatory subject of negotiation. . . ." *Id.* As explained below, *State of New York* is distinguishable on several grounds.

First, nowhere in its Decision did the Second Department hold that any regulation superseded any Taylor Law obligation. *See generally* Decision.

Second, the Third Department's holding in *State of New York* was not as broad as PERB suggests. Indeed, the Third Department merely held that the employer's reliance on a particular regulation was "misplaced and contrary to the facts of the case, as it does not authorize [the employer] to unilaterally alter an established past practice that is a mandatory subject of negotiation. . . ." *Id.* There is no reason to conclude that the specific regulation, facts and/or past practice at issue in *State of New York* has any applicability here.

Third, and more importantly, the Decision did not, as PERB seems to suggest, hold that the regulation cited by the Second Department (4 NYCRR 5.9) "supersede[d] Taylor Law bargaining obligations." The Second Department merely cited 4 NYCRR 5.9 (and Sections 6 and 71 of the CSL) in explaining its rationale for concluding that employers do not have any Taylor Law bargaining obligations when it comes to developing procedures for terminating employees under Section 71.

D. Granting PERB's Motion For Leave To Appeal Would Be Futile And Result In An Inefficient Use Of Valuable Judicial Resources

According to PERB, the Second Department's "rationale [was] based exclusively on an argument not raised before it by the parties or briefed at any point in the court proceedings or before PERB[,]" and, therefore, its Decision should be reversed. (PERB Brief at 2-5, 13). While the parties may not have briefed the issue of whether Section 5.9 of the regulations for the New York State Civil Service apply to local municipalities,[8] the City has, at all times relevant herein, argued that the legislature never intended for employers to have to give a

[8] The regulations for the New York State Civil Service, including, but not limited to, Section 5.9, do not apply to local municipalities like the City. *See* 4 N.Y.C.R.R. § 1.1 (". . . these rules shall apply to positions and employments in the classified service of the State and public authorities, public benefit corporations and other agencies for which the Civil Service Law is administered by the State Department of Civil Service."); *see also* https://www.longbeachny.gov/vertical/sites/%7BC3C1054A-3D3A-41B3-8896-814D00B86D2A%7D/uploads/%7BBD02992C-633B-4AB0-B3FE-6B73FE2F0BB2%7D.PDF (demonstrating that the City has its own Civil Service Commission and rules).

disabled employee more than a year-long leave of absence before terminating him/her under Section 71, and the Second Department considered what the legislature intended in rendering its Decision. Thus, PERB's claim that the Second Department rationale was based *exclusively* on an argument not raised before it is inaccurate.

Furthermore, the Second Department's rationale is, frankly, irrelevant. Even if, *arguendo*, its rationale was flawed, the Second Department reached the correct decision. Under such circumstances, if the Court were inclined to grant PERB's motion for leave to appeal, affirmance of the Decision would ultimately be warranted. Indeed, as observed by this Court over a century ago:

> The fact that the judgment of the trial court was sustained by the appellate division on a different theory than that now adopted offers no obstacle to its affirmance here. We have held that a correct decision will not be reversed on appeal because founded upon a wrong reason. . . .

Ward v. Hasbrouch, 169 N.Y. 407, 420 (1902). Thus, where, as here, a judgment or order is correct, it should not be reversed because the court may have given a wrong or insufficient reason for its rendition.

POINT II

THE UNION'S MOTION FOR LEAVE TO APPEAL SHOULD BE DENIED

The Union "incorporate[d] the arguments and papers in [its] motion . . . , including PE[R]B's memorandum of law in support of their motion for leave to

appeal to the Court of Appeals." (Affirmation of Louis D. Stober, Jr. dated January 14, 2021 at ¶ 4). Since the Union's motion is based on the same grounds as PERB's meritless motion, it follows that it should be denied.

The Union's position that the Second Department erroneously relied on Section 5.9 of the regulations of the New York State Civil Service Department is also disingenuous. Counsel for the Union has, in another case, successfully argued to the Second Department that the City is bound by Section 5.9. *See Cooke v. City of Long Beach*, 247 A.D.2d 538 (2d Dep't 1998), *leave to appeal denied*, 96 N.Y.2d 715 (2001).

CONCLUSION

For all of the foregoing reasons, PERB and the Union's motions for leave to appeal should be denied in their entirety, and the City should be awarded reasonable costs of opposing their motions, together with such other relief as the Court deems just.

Dated: January 25, 2021
Garden City, New York

Respectfully submitted,

BOND, SCHOENECK & KING, PLLC

By: _____

Terry O'Neil
Attorneys for Respondent, City of Long Beach
1010 Franklin Avenue, Suite 200
Garden City, NY 11530
T: (516) 267-6310
F: (516) 267-6301
E: toneil@bsk.com

Of Counsel:
Emily Iannucci

TO: Michael T. Fois, Esq.
General Counsel
Attorney for Respondent-Respondent-Appellant
NYS PUBLIC EMPLOYMENT RELATIONS BOARD
PO Box 2074, ESP Bldg 2, 20th Floor
Albany, NY 12220-0074
T: (518) 457-6410
F: (518) 457-2664
E: mfois@perb.ny.gov

Louis D. Stober, Jr., Esq.
LAW OFFICE OF LOUIS D. STOBER, JR., LLC
Attorney for Respondent-Respondent-Appellant
Long Beach Professional Firefighters Association, IAFF, Local 287
98 Front Street
Mineola, NY 11501
T: (516) 742-6546
F: (516) 742-8603
E: lstober@stoberlaw.com

Nathaniel G. Lambright, Esq.
BLITMAN & KING LLP
Counsel for Amici New York State Professional Fire Fighters Association
Franklin Center, Suite 300
443 North Franklin Street
Syracuse, NY 13204-5412
T: (315) 422-7111
F: (315) 471-2623
E: nglambright@bklawyers.com

Richard S. Corenthal, Esq.
ARCHER, BYINGTON, GLENNON & LEVINE, LLP
Counsel for Amici New York State Professional Fire Fighters Association
One Huntington Quadrangle, Suite 4C10
Melville, NY 11747
T: (631) 777-6935
F: (631) 777-6906
E: rcorenthal@abgllaw.com

CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR § 500.13(c)(1) that the foregoing brief was prepared on a computer using Microsoft Word.

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Dated: January 25, 2021
Garden City, New York

TERRY O'NEIL
EMILY E. IANNUCCI
Attorney(s) for Petitioner-Appellant-Respondent City of Long Beach
Bond, Schoeneck & King, PLLC
1010 Franklin Ave., Ste 200
Garden City, New York 11530
T: (516) 267-6310
F: (516) 267-6301
E: toneil@bsk.com;
eiannucci@bsk.com

AFFIDAVIT OF SERVICE BY REGULAR MAIL

STATE OF NEW YORK)
ss.:
COUNTY OF NASSAU)

REGINA L. OLSEN, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides in East Williston, New York. That on the 25th day of January, 2021, she served a copy of the Memorandum of Law in Opposition to Motions for Leave to Appeal upon:

Michael T. Fois, Esq.
General Counsel
NYS Public Employment Relations Board
P. O. Box 2074, ESP Bldg 2, 20th Floor
Albany, NY 12220-0074

Louis D. Stober, Jr., Esq.
LAW OFFICE OF LOUIS D. STOBER, JR., LLC
98 Front Street
Mineola, NY 11501

Nathaniel G. Lambright, Esq.
BLITMAN & KING LLP
Franklin Center, Suite 300
443 North Franklin Street
Syracuse, NY 13204-5412

Richard S. Corenthal, Esq.
ARCHER, BYINGTON, GLENNON & LEVINE, LLP
One Huntington Quadrangle, Suite 4C10
Melville, NY 11747

the address designated by them for that purpose, by depositing true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within New York State.

Regina L. Olsen
REGINA L. OLSEN

Sworn to before me this
25th day of January, 2021

Notary Public

JUSTIN C. TAN
Notary Public, State of New York
No. 02TA6382685
Qualified in Nassau County
My Commission Expires October 29, 2022

Exhibit “1”

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