To be Argued by:
TERRY O'NEIL
(Time Requested: 20 Minutes)

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Appellate Division–Second Department Docket No. 2018-10975

Court of Appeals

of the

State of New York

In the Matter of

CITY OF LONG BEACH,

Respondent,

– against –

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

Appellants.

BRIEF FOR RESPONDENT

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PRELIMINARY STATEMENT

This brief is respectfully submitted by the Respondent, the City of Long Beach ("City"), in response to the appeal filed by the Appellants, the New York State Public Employment Relations Board ("PERB") and the Long Beach Professional Firefighters Association, IAFF, Local 287 ("Union") (collectively, the "Appellants").

As explained *infra*, Section 71 of the Civil Service Law ("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 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 that it tentatively planned to terminate him pursuant to Section 71. (R. 19-23).[1] The City also provided the member with pre-termination minimal due process (i.e., notice and an opportunity to be heard) prior to removal.

Shortly thereafter, the Union demanded to negotiate pre-termination procedures for terminating the member under Section 71 ("Section 71

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

procedures"). (R. 21, 34). 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 Section 71 procedures.

Shortly thereafter, the Union filed an improper practice charge at PERB alleging that the City violated the Taylor Law by refusing to bargain Section 71 procedures. After a PERB Administrative Law Judge, the full PERB Board and the Supreme Court, Nassau County, ruled against the City, it appealed to the Appellate Division, Second Department ("Second Department").

By Decision and Order dated October 7, 2020 ("Decision"), the Second Department analyzed the issue of whether public employers had a duty to negotiate Section 71 procedures *de novo* because it was "one of pure statutory construction dependent only on an accurate apprehension of legislative intent [with] little basis to rely on any special competence of PERB[.]" (R. 261) (quoting *New York City Tr. Auth. v. New York State Pub. Empl. Rels. Bd.*, 8 N.Y.3d 226 (2007)). Finding 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[,]" the Second Department correctly held that the City was not required to negotiate any Section 71 procedures. (R. 261). In doing so, the Second Department dismissed, with prejudice, the Union's improper practice charge against the City.

Notwithstanding its position that the Second Department ultimately reached the correct holding, the City concedes that the Second Department erroneously relied, in part, upon 4 N.Y.C.R.R. § 5.9 ("Section 5.9"), a regulation which does not apply to local government employers like the City. In that regard, the Decision should be modified as necessary.

For these reasons, and as explained in further detail *infra*, the City respectfully requests that the Decision be affirmed as modified to clarify that: (1) irrespective of Section 5.9, public employers cannot negotiate Section 71 procedures because doing so would violate public policy and frustrate Section 71's legislative intent, as interpreted by this Court; and (2) even if public employers were required to negotiate Section 71 procedures, the City did not unilaterally implement any "procedures" when it provided pre-termination minimal due process; and (3) Section 5.9 does not apply to local government employers like the City.

QUESTIONS PRESENTED

Q1: Did the Appellate Division, Second Department, err when it held that public employers in New York State are not required to negotiate procedures for terminating employees under Section 71 of the Civil Service Law?

A1: No.

Q2: Did the City unilaterally implement "procedures" for terminating employees under Section 71 of the Civil Service Law when it provided pre-termination minimal due process (i.e., notice and an opportunity to be heard)?

A2: No.

Q3: Did the Appellate Division, Second Department, err when it relied, in part, on 4 N.Y.C.R.R. § 5.9?

A3: Yes.

STATEMENT OF FACTS & PROCEDURAL HISTORY

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. 34).

On or about October 16, 2015, almost a year later, a workers' compensation law judge issued a decision granting Mr. Gusler benefits for the injury he 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 terminating Mr. Gusler pursuant to Section 71. (*See* R. 11, 34, 89-90). Accordingly, 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. 89-90).

Although Mr. Gusler never met with representatives of the City to discuss the letter, the City did not separate him from service at that time 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 Section 71 procedures. (R. 11, 34). When the City refused to do so, the Union 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 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 "procedures" and negotiate them 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 since it was inconsistent with public policy and frustrated the legislative intent of Section 71, as interpreted by this Court;[2] and (2) dismissal of the Charge. (R. 16).

By Decision and Order dated July 6, 2018, the Supreme Court, Nassau County, dismissed the City's Article 78 petition ("Supreme Court Decision"). (R. 4-5). In doing so, the Supreme Court deferred to PERB, "the agency charged with

[2] The City also argued that PERB's decision was arbitrary and capricious and/or affected by error of law because the Charge filed by the Union was facially deficient. (R. 16). However, the Second Department did not address that argument and it is not at issue in this appeal.

implementing the fundamental policies of the Taylor Law [(Article 14 of the CSL)]. . . ." (R. 4-5).

The Second Department unanimously reversed the Supreme Court Decision; granted the City's Petition; declared PERB's Decision null and void; and dismissed the Charge. (R. 261). In doing so, the Second Department properly explained why it did not owe PERB any deference regarding whether public employers must negotiate Section 71 procedures. As explained by the Second Department, "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)).

Analyzing the issue *de novo*, the Second Department opined 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, and, in fact, cannot, negotiate Section 71 procedures.

STANDARD OF REVIEW

As explained by this Court in *Rosen v. PERB*, 72 N.Y.2d 42, 47-48 (1988):

> An administrative agency's interpretation of the statute it is charged with implementing is entitled to varying

> degrees of judicial deference depending upon the extent to which the interpretation relies upon the special competence the agency is presumed to have developed in its administration of the statute. Where the interpretation "involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data" within the agency's particular expertise (*Kurcsics v. Mercants Mut. Ins. Co.*, 49 NY2d 451, 459), great deference is accorded the agency's judgment (*see*, *Matter of Incorporated Vil. Of Lynbrook v. New York State Pub. Employment Relations Bd.*, 48 NY2d 398, 404 [prohibited subjects of bargaining]; *Matter of West Irondequoit Teachers Assn. v. Helsby*, 35 NY2d 46 ,50-51 [mandatory subjects of bargaining]). On the other hand, where as here, the question is one of pure statutory construction "dependent only on accurate apprehension of legislative intent [with] little basis to rely on any special competence" (Kurcsics v Merchants Mut. Ins. Co., supra, at 459), judicial review is less restricted as " 'statutory construction is the function of the courts' " (*Matter of Howard v. Wyman*, 28 NY2d 434, 438, quoting *Matter of Mounting & Finishing Co. v McGoldrick*, 294 NY 104, 108; *see*, *Matter of Town of Mamaroneck PBA v. New York State Pub. Employment Relations Bd.*, 66 NY2d 722, 724).

(emphasis added). *Accord Webster Ctr. Sch. Dist. v. PERB*, 75 N.Y.2d 619, 626 (1990) (reiterating that "PERB is accorded no special deference in the interpretation of statutes" and noting that PERB "made only scant reference to the Education Law policy arguments that [were] at the heart of this appeal."); *Bd. of Educ. of City Sch. Dist. of New York v. PERB*, 75 N.Y.2d 660, 666 (1990).

Since the central legal question here is one of statutory construction dependent only on accurate apprehension of legislative intent, there is no need to

determine the reasonableness of PERB's determination under the Taylor Law. *See Webster Ctr. Sch. Dist.*, 75 N.Y.2d at 626. Thus, rather than defer to PERB and merely analyze whether its decision was reasonable, the Court should address the issue *de novo*. *See Newark Valley Ctr. Sch. Dist. v. PERB*, 83 N.Y.2d 315 (1994) (declining to defer to the PERB "[b]ecause the question whether the District's duty to negotiate a smoking policy was preempted by statute or policy is an issue of law" and the Court had to independently examine whether smoking on school buses was a prohibited subject of bargaining); *Webster Ctr. Sch. Dist.*, 75 N.Y.2d at 626 (declining to defer to PERB and holding that Education Law § 1950(4)(bb) clearly manifests a legislative intention that a school district's decision to contract with BOCES for an academic summer school program not be subject to mandatory collective bargaining); *Town of Mamaroneck P.B.A. v. PERB*, 66 N.Y.2d 722, 724 (1985) (declining to accord PERB deference regarding whether issue indirectly covered by Section 153 of the Town Law was subject to arbitration or collective bargaining under the Taylor Law).

Ignoring the exception for questions of pure statutory construction dependent on apprehension of legislative intent, Appellants urge the Court to limit its analysis to whether PERB's decision was rational. (PERB Brief at 16-18; Union Brief at 2). Appellants do not cite any cases involving questions of pure

statutory construction where the Court limited its analysis to whether PERB's decision was rational. One may reasonably infer that no such cases exist.

In any event, based on this Court's precedent, it is clear that where, as here, the question is one of pure statutory construction dependent only on accurate apprehension of legislative intent, the Court should not defer to PERB and should instead address the issue *de novo*. The appropriate standard of review here is, therefore, *de novo*.

ARGUMENT

POINT I

THE APPELLATE DIVISION, SECOND DEPARTMENT, DID NOT ERR WHEN IT HELD THAT PUBLIC EMPLOYERS IN NEW YORK STATE ARE NOT REQUIRED TO NEGOTIATE PROCEDURES FOR TERMINATING EMPLOYEES UNDER SECTION 71 OF THE CIVIL SERVICE LAW

While there is generally a presumption in favor of bargaining over "terms and conditions of employment," this Court has, time and time again, acknowledged that the presumption in favor of bargaining may be overcome. *See*, *e.g.*, *City of N.Y. v. Patrolmen's Benev. Assn. of City of N.Y.*, 14 N.Y.3d 46, 58 (2009); *City of Watertown v. PERB*, 95 N.Y.2d 73, 78-79 (2000); *Webster Ctr. Sch. Dist.*, 75 N.Y.2d at 628; *Town of Mamaroneck*, 66 N.Y.2d at 724-25; *Cohoes City Sch. Dist. v. Cohoes Teachers Assn.*, 40 N.Y.2d 774, 778 (1976); *Susquehana Val. Ctr. Sch.*

Dist. v. Val. Teachers' Assn., 37 N.Y.2d 614, 616-17 (1975); *Syracuse Teachers Assn. v. Bd. of Educ.*, 35 N.Y.2d 743, 744 (1974).

For example, the presumption in favor of bargaining may be overcome by legislative intent that a matter not be subject to bargaining. *See Webster Ctr. Sch. Dist.*, 75 N.Y.2d at 626-27. Indeed, employers need not negotiate a subject where a statute explicitly exempts a subject from bargaining or there is a "plain and clear, rather than express, prohibition[] in the statute or decisional law." *Cohoes City Sch. Dist.*, 40 N.Y.2d at 778 (quoting *Syracuse Teachers Assn.*, 35 N.Y.2d at 744) (quotation marks omitted). Thus, even if a statute does not explicitly forbid bargaining, the fact that bargaining is not required may be "inescapably implicit" in the statute or decisional law. *See Webster Ctr. Sch. Dist.*, 75 N.Y.2d at 626 ("While legislative expression is the best evidence of legislative intent, it is not the only evidence. . . .").

In addition, the presumption in favor of bargaining may be overcome by public policy. *See Economico v. Village of Pelham*, 50 N.Y.2d 120, 129 (1980), *abrogated on other grounds by Prue v. Hunt*, 78 N.Y.2d 364 (1991). In *Economico*, for example, this Court held 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 [under Section 73[3] of the CSL]." *Id. See also* R. 260 ("some subjects are excluded from collective bargaining as a matter of policy, even where no statute explicitly says so") (citing *City of New York v. PBA of the City of N.Y., Inc.*, 13 N.Y.3d 46, 58 (2009)); *Enlarged City Sch. Dist. of Middletown New York v. Civ. Serv. Empl. Assn.*, 148 A.D.3d 1146, 1148 (2d Dep't 2017) (holding that contract clause was unenforceable because it violated public policy by abrogating the employer's right to terminate employees at the point set forth in Section 73 of the CSL – i.e., one year). To the extent that a municipal employer has, for whatever reason, negotiated a prohibited subject of bargaining, the applicable contract clause would be unenforceable.[4] *See Economico*, 50 N.Y.2d at 129.

As explained *infra*, the presumption in favor of bargaining has been overcome with respect to Section 71 procedures because requiring employers to negotiate such procedures would violate public policy and frustrate Section 71's

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[3] Section 73 of the CSL 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. *See Duncan v. New York State Devel. Ctr.*, 63 N.Y.2d 128, 134-35 (1984).

[4] Appellants have only identified one employer in the State which has, in fact, negotiated Section 71 procedures. (PERB Brief at 16). If pre-termination procedures for terminating employees under Section 71 are deemed a prohibited subject of bargaining, a portion of employers' impacted collective bargaining agreement(s) may be deemed unenforceable. *See Economico*, 50 N.Y.2d at 129.

legislative intent. Consequently, the Second Department properly held that public employers need not negotiate Section 71 procedures.

A. Requiring Employers To Negotiate Procedures Before Terminating Employees Under Section 71 Would Violate Public Policy And Frustrate 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.*

While Section 71 does not contain any pre-termination procedures, it provides extensive post-termination procedures as follows:

> 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.[5]

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).[6] *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 proposed discipline and the reasons therefor; provide the employee with a copy of

[5] The post-termination procedures set forth in Section 73, Section 71's companion statute for non-occupational injuries, are nearly identical with just a few minor variations. See Civ. Serv. Law §73.

[6] 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.

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).

As explained in the legislative history for Section 73 of the CSL (Section 71's companion statute for non-occupational disabilities):[7]

> The purpose of the bill is to enable department and agency heads, <u>without resort to</u> disciplinary charges and <u>hearings</u>, 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. . . . <u>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</u>. * * *

[7] *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. *See Duncan v. New York State Devel. Ctr.*, 63 N.Y.2d 128, 134-35 (1984).

> 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).[8] *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).

With the enactment of Section 71, employers could efficiently terminate employees who were unable to work for a year without having to go through the process of a disciplinary proceeding under Section 75. Consequently, unlike in a

[8] 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 terminated 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.

Section 75 proceeding, employers did not have to show any fault on an employee's part before terminating the employee under Section 71. All an employer had to establish was that: (1) the employee had been absent a year; and (2) the employee's occupational injury was deemed compensable under the Workers' Compensation Law.

Forcing employers to bargain procedures before terminating employees under Section 71 is inconsistent with public policy and frustrates the legislative intent of allowing employers to maintain efficiency by quickly filling vacancies on a permanent basis after a year. *See supra* at 14-17. This is particularly true given that employees terminated under Section 71 have post-termination protections (*e.g.*, former employees who are deemed medically fit to perform the duties of their former position can reapply for reinstatement within one (1) year of when their disability ceases, and if there is no vacancy at that time, the employee is placed on a preferred eligible list for four (4) years so he/she receives preference if a position becomes available). Civ. Serv. Law § 71.

The Legislature's failure to explicitly state that employers need not bargain procedures for terminating employees under Sections 71 and 73 is of no moment because both statutes were enacted before the Taylor Law.[9] (*See* R. 162) (citing

[9] The City is aware of only one statute – Section 470 of the New York Retirement and Social Security Law ("RSSL") – which explicitly exempts employers from the public policy in favor of collective bargaining. *See* Ret. Soc. Sec. Law § 470 ("Changes negotiated between any public

Town of Cortlandt v. PERB, 30 PERB ¶ 7012 (Sup. Ct. Westchester Co. 1997)); Civ. Serv. Law § 71 (enacted in 1958); Civ. Serv. Law § 200 *et seq.* (Taylor Law) (enacted in 1967).

In brief, the legislative history, together with the statute's extensive post-termination protections[10] and blatant omission of pre-termination protections, clearly evidences the Legislature's intent to allow employers to remove disabled employees without having to comply with any pre-termination procedures. *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

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employer and public employee . . . 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 Section 470 of the RSSL, which was enacted after the Taylor Law required public employers to collectively bargain employees' terms and conditions of employment, Sections 71 and 73 were enacted before the Taylor Law, so there was no reason for the Legislature to explicitly exempt employers from any bargaining obligations. 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). Consequently, no inference can be drawn from the absence of express language granting such an exemption.

[10] 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 terminated 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.

added). *See also Webster Ctr. Sch. Dist.*, 75 N.Y.2d at 627-28 (holding, based on statutory scheme, that Legislature clearly intended to exempt school districts from having to negotiate the decision to contract with BOCES even though the statute in question did not explicitly prohibit collective bargaining).

B. The Second Department's Holding That Public Employers Need Not Negotiate Procedures For Terminating Employees Under Section 71 Was Consistent With The Public Policy And Legislative Intent Of Section 71, As Interpreted By This Court

This Court has reaffirmed the public policy and intent of Sections 71 and 73 on numerous occasions. *See*, *e.g.*, *Jordan v. New York City Hous. Auth.*, 33 N.Y.3d 408, 413 (2019) ("Section 71 was designed to remove the procedural hurdle imposed by section 75 by allowing a '. . . governmental employer' to terminate an employee without 'resort to a disciplinary proceeding' and providing the injured employee a mechanism for later reinstatement."); *Allen v. Howe*, 84 N.Y.2d 66, 671-72 (1994) (Sections 71 and 73 establish "the point at which injured civil servants may be replaced" and "strike a balance between the recognized substantial State interest in an efficient civil service and the interest of the civil servant in continued employment in the event of a disability."); *Duncan v. New York State Devel. Ctr.*, 63 N.Y.2d 128, 135 (1984) (explaining, in the context of Section 73, "[a]n employer should be permitted to take reasonable steps to secure a steady, reliable, and adequate work force."); *Economico v. Village of Pelham*, 50 N.Y.2d 120, 126 (1980) ("Continued performance of the business of government

necessitates that there be a point at which the disabled officer may be replaced."). *See also Bodnar v. New York State Thruway Auth.*, 52 A.D.2d 345, 347 (3d Dep't 1976); *Enlarged City Sch. Dist. of Middletown New York v. Civ. Serv. Empl. Assn.*, 148 A.D.3d 1146, 1148 (2d Dep't 2017).

On the one hand, the law recognizes employees' interest in continued employment and relieves affected employees of the stigma they might otherwise face if they were terminated for cause pursuant to Section 75 of the CSL (a disciplinary statute). *See Economico v. Village of Pelham*, 50 N.Y.2d 120, 126 (1980); *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:

> [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. PERB*, 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) (emphasis added). While the "procedural hurdle" referenced by the Court 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 Section 73) would obviously present another "procedural hurdle" which would delay employers' ability to replace disabled employees, thereby frustrating Section 71's legislative intent.

Holding that public employers have the statutory right to terminate employees after they are absent a year, as opposed to a year *plus* whatever time it takes to negotiate and implement pre-termination procedures, would be a natural extension of this Court's decades-long precedent interpreting the policy and intent of Sections 71 and 73. Indeed, this Court 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 (emphasis added). *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 73).

By contrast, requiring employers to negotiate Section 71 procedures would contravene the public policy and legislative intent of Section 71, as interpreted by this Court. Doing so would essentially force employers to bargain away their right to maintain efficiency by *promptly removing and replacing* covered employees after a year. 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).

This means that unions will be able to delay the termination of their members' employment and force employers to continue providing costly benefits by drawing out negotiations of pre-termination procedures for months to years.[11] Such benefits could include, but not be limited to, individual / family health insurance coverage, paid / unpaid sick leave, longevity payments, vacation /

[11] Appellants have only identified one employer in the State which has, in fact, already negotiated Section 71 procedures. (PERB Brief at 16).

personal leave / terminal leave accruals to potentially be paid out upon termination, etc.

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 in November 2015. (R. 89-90).

As explained by the City during oral argument before the Second Department, there is no reason to believe that negotiating Section 71 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 relevant contract expired on June 30, 2010, and efforts to reach a successor agreement since then have been unsuccessful. *See id.*

To further complicate matters, 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 easily take more than an additional year past the one (1) year provided under Section 71. *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 people capable of working.

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

C. The Issues Involved In Terminating Employees Under Section 71 Do Not Lend Themselves To The Need For "Procedures"

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 Economico*, 50 N.Y.2d 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 "procedures" like a hearing. The issues 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).

If there is a dispute over such issues, the matter can be addressed post-termination. *See id.* (reiterating that "the interest of the governmental employer in being able to act expeditiously to remove an absent employee is substantial."). Indeed, Sections 71 and 73 provide ample post-termination protection for employees. 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. *See* Civ. Serv. Law §§ 71, 73.

Given public employers' "substantial" interest in maintaining efficiency, and the availability of post-termination reinstatement protections, this Court has described employees' rights under Sections 71 and 73 as "inferior to a full property right." *See Economico*, 50 N.Y.2d at 127 ("the contours of petitioner's entitlement to his position are circumscribed by the parameters of section 73 which, in this case, created an interest inferior to a full property right.").

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. *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). At 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 (emphasis added). 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.*, *Dechbery v. Cassano*, 157 A.D.3d 499, 500 (1st Dep't 2018) (employer did not violate plaintiff's due process by mailing notice of termination letter to her prior address since she was provided with post-termination due process); *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); *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. . . ."); *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.").

In brief, requiring employers to negotiate procedures for terminating employees under Section 71 would be inconsistent with public policy and legislative intent. This conclusion is supported by the fact that the issues involved in terminating employees under Section 71 do not lend themselves to the need for "procedures." Moreover, given the post-termination remedies available, several courts have held that employees are not entitled to a hearing before being terminated under Section 71.

D. The Decision Is Not Inconsistent With Court of Appeals Precedent

Appellants argue that the Decision is inconsistent with this Court's decisions in *Watertown*, *Schenectady*, *Board of Education* and *Auburn*. (PERB Brief at 18-22; Union Brief at 2). Respectfully, however, PERB's contention is incorrect. Indeed, *Watertown*, *Schenectady*, *Board of Education* and *Auburn*, none of which concerned, let alone cited, Section 71 or 73, are all distinguishable.

1. The Decision Is Not Inconsistent With *Watertown*

In *Watertown*, the issue before the Court was whether public employers must negotiate procedures for contesting an employer's decision to exercise its statutory right to deny a police officer's application for benefits under Section 207-c of the General Municipal Law ("Section 207-c"). *See City of Watertown v. PERB*, 95 N.Y.2d 73, 76-81 (2000). According to the Court, neither Section 207-c nor its legislative history demonstrated any intent to exempt employers from having to negotiate such procedures. In the absence of clear evidence that the Legislature intended to exempt procedures for contesting employers' decisions regarding officers' eligibility for Section 207-c benefits from bargaining, the Court held that public employers had to negotiate such procedures.

Here, unlike in *Watertown*, there is clear evidence that the Legislature intended for employers to be able to terminate employees under Sections 71 and 73 without having to negotiate pre-termination procedures. *See supra* at 14-25.

Moreover, there is no reason to believe that having to negotiate the post-action procedures at issue in *Watertown* would impede or delay an employer's ability to exercise its statutory right to deny an employee's application for Section 207-c benefits. By contrast, 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. *See supra* at 23-24.

Thus, *Watertown* is distinguishable.

2. *Schenectady* Is Not Applicable

In *Schenectady*, the issue before the Court was whether Section 207-c authorizes public employers "to require both light duty and, under appropriate circumstances, even surgery, where reasonable." *City of Schenectady v. PERB*, 85 N.Y.2d 480 (1995). As explained by the Court therein, since the statute in question authorized employers to take certain actions, employers did not have to negotiate the decision to take such actions. *Id.* Significantly, however, the issue of whether employers had to negotiate procedures for implementing such actions was not before the Court. *See id.* at 487. Thus, *Schenectady* is not applicable.

3. The Decision Is <u>Not</u> Inconsistent With *Board of Education*

In *Board of Education*, the issue before the Court was whether employers had a duty to negotiate a requirement that employees disclose certain financial

information pursuant to Section 2590-g(14) of the Education Law. *See Bd. of Educ. of the City Sch. Dist. of the City of New York v. PERB*, 75 N.Y.2d 660 (1990). According to the Court in that case, there was no evidence that the Legislature intended to exempt employers from having to negotiate such a requirement. *Id.* However, neither the Court's opinion nor Appellants' papers suggest that Section 2590-g(14)'s language or legislative history is comparable to that of Section 71 or Section 73. *See id.*; PERB Brief at 18-22; Union Brief at 2. Thus, there is no basis to conclude that the Second Department's holding is inconsistent with *Board of Education*.

4. The Decision Is <u>Not</u> Inconsistent With *Auburn*

PERB's claim that the Decision is inconsistent with *Auburn* is similarly unfounded. (*See* PERB Brief at 19-22) (citing *Auburn Police Local 195 v. Helsby*, 46 N.Y.2d 1034 (1979). The issue before the Court in that case was whether employers and unions could negotiate alternatives to the disciplinary procedures set forth in Sections 75 and 76 of the CSL, such as, for example, just cause arbitration. *Auburn*, 46 N.Y.2d at 1035.

While the Court found that negotiating alternatives to the disciplinary procedures set forth in Sections 75 and 76 was not a prohibited subject of bargaining, *Auburn* is distinguishable for a number of reasons.

First, neither the Court's opinion nor Appellants' papers suggest that the language or legislative history of Sections 75 and 76 is comparable to that of Section 71 or Section 73. Consequently, *Auburn* offers no guidance as to the issue currently before the Court – i.e., whether forcing employers to bargain Section 71 procedures would be inconsistent with the public policy and legislative intent of Section 71.

Second, *Auburn* 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 or public policy.

By contrast, if the Court were to find that Section 71 procedures must be negotiated, then employers would not be able to exercise their statutory right to terminate an employee until such procedures were negotiated (as opposed to after one (1) year). As discussed *supra*, this would frustrate Section 71's legislative intent. Plus, the procedures would be subject to negotiations and interest

arbitration in subsequent negotiations if an employer pursued needed changes to the previously-negotiated procedures.

In brief, the Second Department's conclusion that the Legislature did not intend for employers to have to bargain Section 71 procedures is not inconsistent with any of this Court's prior decisions. To the contrary, the Second Department's holding that employers need not bargain Section 71 procedures is consistent with public policy and legislative intent, as previously interpreted by this Court.

POINT II

EVEN IF, *ARGUENDO*, PUBLIC EMPLOYERS WERE REQUIRED TO NEGOTIATE PROCEDURES FOR TERMINATING EMPLOYEES UNDER SECTION 71 OF THE CIVIL SERVICE LAW, THE CITY DID NOT IMPLEMENT ANY SUCH PROCEDURES

As explained *supra*, the Second Department correctly held that public employers need not bargain Section 71 procedures. However, even if, *arguendo*, public employers did have a duty to negotiate Section 71 procedures, the City did not violate that duty because it never implemented any such "procedures."

All the City did was offer Mr. Gusler minimal due process, which is ordinarily what public employees are entitled to before being terminated and deprived of a property interest, i.e., their job. *See Gudema v. Nassau County*, 163 F.3d 717, 724 (2d Cir. 1998). *But see supra* at 26-29 (explaining that it is unclear whether public employees are even entitled to minimal due process before being terminated pursuant to Section 71).

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 City implemented a mandatorily-negotiable "procedure" by providing Mr. Gusler with notice and an opportunity to be heard. (R. 163). Since the Second Department found that public employers are not required to negotiate Section 71 procedures, it did not address the issue of whether the City's provision of minimal due process constituted a "procedure."

If the Court finds that the Second Department erred when it held that public employers need not negotiate Section 71 procedures, then the portion of the PERB Decision finding that the City implemented a "procedure" when it offered Mr.

Gusler pre-termination minimal due process should be declared null and void as it was arbitrary and capricious.

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) pre-termination 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."

In brief, if the Court determines that the Second Department erred when it held that public employers need not negotiate Section 71 procedures, the Court should, at a minimum, declare the PERB Decision null and void to the extent that it held that the City implemented a "procedure" when it offered Mr. Gusler pre-termination minimal due process.

POINT III

THE APPELLATE DIVISION, SECOND DEPARTMENT, ERRED IN RELYING, IN PART, ON 4 N.Y.C.R.R. § 5.9

The Second Department concluded that public employers need not negotiate Section 71 procedures because:

> the specific directives of [Section 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). Respectfully, the Second Department's reliance, in part, on Section 5.9 was misplaced.

The language contained in Title 4 of the N.Y.C.R.R. is unequivocal, making clear that the requirements imposed by Section 5.9 only apply to *State* employees who fall under the jurisdiction of the New York State Civil Service Department – not to local government employees. Indeed, 4 N.Y.C.R.R. Section 1.1, in unambiguous terms, limits the application of Title 4 to *State* employees and employees of State agencies for which the State Department of Civil Service administers the Civil Service Law.

Specifically, Section 1.1 provides:

> Except as otherwise specified in any particular rule, <u>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</u>

> Service Law is administered by the State Department of Civil Service.

4 N.Y.C.R.R. § 1.1 (emphasis added).

Local civil service commissions—not the State Department of Civil Service—are vested with "the powers and duties to administer the provisions of the Civil Service Law (Civil Service Law, § 17)" on the local level. *City of New York v. City Civ. Serv. Comm'n*, 60 N.Y.2d 436, 441 (1983). The Long Beach Civil Service Commission is one such local civil service commission. *See generally City of Long Beach v. Civ. Serv. Emps. Ass'n, Inc.--Long Beach Unit*, 8 N.Y.3d 465 (2007).

Consistent with the precise language set forth in Section 1.1, Section 5.9 limits its application to *State* employees, as set forth below:

> (a) Applicability.
>
> These rules shall govern procedures for restoration to duty from workers' compensation leave, termination of service upon exhaustion or termination of workers' compensation leave, reinstatement to service, or entitlement to placement upon a preferred eligible list, for all *State* employees who are subject to section 71 of the Civil Service Law.

4 N.Y.C.R.R. § 5.9(a) (emphasis added).

To the extent further discussion is even required given the Rules' explicit language, the Second Department, citing Section 1.1, has held that the requirements imposed by Title 4 do not apply to a municipality under the jurisdiction of its own local civil service commission. *See Goodman v. Dept. of Civ. Serv. of Cty. of Suffolk*, 151 A.D.2d 481 (2d Dep't 1989) (Title 4 of the NYCRR does not apply to Suffolk

County employees because it is limited "only to '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'").

Cooke v. City of Long Beach, 247 A.D.2d 538, 538 (2d Dep't 1998) later contradicted *Goodman* without distinguishing or even referencing that holding. Contrary to *Goodman*, the *Cooke* Court instead concluded that:

> The respondent failed to serve notice to the petitioner of the impending termination of her employment at least 30 days prior thereto pursuant to 4 NYCRR 5.9(c)(2). Since the respondent's notice did not comply with that regulation or the requirements of due process (*see, Matter of Prue v. Hunt,* 78 N.Y.2d 364, 575 N.Y.S.2d 806, 581 N.E.2d 1052; *Matter of La Joie v. County of Niagara,* 239 A.D.2d 908, 659 N.Y.S.2d 622), the petitioner should be restored to her prior position.

The Second Department's seeming "departure" from *Goodman* in *Cooke* was likely the unintentional result of the litigants' briefing. The employee's appellate brief in *Cooke* urged application of Section 5.9 while never mentioning *Goodman* or addressing the explicit language contained in Section 1.1 or 5.9. (A copy of the employee's appellate brief in *Cooke* is included in Respondent's Appendix as Exhibit "1"). The employer's brief also inexplicably failed to reference *Goodman* or discuss the clear and unambiguous inapplicability of Section 5.9, instead arguing only that the appellant had failed to raise Rule 5.9 in the Court below. (A copy of

the employer's appellate brief in *Cooke* is included in Respondent's Appendix as Exhibit "2").

In any event, subsequent case law is consistent with *Goodman* and signals an abandonment of *Cooke*. For example, in *Lynn v. Town of* Clarkstown, 2001 N.Y. Misc. LEXIS 1443 (Sup. Ct. Rockland Co. 2001), *aff'd* 296 A.D.2d 411, 411 (2d Dep't 2002), the trial Court rejected the petitioner's contention that his separation from service under Section 71 of the Civil Service Law must be annulled because the Town failed to comply with the requirements set forth in Section 5.9. There, the Town argued that:

> [T]here was no obligation for a 'full blown due process hearing' and that the Rules of the State Civil Service commission are inapplicable to this matter, as they apply solely to 'offices and positions in the classified service of the state.' Civil Service Law Section 6, subd. 1; 4 NYCRR 1.1. Instead, respondents argue that pursuant to Section 17 of the Civil Service Law, jurisdiction over local offices in the County of Rockland is controlled by the County's personnel officer.

Lynn, 2001 N.Y. Misc. LEXIS 1443, at *11.

Agreeing with the Town's position and dismissing the petition, the Supreme Court, Rockland County, concluded:

> [T]he Court cannot agree with Petitioner that he had been deprived due process prior to the Commission's determination terminating him. Firstly, nowhere does the statute provide that a full evidentiary hearing is required.

> Nor is this Court persuaded, as petitioner maintains, that the procedurally detailed State Civil Service Rules applied to his pre-termination proceeding. Petitioner's position clearly was not a position 'in the classified service of the state,' see 4 NYCRR 1.1., but rather one, by statute, within the jurisdiction of the Personnel Officer of the County. See Civil Service Law, section 17, subd. 1. Accordingly, the court finds that the State Civil Service Rules are inapplicable.

Lynn, 2001 N.Y. Misc. LEXIS 1443, at *18.

The petitioner appealed the trial Court's decision, specifically arguing that *Cooke* and the notice provisions contained in Title 4 should have been applied below:

> Additionally, the termination of Officer Lynn was clearly made contrary to provisions of 4 NYCRR § 5.9(c)(2). This violation resulted since Officer Lynn did not receive the thirty (30) day notice of termination prior to said termination. Respondents concede non-compliance with 4 NYCRR § 5.9, but argue it is not applicable. Although the Court below found for the Respondents on this issue (R. at 6), the Second Department has held to the contrary. In *Cooke v. City of Long Beach*, 247 AD.2d 538, 669 N.Y.S.2d 312 (2nd Dept. 1999), the Second Department expressly found that a non-state employee (working for a City) was entitled to the notice benefits under 4 NYCRR § 5.9(c)(2). The Second Department noted because the employer failed to "serve notice to the Petitioner of the impending termination of her employment at least thirty (30) days prior thereto" that the "Petitioner should be restored to her prior position". (Id., 669 N. Y.S.2d at 313).

(A copy of the appellant's brief in *Lynn* is included in Respondent's Appendix as Exhibit "3").

Rejecting appellant's argument and effectively signaling that *Cooke* was wrongly decided, the Second Department affirmed the trial Court's decision, concluding as follows:

> The petitioner was lawfully terminated from his employment pursuant to Civil Service Law § 71. In substance, he was accorded all of the regulatory and due process rights to which he was entitled (*see Matter of Hurwitz v. Perales,* 81 N.Y.2d 182, 597 N.Y.S.2d 288, 613 N.E.2d 163, *cert. denied* 510 U.S. 992, 114 S.Ct. 550, 126 L.Ed.2d 452; *Matter of Prue v. Hunt,* 78 N.Y.2d 364, 575 N.Y.S.2d 806, 581 N.E.2d 1052).

Lynn v. Town of Clarkstown, 296 A.D.2d 411, 411 (2d Dep't 2002).

In *Gentile v. Nulty*, 2006 WL 6928277 (S.D.N.Y. 2006), decided four (4) years after *Lynn,* the Southern District of New York applied the same logic to reach the same result. In a well-reasoned decision that invoked the correctly-decided *Goodman* case, the Court rejected the plaintiff's contention that Section 5.9 applied to the Town of Orangetown, explaining as follows: !

> Furthermore, to the extent Plaintiff contends that the Defendants' failure to comply with the Civil Service regulations set forth in Title 4, Section 5.9 of the New York Code of Rules and Regulations deprived him of his right to procedural due process, his claim is without merit. Plaintiff's reliance on this regulation is misplaced. As the Defendants explain in their reply memorandum of law, because Plaintiff's employment with the Town was not a position "in the classified service of the State," the rules set forth in 4 N.Y.C.R.R. § 5.9 do not apply to his termination. Section 6 of the Civil Service Law provides that the state Civil Service Commission must establish rules and regulations for the enforcement and

> administration of the Civil Service Law with respect to "offices and positions within the classified service of the state." N.Y. Civ. Serv. Law § 6(1). Indeed, section 1.1 of the Civil Service rules and regulations states, "Except as otherwise specified in any particular rule, 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." 4 N.Y.C.R.R. § 1.1 (emphasis added). On the other hand, under the Civil Service Law, jurisdiction over classified civil service positions in a town, such as the Town of Orangetown, lies with the municipality. N.Y. Civ. Serv. Law § 17(2). Moreover, section 20 provides that municipal civil service commissions are responsible for prescribing, amending, and enforcing suitable rules and regulations for carrying into effect the provisions of the state Civil Service Law, "including rules for the jurisdictional classification of the offices and employments in the classified service under its jurisdiction, for the position classification of such offices and employments, for examinations therefor and for appointments, promotions, transfers, resignations and reinstatements therein." N.Y. Civ. Serv. Law § 20(1). *See Goodman v. Dep't of Civil Serv. of Cty. of Suffolk,* 151 A.D.2d 481, 482, 542 N.Y.S.2d 273, 274 (2d Dep't 1989). Thus, the Defendants were not required to comply with the rules set forth in 4 N.Y.C.R.R. § 5.9 and their failure to do so does not constitute a violation of Plaintiff's due process rights.

Gentile, 2006 WL 6928277, at *10.

In brief, the Second Department erred in relying, in part, on Section 5.9. (*See* R. 261). Not only does the plain language of Sections 1.1 and 5.9 make clear that Section 5.9 does not apply to local government employers like the City, but that conclusion has also been reached in several well-reasoned court opinions. *See*

4 N.Y.C.R.R. §§ 1.1, 5.9; *Goodman*, 151 A.D.2d at 482; *Lynn*, 296 A.D.2d at 411; *Gentile*, 2006 WL 6928277 at *10. The City therefore respectfully requests that the Decision be modified to clarify that Section 5.9 is not applicable.

POINT IV

APPELLANTS' EMPHASIS ON THE SECOND DEPARTMENT'S MISTAKEN RELIANCE ON 4 N.Y.C.R.R. § 5.9 IS MISPLACED

Appellants' argue that 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; Union Brief at 2). Respectfully, Appellants' claim is incorrect and should be rejected.

Preliminarily, as explained *supra*, the central question here is one of pure statutory construction dependent on apprehension of legislative intent. *See supra* at 8-11. Thus, even if the Second Department's rationale was flawed, that alone would not necessitate reversal. The Court can and should address whether the policy in favor of collective bargaining has been overcome by the public policy and/or legislative intent of Section 71 *de novo*. *See Webster Ctr. Sch. Dist.*, 75 N.Y.2d at 626 (reiterating that "PERB is accorded no special deference in the interpretation of statutes" and noting, as is the case here, that PERB "made only scant reference to the . . . policy arguments that [were] at the heart of th[e] appeal.");

Moreover, the Second Department did not, as Appellants argue, base its Decision *exclusively* on an argument which was not: raised by the City before PERB; preserved for appeal; and raised by the parties or briefed at any point in the court proceedings. (PERB Brief at 4, 23-25; Union Brief at 2).

The Second Department based its Decision on Section 71 *and* Section 5.9. (R. 261) ("Here, the specific directives of [Section] 71 and [Section] 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."). To say that the Second Department relied exclusively on Section 5.9 is simply inaccurate.

The City concedes that it has never argued that Section 5.9 supports its position that employers should not be required to bargain Section 71 procedures. At all stages of this litigation, the City has argued that requiring employers to negotiate Section 71 procedures is inconsistent with and frustrates the legislative intent and public policy behind Section 71. (R. 105-107, 144-148, 179-188, 238-245).

In any event, whether the parties argued and/or briefed Section 5.9's applicability below, or otherwise preserved the argument, is irrelevant. The Second Department correctly determined that the central question was one of pure statutory construction dependent on apprehension of legislative intent and

appropriately addressed the issue *de novo*. (*See* R. 261). The Second Department was not limited by the parties' arguments.

Appellants' argument that the Second Department improperly held that Section 5.9 "superseded" the Taylor Law's bargaining obligation is also misplaced. (*See* PERB Brief at 25-26; Union Brief at 2). The Second Department made no such finding. *See generally* Decision. Indeed, not once in the Decision does the word "supersede" appear.

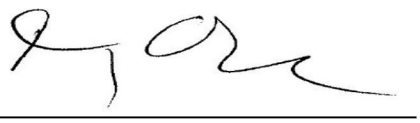
CONCLUSION

For all of the foregoing reasons, the City respectfully requests that the Second Department's Decision be affirmed as modified to clarify that: (1) irrespective of Section 5.9, public employers need not, and, in fact, cannot, negotiate procedures for terminating employees under Section 71 because doing so would violate public policy and frustrate Section 71's legislative intent, as interpreted by this Court; (2) even if public employers were required to negotiate procedures for terminating employees under Section 71, the City did not unilaterally implement "procedures" for terminating employees under Section 71 when it provided pre-termination minimal due process; and (3) Section 5.9 does not apply to local government employers like the City. The City also respectfully requests that it be awarded reasonable costs, together with such other relief as the Court deems just.

Dated: September 23, 2021
Garden City, New York

Respectfully submitted,

BOND, SCHOENECK & KING, PLLC

By: 

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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: September 23, 2021
Garden City, New York

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ADDENDUM

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EXHIBIT 1

ADD-2

1997 WL 34605665 (N.Y.A.D. 2 Dept.) (Appellate Brief)
Supreme Court, Appellate Division, Second Department, New York.

In the Matter of the Application of Cheryl COOKE, Petitioner-Appellant,
v.
THE CITY OF LONG BEACH, Respondent-Respondent.

No. 1997-03683.
September 30, 1997.

Index No. 30829/96

Brief for Petitioner-Appellant

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*1 **BRIEF ON BEHALF OF APPELLANT-PETITIONER CHERYL COOKE**

PRELIMINARY STATEMENT

This brief is submitted on behalf of Appellant-Petitioner for a judgment reversing the decision to dismiss Appellant-Petitioner's petition dated October 24, 1996, and to vacate the Respondent's decision to terminate Appellant-Petitioner, effective July 1, 1996, pursuant to Section 71 of the Civil Service Law.

*2 *QUESTIONS PRESENTED*

1) Did the City of Long Beach provide sufficient notice prior to terminating Cheryl Cooke pursuant to Section 71 of the Civil Service Law?

The petitioner asserts this question should be answered in the negative.

2) Was the Short Form Order dated January 30, 1997, wherein the Honorable Edwin W. McCarty III, Supreme Court, Nassau County, which dismissed Ms. Cooke's petition for failing to establish she timely complied with Section 71 of the Civil Service Law or that she failed to exhaust the remedies available under said section, premature?

The petitioner asserts this question should be answered in the affirmative.

*3 3) Was the Respondent's decision to dismiss Cheryl Cooke affected by an error of law?

The respondent asserts this question should be answered in the affirmative.

4) Was the respondent's decision to terminate Ms. Cooke an arbitrary and capricious act and an abuse of discretion?

The respondent asserts this question should be answered in the affirmative.

*4 STATEMENT OF FACTS

This action was initiated by the CSEA and Cheryl Cooke challenging the City of Long Beach's decision to terminate Ms. Cooke pursuant to Section 71 of the Civil Service Law.

Ms. Cooke was a permanent employee of the City of Long Beach as a bus driver from 1985 until her termination on July 1, 1996 (R-5). On October 18, 1994, Ms. Cooke was attacked on her bus by a person wielding a pipe (R-5). Ms. Cooke was injured in said attack and was on workers compensation until December 27, 1995 (R-5). On March 4, 1996, Ms. Cooke had to go back on Workers Compensation for the same injury (R-5). By letter dated June 18, 1996, Ms. Cooke was advised by the City of Long Beach that her employment would terminate effective July 1, 1996, pursuant to CSL Section 71, unless she applied for reinstatement to the City Manager's office prior to July 1, 1996 (R-10).

On June 25, 1996, Ms. Cooke submitted a doctor's note to the City Manager's office stating she was physically ready to return to work on June 30, 1996 (R-13). Despite this, the City of Long Beach terminated Ms. Cooke's employment on July 1, 1996, ostensibly pursuant to Section 71 CSL (R-6).

*5 In an effort to correct this matter, Ms. Cooke immediately contacted her Union President. The Union President then filed a letter with the City Manager seeking reinstatement (R-15). To date the City of Long Beach has failed to reinstate Ms. Cooke, to have her examined by a City of Long Beach or Civil Service Commission doctor or to take any action to correct Ms. Cooke's termination.

*6 *POINT ONE*

THE CITY OF LONG BEACH DID NOT PROVIDE SUFFICIENT NOTICE PRIOR TO TERMINATING CHERYL COOKE'S EMPLOYMENT PURSUANT TO SECTION 71 OF THE CIVIL SERVICE LAW.

In order for a termination to be effective under Civil Service Law governing disabilities, it is incumbent on a public employer to strictly follow the rules governing termination of service upon exhaustion or termination of workers compensation leave and providing that no termination of service, if not the result of a hearing, shall be effective until 30 days from the service of notice upon the employee. *Wickwire v. State University of New York Health Science Center at Syracuse*, 169 Misc. 2d 1058, 648

N.Y.S.2d 263. In *Wickwire,* the petitioner (a permanent state university employee) without the benefit of a hearing and without being given at least 30 days notice, was terminated under Section 71 of the Civil Service Law. The court held strict adherence to the notice requirement of Section 71 CSL, and 4 NYCRR Section 5.9 (c) was required to satisfy due process requirements, and that said requirements included either 30 days notice prior to termination or a pretermination hearing.

The Honorable James C. Tormey III, Justice, stated that the Wickwire case was a case of first impression regarding what is the *7 proper procedure for the appointing authority to utilize where a statute provides for the termination of a permanent employee without a prior hearing. Id. at 1059, 263. The court made it abundantly clear that permanent state employees were entitled to due process prior to being terminated under Section 71 of the New York State Civil Service Law. The court defined due process to mean a permanent state employee is entitled to a pretermination hearing and/or at least 30 days notice (35 days if said notice is sent via the mail) prior to termination under Section 71, CSL. Id. at 1060, 264, CPLR Section 2103(b)(s). The court held failure to give 30 days notice prior to termination negated the effectiveness of the termination. Accordingly, the employee in Wickwire, who was given less than thirty days notice, was reinstated retroactively.

In the instant case, the City of Long Beach sent a letter via certified mail dated June 18, 1996, wherein Ms. Cooke was noticed she would be terminated effective July 1, 1996, if she did not apply for restoration to duty prior to June 28, 1996 (R-10). Consequently, Ms. Cooke was afforded 10 days notice (at most) to apply for restoration to duty before her termination. In fact, in accordance with the holding in Wickwire, the earliest Ms. Cooke could be terminated was July 23, 1996. The City of Long Beach admits via their Answer and an affidavit attached thereto by Edwin *8 L. Eaton, City Manager the City of Long Beach, that they were notified on July 15, 1996, that Ms. Cooke "wished to return to work and was medically able to do so." (R-21) Accordingly, the City has admitted that Ms. Cooke gave timely notification of her intent and her ability to return to work as a bus driver with the City. Therefore, Ms. Cooke should be reinstated to her previous position retroactive to July 1, 199??.

Due process requires there be sufficient notice for all public employees, not just state employees. In fact, the Appellate Division held in *LaJoie v. County of Niagara,* 239 A.D.2d 908, 659 N.Y.S.2d 622, that the County violated NYCRR Section 5.9(b) when the County failed to notify LaJoie that if she failed to return to work within one year after being placed on workers' compensation leave she would be terminated. The court held, in a unanimous decision, said failure to notify was in violation of NYCRR Section 5.9(b), and requirements of due process and reinstated LaJoie retroactively to her previous position with the county. *Id.*

Likewise, in the instant case the City of Long Beach violated NYCRR Section 5.9(c) and Ms. Cooke's due process rights when they failed to give her a pretermination hearing and/or thirty days notice (thirty five days if notice was given via mail) prior to her termination. The facts of the instant case are analogous to the *9 facts in the LaJoie case. The employee in LaJoie and Ms. Cooke were terminated for allegedly failing to return to work within one year of suffering a workers compensation injury, both employers violated state regulations dealing with the notice requirements when an employee suffers a workers compensation injury, and both employees had their due process rights violated by their respective employer as a result. Accordingly, the court trust (as it did in the LaJoie case) order Ms. Cooke reinstated retroactively to her previous position with the City.

There can be no rational reason for the altering of the thirty day requirement (or thirty five days because notice was mailed) for municipal employees. In the instant case, Ms. Cooke, a permanent public employee, was not given thirty days notice prior to her termination, nor was she given a pretermination hearing. Rather, she was given at most 10 days notice prior to her termination (R-10). Therefore, in accordance with the holding in *Wickwire,* and the due process requirements of the United States Constitution, coupled with the holding in *LaJoie,* Ms. Cooke must be reinstated retroactively to her job as a bus driver.

*10 ***POINT TWO***

THE SHORT FORM ORDER DATED JANUARY 30, 1997, WHEREIN THE HONORABLE EDWARD W. MCCARTY III, SUPREME COURT, NASSAU COUNTY, DISMISSED CHERYL COOKE'S PETITION FOR

FAILING TO ESTABLISH SHE TIMELY COMPLIED WITH SECTION 71 OF THE CIVIL SERVICE LAN OR THAT SHE FAILED TO EXHAUST THE REMEDIES AVAILABLE UNDER SAID SECTION WAS PREMATURE.

Section 71 of the Civil Service Law provides in part for the termination of an employee after she has been absent by reason of a disability resulting from an occupational injury or disease as defined in the worker's compensation law. Said provision is not applicable in the instant case because Ms. Cooke was not out of work for over one year nor is she permanently incapacitated from the performance of her duties. The separation provisions of Section 71 of the Civil Service Law are only applicable in cases where an employee is determined to be permanently incapacitated from the performance of her duties or if she has been on a leave of absence for at least one year.

In the instant case, Ms. Cooke was advised by letter dated June 18, 1996, that her employment as a bus driver would terminate July 1, 1996, unless she applied for reinstatement to the City *11 Manager's office prior to June 28, 1996 (R-10). Ms. Cooke claims she did apply for reinstatement prior to June 28, 1996. Specifically, she claims on June 25, 1996, she submitted a doctor's note to the City Manager's Office dated June 24, 1996, stating she was physically ready to return to work on June 30, 1996. Despite the above, the City of Long Beach terminated Ms. Cooke effective July 1. 1996.

The court committed reversible error when it dismissed Ms. Cooke's petition pursuant to Section 71 of the Civil Service Law and/ or for failing to exhaust the remedies available under said section. Ms. Cooke's allegations, if true, would make the provisions contained in Section 71 of the Civil Service Law inapplicable because Ms. Cooke, by the City of Long Beach's admission, was eligible for dismissal as of July 1, 1996, and not before. The City of Long Beach's assertion that they never received Ms. Cooke's doctor's note is at best an admission that a triable issue of fact is present in the instant case. Accordingly, the court was wrong when it dismissed the petition without first allowing the trier of fact to consider the merits of the case.

*12 ***POINT THREE***

THE RESPONDENT'S DECISION TO DISMISS CHERYL COOKE WAS AFFECTED BY AN ERROR OF LAW.

The City of Long Beach erred when it terminated Ms. Cooke pursuant to Section 71 of the Civil Service Law. Section 71 of the CSL only applies in two situations. First, if an employee's disability is of such a nature as to permanently incapacitate him. Second, if an employee has been absent by reason of a disability resulting from an occupational disease or injury for over one year.

In the instant case the City of Long Beach contends that Ms. Cooke was out of work for in excess of one year effective July 1, 1996. In fact, Ms. Cooke submitted a doctor's note to the City Managers Office dated June 24, 1996, stating she was physically ready to return to work on June 30, 1996. Accordingly, the provisions of Section 71, that the City of Long Beach relied on when they terminated Ms. Cooke, are not applicable in the instant case. Therefore, the City of Long Beach's reliance on said Statutory provision was in error. Accordingly, Ms. Cooke should be reinstated retroactively to her former position as a bus driver effective July 1, 1996.

*13 ***POINT FOUR***

THE RESPONDENT'S DECISION TO TERMINATE CHERYL COOKE WAS AN ARBITRARY AND CAPRICIOUS ACT AND AN ABUSE OF DISCRETION.

Civil Practice Law and Rules Section 7803(3) gives the court the authority to decide whether a determination was arbitrary and capricious or an abuse of discretion. Petitioner asserts that Respondent's decision to terminate Ms. Cooke was an arbitrary and capricious act not supported by the evidence.

ADD-6

It is clear from the facts in the instant case that the decision to terminate Ms. Cooke was arbitrary and capricious. On June 25, 1996, Ms. Cooke submitted a doctor's note to the City Manager's Office dated June 24, 1996, that stated she was physically able to return to work on June 30, 1996 (R-13). The City Manager's claim that no one in his office received same is not consistent with the record. The aforementioned doctor's note was dated June 24, 1996, and it logically follow that Ms. Cooke, knowing her termination date was approaching, turned in said note as soon as she could. Accordingly, Ms. Cooke's assertion that she turned in said doctor's slip on the following day (ie. June 25, 1996) is logical and supported by the record. Further, Ms. Cooke's letter by and through her Union President received by the City *14 Manager on July 15, 1996, is consistent with Ms. Cooke's assertion that she delivered said doctor's note on June 25, 1996.

It is illogical to assert that Ms. Cooke did not submit a doctor's note when said note was dated prior to her termination date. Respondent's assertion to the contrary is illogical, and an abuse of discretion and Respondent's decision to terminate Ms. Cooke was an arbitrary and capricious act not consistent with the record.

CONCLUSION

By reason of all the forgoing, the petition must be granted in all respects.

EXHIBIT 2

ADD-8

1997 WL 34605666 (N.Y.A.D. 2 Dept.) (Appellate Brief)
Supreme Court, Appellate Division, Second Department, New York.

In the Matter of the Application of Cheryl COOKE, Petitioner-Appellant,
v.
THE CITY OF LONG BEACH, Respondent-Respondent.

No. 1997-03683.
October 10, 1997.

Nassau County Clerk's Index Number 30029/96

Brief of Respondent-Respondent City of Long Beach

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On the Brief: Judith A. Peters, Esq.

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*ii *TABLE OF AUTHORITIES*

*1 *PRELIMINARY STATEMENT*

On July 1, 1996, Respondent-Respondent, the City of Long Beach, terminated the employment of Petitioner-Appellant, Cheryl Cooke, pursuant to Section 71 of the Civil Service Law. Petitioner-Appellant challenged this action by commencing an Article 78 proceeding, seeking reinstatement and back pay.

IAS Part (E. McCarty, III, J.) denied the application, finding that Petitioner-Appellant had not established that she timely complied with Section 71 of the Civil Service Law, nor had she exhausted her remedies available under said section.

For the reasons stated hereafter, it is respectively contended that IAS Part was correct in dismissing the Article 78 petition.

*2 *QUESTIONS PRESENTED*

1. Was the issue set forth in Petitioner-Appellant's first Question Presented and argued in Point One of her brief, i.e., whether the Respondent-Respondent provided sufficient notice under Section 71 of the Civil Service Law prior to terminating Petitioner-Appellant, raised before the IAS Part? It is respectfully contended that it was not and therefore should not be considered by this court.

2. Was the issue set forth in Petitioner-Appellant's second Question Presented and argued in Point Two of her brief, i.e., whether the short form order dated January 30, 1997, was premature because Section 71 of the Civil Service Law was inapplicable to Petitioner-Appellant, raised before the IAS Part? It is respectfully contended that it was not and therefore should not be considered by this Court.

3. Was the issue set forth in Petitioner-Appellant's third Question Presented and argued in Point Three of her brief, i.e., whether Respondent-Respondent erred by terminating Petitioner-Appellant because Section 71 of the Civil Service Law was inapplicable to Petitioner-Appellant, raised before the IAS Part? It is respectfully contended that it was not and therefore should not be considered by this Court.

4. Was Petitioner-Appellant's Article 78 proceeding premature because she had failed to exhaust all of her administrative remedies? IAS answered this question in the affirmative and it is respectfully contended that this decision should be upheld.

*3 5. Did Respondent-Respondent act properly under Section 71 of the Civil Service Law in terminating Petitioner-Appellant's employment? IAS answered this question affirmatively, and it is respectfully contended that this decision should be upheld.

*4 ***STATEMENT OF FACTS***

Petitioner-Appellant (hereinafter "Ms. Cooke") worked as a bus driver for Respondent-Respondent (hereinafter the "City"). She was injured on October 18, 1994, and thereafter remained out of work and received workers' compensation through December 26, 1995 (R. 20). She returned to work from December 27, 1995, through March 3, 1996, and then went back out on workers' compensation and continued to be so compensated through the date of the filing of the Article 78 proceeding which forms the basis of this appeal (R. 20). Thus, as of June of 1996, Ms. Cooke had remained out of work while receiving workers' compensation for a cumulative period in excess of one year.

On June 18, 1996, the City sent Ms. Cooke a letter informing her that she would be terminated from employment if she did not take steps to show her medical fitness to work prior to June 28, 1996 (R. 10). As of July 1, 1996, the City had received no response from Ms. Cooke, and she was thus discharged from employment with the City on that date (R. 21).

Ms. Cooke was also informed in the letter of June 18, 1996 (R. 10) that she had the right to apply to Civil Service within one year of the end of her medical disability for reinstatement. As of the date of the filing of her Article 78 proceeding and as of the date of the IAS order, January 30, 1997, Ms. Cooke had not so applied to the Civil Service Commission (R. 21-22).

***5 POINT I**

THE PETTIONER-APPELLANT HAVING FAILED TO ADVANCE IN THE COURT BELOW THE ISSUES NOW RAISED IN POINTS ONE, TWO AND THREE OF HER BRIEF ON THIS APPEAL, THE APPELLATE COURT SHOULD NOW *DECLINE TO CONSIDER THEM.*

The gravaman of Petitioner-Appellant's argument in the court below was that the City had violated Section 71 of the Civil Service Law and had acted in an arbitrary and capricious manner and in bad faith, constituting an abuse of discretion (R. 6). There was no allegation in the Petition below that the City had failed to give sufficient notice to Ms. Cooke before her termination (R. 5-7), as raised in Point One of Petitioner-Appellant's appellate brief. Likewise, there was no claim below that Section 71 of the Civil Service Law was improperly applied to Ms. Cooke because she was neither (a) permanently incapacitated, nor (b) out of work for over one year (R. 5-7), as argued in Points Two and Three of Petitioner-Appellant's brief.

It is well established law that an appellate court should not, and will not, consider different theories or new questions, if proof might have been offered to refute or overcome them had they been presented in the curt of first instance. *Northville Industries Corporation v. National Union Fire Insurance Company of Pittsburgh, Pa.*, 218 A.D.2d 19, 636 N.Y.S.2d 359 (2d Dept. 1995); *Orellano v. Samples Tire Equipment and Supply Corp.*, 110 A.D.2d 757, 488 N.Y.S.2d 211 (2d Dept. 1985); *Rentways v. O'Neill Milk and Cream Co.*, 308 N.Y. 342 (1955).

Petitioner-Appellant's failure to raise these particular challenges in the Court below, which would have given the City an opportunity to specifically address these ***6** legal theories and factual allegations in that forum, means that they have not been preserved for appeal; and it is respectfully submitted that said arguments should not be entertained by this court.

POINT II

IAS PART CORRECTLY DISMISSED THE PETITION BELOW BECAUSE THE PETITIONER FAILED TO COMPLY WITH SECTION 71 OF THE CIVIL SERVICE LAW AND *EXHAUST HER REMEDIES THEREUNDER*

Section 7801(1) of the CPLR sets forth the doctrine that a petitioner must exhaust his or her administrative remedies before being entitled to judicial relief via an Article 78 proceeding. This is black letter law which has long been enforced by the courts.

Watergate II Apts. v. Buffalo Sewer Auth., 46 N.Y.2d 52, 412 N.Y.S.2d 821 (1978); *Cosgrove v. Klinger*, 58 A.D.2d 910, 396 N.Y.S.2d 498 (3rd Dept. 1977); *Matter of Pavone*, 88 Misc. 2d 675, 389 N.Y.S.2d 249 (Fam. Ct. Suff. Cty. 1976).

In the *Matter of Pavone, supra*, it was noted that where, as here, an administrative remedy has been set forth in a statute such as Section 71 of the Civil Service Law, that administrative procedure must be followed before a court should act or exercise jurisdiction. Further, in *Guddemi v. Rozzi*, 210 A.D.2d 4790, 621 N.Y.S.2d 354 (2d Dept. 1994), this court upheld the doctrine of exhaustion of administrative remedies in a case where a petitioner had been given notice of his Fights to administrative remedy but failed to exercise them, as in the instant case.

***7** Respondent City of Long Beach gave notice to Ms. Cooke of her right to petition the City for restoration to duty upon indication of her physical fitness to do so (R. 10); she failed to pursue this course of action in a timely fashion. She was also given notice of her right under Section 71 of the Civil Service Law to apply to Civil Service within one year of the end of her disability for reinstatement to her position. This administrative avenue was made expressly available to Ms. Cooke in the text

of Section 71 itself and pointedly brought to her attention. Yet Ms. Cooke, as of the date of her Article 78 proceeding, failed to lake advantage of this course of action.

Clearly, Petitioner-Appellant failed to exhaust her available administrative remedies under Section 71, and IAS Part was correct in dismissing her petition on this basis.

POINT III

RESPONDENT-RESPONDENT ACTED PROPERLY PURSUANT TO SECTION 71 OF THE CIVIL SERVICE LAW *IN DISCHARGING PETITIONER-APPELLANT FROM EMPLOYMENT*

Petitioner-Appellant argues in points two and three of her brief, for the first time on appeal (see Point One herein), that Section 71 of the Civil Service Law does not apply to her because she was not (a) out of work for over one year, nor was she (b) permanently incapacitated from performing the duties of her job, as required by the satute.

In determining whether a municipality may legally terminate an employee pursuant to Section 71, courts have repeatedly interpreted the requirement of absence ***8** for a period of one year by the employee to mean cumulative absences of one year. *Allen v. Howe,* 84 N.Y.2d 665, 621 N.Y.S.2d 287 (1994); *Crestwood v. Creedmoor Psychiatric Center,* 88 Misc. 2d 492, 388 N.Y.S.2d 546 (Sup. Ct. Queens Cty. 1976).

The record shows that between October 1994 and June 1996 Cheryl Cooke was absent from work for a cumulative period in excess of one year (R. 20). Petitioner-Appellant has submitted no facts, either in the court below where the issue was not even raised, or on appeal, which contradict the fact of her absences for a cumulative period of over one year. The mere assertions that Ms. Cooke was not out of work for one year or that she was ready to return to work in June 1996, do not negate the fact of her cumulative absences as set forth in the City's Answer below. The City was within its rights under Section 71 in terminating her on this basis.

Petitioner-Appellant further argues that Section 71 is inapplicable to her because she is not permanently incapacitated. It is not necessary for the City to rebut this assertion, since it is sufficient under Section 71 to show cumulative absences in excess of one year, and also because the issue was not raised below. Even so, despite doctor's notes allegedly submitted by Ms. Cooke and tardy indications of her willingness to work, the fact remains that she continued to receive workers' compensation benefits through the time of her termination and has continued to assert before the Workers' Compensation Board that she is disabled and cannot work (R. 21-22). Respondent urges this court to give short shrift to the argument that Section 71 is inapplicable to Ms. Cooke.

As to the argument raised in Petitioner-Appellant's Point One,that the City failed to give Ms. Cooke adequate notice under Section 71, it is contended that the ***9** facts in the instant case differ from those in *Wickwire v. State University of new York Health Science Center at Syracuse,* 169 Misc. 2d 1058, 648 N.Y.S.2d 263, and those in *LaJoie v. County of Niagra,* 239 A.D.2d 908 659 N.Y.S.2d 622 (4th Dept. 1997), which are relied upon by Petitioner-Appellant. However, since this issue was not raised in the IAS Part, the City was not given an opportunity to come forward with distinguishing facts, including evidence of notice on a prior occasion, and this issue has not been preserved for appeal. Again, it is respectfully submitted that this issue should not even be considered by this court.

Petitioner-Appellant further argues that the City's termination of Ms. Cooke's employment was arbitrary and capricious and an abuse of discretion. Although this issue was not addressed in the IAS Part because the judge there ruled that the petition was premature because the Petitioner had failed to exhaust her administrative remedies, this argument should also fail on its merits.

The "arbitrary and capricious" test used by the courts in Article 78 proceedings to determine the validity of a municipality's actions involves whether "arbitrary action is without sound basis in reason and is generally taken without regard to the facts."

Pell v. Board of Ed. of Union Free School Dist No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County, 34 N.Y.2d 222, 356 N.Y.S.2d 833 (1974).

The City of Long Beach was faced with an employee, Ms. Cooke, who had been absent from work and receiving workers' compensation for a cumulative period in excess of one year. The State Department of Civil Service construes Section 71 to allow public employers to terminate employees after absences of an aggregate one- ***10** year period and not require a continuous one-year period. This construction was found to be rational by the Court of Appeals in *Allen v. Howe, supra.*

The City's action was reasonably taken in reliance upon Section 71 and based upon the fact of Ms. Cooke's absences for a cumulative period of over one year. The City acted properly and not arbitrarily or capriciously. Dismissing Ms. Cooke was not an abuse of discretion.

11** ***CONCLUSION

It is respectfully contended that based on the foregoing, the Order of the Supreme Court should be affirmed in all respects and the petition dismissed.

EXHIBIT 3

2001 WL 34683810 (N.Y.A.D. 2 Dept.) (Appellate Brief)
Supreme Court, Appellate Division, Second Department, New York.

In the Matter of the Application of John LYNN, Petitioner-Appellant,
For a Judgment Pursuant to Article 78 of the Civil Practice Laws and Rules,
v.
Town of Clarkstown, Charles Holbrook, Supervisor, Town of Clarkstown Police Commission and Kevin Kilduff, Chief of Police of the Town of Clarkstown Police Department, Respondents-Respondents.

December 27, 2001.

Rockland County Clerk' Index Number: 691/01.

Appellant's Brief

Dorfman, Lynch & Knoebel, By: Dennis E.A. Lynch, Attorney for Petitioner-Appellant, 51 North Broadway, Nyack, New York 10960, (845) 353-3500

STATEMENT PURSUANT TO CPLR 5531

1. The index number of the case in the court below is 691/01.

2. The full names of the original parties are the same; there has been no change.

3. Action commenced in the Supreme Court, Rockland County.

4. Action was commenced by service of a Notice of Petition and Petition, dated February 6, 2001.

5. Nature of Action concerns public employment.

6. Appeal is from an Order of the Honorable Andrew P. O'Rourke, dated June 5, 2001.

7. Appeal is on a full Record (Reproduced).

8. There are no trial transcripts involved in this appeal.

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*1 I INTRODUCTION

This appeal involves the termination of the Appellant police officer with over one decade of unblemished police work without notice of the termination Hearing. That termination took place at a Hearing without the police officer present to defend his record since it was not disputed this police officer was given the wrong Hearing date before the Police Commission that terminated him. Compounding this fundamental unfairness was the conceded inconsistent consideration by the Employer of this police officer's work related injury. The Employer Police Commission claimed the injury sustained by the Appellant Police Officer was work related while the Police Chief asserted it was not work related. For the reasons based upon this Record, the determination of the Court below upholding the termination of the Appellant under Civil Service Law Section 71 should be reversed and the matter remanded for further proceedings.

*2 II. FACTS ON APPEAL

A. BACKGROUND

In the Town of Clarkstown, New York, the entity responsible for appointing and removing police officers is the Town of Clarkstown Police Commission ("Commission") (R. at 56). Although the Commission has the absolute power to hire and fire police officers, the Police Chief ("Chief") has the power to determine whether or not to grant a police officer benefits pursuant to General Municipal Law Section 207-c. (R. at 90-91). Except for determining Section 207-c benefits, however, the Commission has final authority for termination of a police officer such as the Appellant.

In 1989, the Appellant John Lynn was appointed by the Commission as a police officer in the Town of Clarkstown, County of Rockland, New York. (R. at 25). After serving as a police officer for a few years, it was conceded by Respondents that Appellant Police Officer John Lynn (the "Appellant") or ("Officer Lynn") sustained a work related injury. As a result of that work related injury, Officer Lynn was granted General Municipal Law Section 207-c benefits by the Chief. After an apparent recovery from that conceded work related disability, Officer Lynn returned to full employment with the Town of Clarkstown Police Department ("Department") and worked gainfully for many years with an unblemished employment record in law enforcement.

B. EVENTS LEAPING TO TERMINATION OF OFFICER LYNN

Having returned to employment in the Department after the work related disability that Respondents concede, Officer Lynn experienced increasing difficulty performing his police related *3 duties. (R. at 26-27). As a result, Officer Lynn began to utilize his allotted time pursuant to the Collective Bargaining Agreement with the Department for leave. That allotted time included sick time, vacation and other excused absences from employment as a police officer with the Department. Nowhere do Respondents allege that the allotted time off from employment was improperly sought, obtained or utilized by Officer Lynn. Instead, all Respondents concede that Officer Lynn legitimately utilized his allotted time under the Collective Bargaining Agreement.

Eventually Officer Lynn needed additional time off from law enforcement work and candidly explained to the Chief that an unpaid leave of absence was necessary. (R. at 26-28). The Chief granted the unpaid leave of absence recognizing the legitimate request of Officer Lynn for that relief. (R. at 27). When that unpaid leave of absence was exhausted, Officer Lynn made specific application to the Police Commission for further unpaid leave. On September 4, 1998, Officer Lynn in writing, advised the Police Commission that he:
respectfully request that I be granted an extension of my leave of absence without pay for a period of three (3) months.

Please be advised that I have been going to physical therapy for the last few months, but my back condition has not substantially improved. Consequently, I am hoping that my application for ordinary disability will be approved prior to the expiration of the extension. Please note that I am requesting simultaneous leave under the Family and Medical Act. (R. at 108). (emphasis supplied)

Accordingly, Officer Lynn expressly advised the Commission of his request for unpaid leave because of his disability as well as pursuant to the Family and Medical Leave Act at 29 U.S.C. § 2601 et. seq. (the "FMLA").

In response to the request of Officer Lynn for unpaid leave pursuant to his disability as well as pursuant to FMLA, neither the Commission nor the Chief provided any notice or acknowledgment of the Appellant's rights under FMLA. Strikingly, neither the Commission nor *4 the Chief even acknowledged Officer Lynn's FMLA rights and totally ignored their responsibilities under FMLA. This disregard of Appellant's rights under Federal and State Law became increasingly apparent as the Respondents implemented their scheme to terminate Appellant who was a police officer with over one (1) decade of unblemished work history in law enforcement,

C. RESPONDENTS CONDUCT WHILE APPELLANT WAS ON UNPAID LEAVE

Although Respondents conceded the injury Officer Lynn complained of was initially accorded General Municipal Law Section 207-c benefits previously, the Chief and Commission began to inconsistently treat the disability complaints of the Appellant. For example, while Officer Lynn was on unpaid leave from the Department, the Department accepted (but strangely did not pay Appellant) over $30,000.00 in Workers Compensation payments specifically identified to the work related injury claimed by Officer Lynn. Clearly, Respondents considered at least part of Officer Lynn's unpaid leave to be a disability or occupational injury related to the employment of Officer Lynn compensable by Workers Compensation. (R. at 54 & 55). In fact, during part of the unpaid absence of Officer Lynn, the Department considered him on work related disability. (R. at 28).

Inconsistently, however, other periods of the unpaid leave for Officer Lynn were not considered by Respondents as a disability absence related to Officer Lynn's employment with the Department. In a written communication to Officer Lynn dated March 17, 2000, the Chief confirmed to Officer Lynn that the Respondents did not consider part of the unpaid leave as a disability-related compensable period of time pursuant to Workers Compensation. As the Chief *5 advised Appellant:

> Your medical records indicate that you have advised your treating physician, Dr. Louis Starace, that your present disability was not a "worker's injury" and that you were utilizing your "accumulated overtime" or your "own time" to remain absent from your employment as a Clarkstown Police Officer. (R. at 70).

Therefore, at least part of the unpaid absence of Officer Lynn was considered by the Chief to be not related to employment as a police officer and not a disability compensable by Worker's Compensation. This inconsistent and conflicting conduct by Respondents is important since Respondents termination under Civil Service Law can only be for absence related to a disability recognized under Workers Compensation Law.

Strangely, neither the Chief nor the Commission ever identified what period of time during the unpaid leave for Officer Lynn was considered as related to employment (compensable by Worker's Compensation) and not related to employment (not compensable by Worker's Compensation). Otherwise stated, Respondents never determine the amount of unpaid leave time attributable to any work related disability before Appellant's termination under Civil Service Law, § 71. This refusal by Respondents to

distinguish between unpaid leave attributable or not attributable to a compensable injury is a glary omission vitiating any purported termination of Appellant pursuant to Civil Service Law § 71.

D. TERMINATION OF OFFICER LYNN

Although Respondents never distinguished between the amount of Officer Lynn's time on unpaid leave compensable or not under Worker's Compensation, Officer Lynn received a letter from the Chief dated November 3, 2000 indicating the Commission may terminate his employment pursuant to Civil Service Law § 71. (R. at 56). The Chief also advised Officer Lynn *6 in writing that the determination regarding any termination would take place in a Hearing by "the Police Commission at it's (sic) next meeting thereafter (November 21, 2000)". (R. at 56). Again, Respondents never then or later calculated or otherwise determined regarding Appellant the amount of unpaid leave time pursuant to a Worker's Compensation compensable injury or not related to employment.

Although the Commission was the responsible entity to act pursuant to Civil Service Law § 71, Officer Lynn met with the Chief to discuss the recommendation the Chief would make to the Commission at the November 21, 2000 Commission Hearing. (R. at 88). Thereafter at a meeting, Officer Lynn submitted additional information to the Chief. (R. at 89). At that meeting, however, the Chief advised Appellant of a different date (than the November 21, 2000 date previously disclosed) for the Appellant's termination Hearing before the Commission. Without any contradiction by Respondents, Officer Lynn confirmed the Chief advised the Commission termination Hearing would instead take place on December 12, 2000. (R. at 30). For whatever reason, Respondents changed (for a second time) the scheduling of the important Commission Hearing regarding termination of Officer Lynn who was a police officer with over ten (10) years of unblemished law enforcement employment with the Department.

Shockingly, the Commission without notice to Officer Lynn conducted its Hearing according to Civil Service Law § 71 not on December 10, 2000, but on December 7, 2000 which hearing date was never disclosed to Officer Lynn. (R. at 93). At the Commission's December 7, 2000 Hearing, Officer Lynn was not given notice of the Hearing, Officer Lynn had no opportunity to present testimony to the Commission and Officer Lynn had no opportunity to cross-examine any witnesses or challenge any evidence submitted to the Commission regarding his termination. *7 Without any opportunity to attend and contest evidence at the Hearing before the Commission, Lynn was terminated by the Commission in an undated Resolution. (R. at 67).

E. SECTION 207-c BENEFITS

Separate and apart from the termination by Respondents of Officer Lynn, the Chief also denied the General Municipal Law Section 207-c benefit application by Appellant. (R. at 74). Although this is a separate issue from the fundamental issue presented regarding the termination of Officer Lynn from employment with the Department, the GML § 207-c issue was also preserved for appellate review.

*8 III. ANALYSIS OF THE LAW

A. TERMINATION WITHOUT THE RIGHT TO PARTICIPATE IN THE HEARING IS FUNDAMENTALLY UNFAIR TO OFFICER LYNN

It is undisputed that the Commission terminated Officer Lynn without him being present or providing an opportunity to present witnesses or cross-examine witnesses at a Hearing on December 7, 2000. It is likewise undisputed that the Commission was the only entity that could terminate Officer Lynn pursuant to Civil Service Law § 71. It is also undisputed that Appellant's interest in his over one decade of unblemished law enforcement employment is a valuable property right. Simply stated, it is unprecedented for the Commission to terminate this valuable property right without according Appellant the modicum of procedural and substantive due process, namely, notice of the termination Hearing date.

Not advising Officer Lynn of the critical Hearing date before the Commission is fundamentally unfair as a matter of fact and law. As the New York Court of Appeals noted in People v. De Jesus, 42 N.Y.2d 519, 399 N.Y.S.2d 196:
"It is 'the law of the land' that no man's life, liberty or property be forfeited as a punishment until there has been a charge fairly made and fairly tried in a public tribunal". (Matter of Oliver. 333 U.S. 25.7, 268 (68 S. Ct. 499, 510, 92 L.Ed. 682)). Such a right constitutes the most fundamental of all freedoms (Estes v. Texas, 381 U.S. 532, 540 (85 S. Ct. 1628, 1631, 14 L.Ed.2d 543)). (42 N.Y.2d at 520, 399 N.Y.S.2d 196).

Clearly, Officer Lynn was deprived of a significant property right without a charge "fairly made and fairly tried" when Officer Lynn was not even advised regarding the Commission Hearing date.

Not only is the failure to provide Officer Lynn with proper notice of the termination Hearing date a violation of fundamental fairness, the appearance of fundamental fairness is ***9** destroyed in such misconduct by Respondents, The United States Supreme Court noted in its holding In re Murchison, 349 U.S. 133,136,1995, "[J]ustice must satisfy the appearance of justice". Without doubt, an impartial decision could not be made by the Commission when Officer Lynn did not have an opportunity to testify at the Hearing before the Commission and cross-examine any witnesses or evidence.

As the Court of Appeals in New York State held in 1660 Second Aye. Restaurant, Inc. v. New York State Liquor Authority, 75 N.Y.2d 158, 161, 551 N.Y.S.2d 461, 462, "It is beyond dispute that an impartial decision maker is a core guarantee of due process fully applicable to adjudicatory proceedings before administrative agencies", (citations omitted). In the case on appeal, the bare minimum of due process is violated when the Commission as the adjudicatory body failed to give notification to Officer Lynn of the termination Hearing date. Therefore, without regard to any other issue presented on appeal, the Commission's failure to property advise Officer Lynn of the correct Hearing date for the Civil Service Law § 71 termination Hearing is a fundamental error requiring reversal.

In addition, the Second Department has clearly determined that the right to notice of any termination Hearing is one of the "requirements of due process", (Matter of Prue v. Hunt, 78 N.Y.2d 364, 575 N. Y.S.2d 806, Matter of LaJoie v. County of Niagara, 239 A.D.2d 908, 659 N. Y.S.2d 622). In fact, the Second Department in Cooke v. City of Long Beach, 247 A.D.2d 538, 669 N.Y.S.2d 312, 313 (2nd Dept. 1998) expressly noted that proper notice of a termination Hearing under Civil Service Law § 71 is an essential requirement "of due process". Because Respondents failed to give Officer Lynn notice of the actual termination proceedings before the Commission on December 7, 2000, the determination of the Commission to terminate Officer ***10** Lynn is flawed and must be annulled. Notice of the termination proceedings in advance is mandated under Civil Service Law § 71. (See, Alien v. Howe, 84 N.Y.2d 665, 670, 621 N.Y.S.2d 287, 288 (1994).

B. RESPONDENTS TERMINATION OF APPELLANT UNDER CIVIL SERVICE LAW § 71 WITHOUT CONSIDERING APPELLANT'S FMLA RIGHTS IS REVERSIBLE ERROR

In another undisputed fact in this Record, Officer Lynn advised the Commission on September 4,1998 that he was requesting with his unpaid disability leave of absence "simultaneous leave under the Family and Medical Act". (R. at 108). In rendering its decision, the Commission did not consider or even reference the rights of Appellant for time away from employment under the Family and Medical Leave Act ('FMLA") at 29 U.S.C. § 2601 at et. seq. In fact, there is nothing in the Record to confirm that the Commission in terminating Appellant's employment of over one decade properly considered Officer Lynn's FMLA rights for time off in calculating Officer Lynn's Civil Service Law, Section 71 disability time of "at least one year". (See, R. at 92-94 & 67). As such, independent of any other issues on appeal, this determination of the Commission terminating Appellant's employment should be annulled.

As the Appellate Division held in Jacobsen v. New York State Dept. of Labor, 274 A.D.2d 809, 711 N.Y.S.2d 61 (3rd Dept. 2000), the calculation of the "total number of cumulative absences" attributable to an injury pursuant to Civil Service Law § 71 is a critical inquiry that any FMLA election of rights must include. (274 A.D.2d at 811, 711 N.Y.S.2d at 63). In Jacobsen, the Appellate Division found that the Employer "was obliged to notify Petitioner of that election promptly" pursuant to FMLA,

In fact, the Appellate Division in Jacobsen expressly ruled, "in the *11 absence of the prescribed statutory notice (see. 29 CFR § 825.208 (b)(l);(c), none of Petitioner's absences after April 6,1995 should have been deducted from her FMLA leave entitlements" in determining Civil Service Law § 71 issues. (Id. at 812, 711 N.Y.S.2d at 64), Respondents concede that no notice (let alone prescribed statutory notice) was given by Respondents to Officer Lynn in the termination process regarding Appellant's FMLA rights. Likewise, Respondents do not (and cannot) claim that the calculation of time absent under Civil Service Law, Section 71 considered Officer Lynn's allowable time under FMLA.

Under FMLA Officer Lynn was improperly terminated for the very reasons relied upon by the Appellate Division in the Jacobsen holding. Reference to that actual decision is important to understand the scope of the error by Respondents in recognizing Officer Lynn's FMLA rights:
On the other hand, it appears that petitioner may have been improperly terminated on March 25,1998 since she did not properly

receive her entitlements to additional unpaid leave pursuant to the Family and Medical Leave Act (hereinafter FMLA) (29 USC § 2601 *et seq.)*. The record supports petitioner's contention that she did not receive notification from respondent that her leave accrued pursuant to the FMLA would run concurrently with her workers' compensation leave calculated for the October 29,1991 injury under Civil Service Law § 71. We have previously noted *in Matter of McKnight v. Dormitory Auth. of State of N.Y.*, 267 A.D.2d 708, 699 N.Y.S.2d 524, lv *denied* 94 N.Y.2d 762, 707 N.Y.S.2d 622, 729 N.E.2d 341, that:

The FMLA guarantees a minimum of 12 weeks [during any 12-month method period chosen by the employer in accordance with the methods set forth in 29 CFR 825.200(b)] of unpaid leave of absence for, *inter alia*, employee illness, and, in the absence of statutorily prescribed notice such leave of absence would begin *after* an employee has exhausted his or her paid leave of

absence *(see*, 29 CFR 825.208(c)). *(Id*, at 710, 699 N.Y.S.2d 524 [emphasis supplied]).

The FMLA did not exist before 1993 *(see, 29* CFR 825.102(a)) and the regulations requiring respondent to give notice to its employees of an FMLA leave designation decision did not take effect until April 6,1995 *(see*, 60 Fed. Reg. 6658).

Accordingly, for yet another reason the determination of Respondents that terminated Officer *12 Lynn's employment should be reversed for violating requirements of FMLA in connection with calculation of disability time in the Civil Service Law § 71 termination.

C. TERMINATION PURSUANT TO CIVIL SERVICE LAW SECTION 71 WAS NOT WARRANTED

Respondents base the termination of Officer Lynn upon Civil Service Law § 71. Reference to that statute is paramount to determine whether the termination by Respondents of Officer Lynn was properly undertaken pursuant to statute.

As the Court noted in Crestwood v. Creedmoor Psychiatric Center, 88 Misc.2d 492, 388 N.Y.S.2d 546 (1976) regarding this statute:
Section 71 of the Civil Service Law was enacted for the protection of employees disabled by an occupational injury or disease (Memorandum on 1958 Revision, L. 1958, ch. 790, s 1; 1958 N.Y. Legis, Ann., p. 75). The statute provides in pertinent part the following:

"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 shall be entitled to a leave of absence for at least one year, unless his disability

is of such a nature as to permanently incapacitate him for the performance of the duties of his position...It is apparent from a reading of section 71 of the Civil Service Law that it does not authorize termination of employment but rather sets up safeguards to insure that occupationally injured employees not permanent incapacitated will retain their positions or rights to reinstatement during the period of their disability." (88 Misc. 2d at 493-494, 388 N.Y.S.2d at 547)

Certainly, Civil Service Law § 71 has been construed by the Courts to protect employees not working "by reason of a disability resulting from occupational injury or disease as defined in the Workman's Compensation Law..." (Civil Service Law § 71). Thus, Civil Service Law § 71 and any right of Respondents to terminate Officer Lynn depends upon Appellant's inability to work resulting from a job related disability and Worker's Compensation recognized injury.

***13** In applying the termination provisions of Civil Service Law § 71, Respondents concede that Officer Lynn must be "absent due to a disability covered under the Worker's Compensation Law" for a period that "exceeds one (1) year". (R. at 56). The Chief expressly so stated to Officer Lynn in advising about any basis for recommendation for termination before the Commission. The Commission also based its termination Resolution of Officer Lynn upon his absence for "a period of at least one (1) year" by reason of a "disability resulting from occupational injury or disease as defined in the Worker's Compensation Law". (R. at 67). Yet, there was no evidence cited by the Commission (nor proffered by the Chief) that Officer Lynn was absent for at least one (1) year regarding a Worker's Compensation recognized disability. To the contrary, the Chief claimed Officer Lynn's absence was not work related. (R. at 70).

The Commission made no finding about what periods of time under Civil Service Law, Section 71 were recognized by the Commission as job related injuries of Officer Lynn. (R at 92-94). Compounding this failure by the Commission to determine what unpaid absence time was from a disability due to an occupational injury as defined in the Worker's Compensation Law, the only evidence before the Commission was from the Chief who asserted and provided information to the Commission that Appellant's unpaid leave "was not a 'worker's injury'". (R. at 70).

Therefore, the Commission had information that Officer Lynn's unpaid absence was not an occupational injury and, nowhere did the Commission determine factually any disapproval or approval of the Chief's assertion of a lack of disability related injury to Officer Lynn, (R. at 67). Without this requisite finding pursuant to Civil Service Law § 71 (that any absence of over one (1) year related from occupational injury as opposed to non-occupational injury), the determination of the Commission to terminate Officer Lynn pursuant to Civil Service Law § 71 is ***14** fundamentally flawed and must be reversed.

Additionally, the termination of Officer Lynn was clearly made contrary to provisions of 4 NYCRR § 5.9(c)(2). This violation resulted since Officer Lynn did not receive the thirty (30) day notice of termination prior to said termination. Respondents concede non-compliance with 4 NYCRR § 5.9, but argue it is not applicable. Although the Court below found for the Respondents on this issue (R. at 6), the Second Department has held to the contrary. In Cooke v. City of Long Beach, 247 AD.2d 538, 669 N.Y.S.2d 312 (2nd Dept. 1999), the Second Department expressly found that a non-state employee (working for a City) was entitled to the notice benefits under 4 NYCRR § 5.9(c)(2). The Second Department noted because the employer failed to "serve notice to the Petitioner of the impending termination of her employment at least thirty (30) days prior thereto" that the "Petitioner should be restored to her prior position". (Id., 669 N. Y.S.2d at 313).

Therefore, for yet another reason the termination of Officer Lynn pursuant to Civil Service Law § 71 by the Respondents is flawed.

D. RESPONDENTS DETERMINATION REGARDING

GML SECTION 207-c BENEFITS SHOULD BE REVERSED

Independent of any termination issues regarding Civil Service Law § 71, the Appellant also brought before the Court below the issue of GML § 207-c denial of benefits. That GML § 207-c denial is a separate and distinct issue from the termination issue.

As the Court below noted, Officer Lynn's right to benefits pursuant to GML Section 207-c "is a remedial statute which should be construed in favor of a police officer injured in the course of his or her duties". (R at 13). The Court below cited two Second Department cases and one ***15** Third Department case supporting that undisputed rule regarding application of GML Section 207-c awards. (See, generally, Crawford v. Sheriff's Department Putnam County, 152 A.D.2d 382, 385 (2nd Dept. 1989). Yet, the Court below determined that the dismissal of Officer Lynn's GML Section 207-c application was "time-barred". (R. at 11). The Court so found that the GML Section 207-c application was time-barred since the initial decision denying such benefits by the Chief occurred on March 17, 2000. (R. at 11). Admittedly, the Article 78 Proceeding was not brought within four (4) months of that date by Officer Lynn.

Nevertheless, the Article 78 Proceeding brought by Officer Lynn related to a January 29, 2001 application to the Chief for GML Section 207-c benefits that was denied. (R. at 73). It is that denial by Respondents that was the subject of the Article 78 petition by Officer Lynn. (Id. at 31-32). As demonstrated to the Court below, nowhere does GML Section 207-c prohibit an injured police officer from seeking additional benefits under GML Section 207-c at a later date. (R. at 114-115) (citing, *inter alia*, Matter of Curley v. Dilworth, 96 A.D.2d 903, 904 (2nd Dept. 1983). Therefore, this failure by the Court below not to consider the right of Officer Lynn to reapply for GML Section 207-c benefits at a later date was erroneous.

In fact, if the Court below and Respondents are to be held to a consistent position, the prior provision by Respondents of GML Section 207-c benefits to Officer Lynn from the 1992 incident (R. at 41) would prevent the Respondents from ever denying GML Section 207-c benefits again for the re-injury to Officer Lynn. Clearly, this is not the law in New York State and never has been the law in New York State on this matter. Re-applying for previously granted GML Section 207-c benefits has never been prohibited by any prior precedent.

Therefore, independent of Civil Service Law § 71, the Court below should have annulled ***16** the denial of GML Section 207-c benefits to Officer Lynn. The assertion by the Court below that a police officer cannot receive Section 207-c benefits years after an initial injury is without precedent. (R. at 13-14). In fact, the determination by the Court below that a police officer like Officer Lynn cannot reapply for such benefits is against public policy. Such a determination by a Court would encourage police officers never to return to work after GML Section 207-c benefits are first provided since any subsequent re-injury would preclude them from ever obtaining such benefits again. Again, this is not now and never was the law in New York State regarding entitlement to GML Section 207-c benefits.

Accordingly, the determination denying GML Section 207-c benefits to Officer Lynn should be reversed and remanded for further proceedings.

***17 IV. CONCLUSION**

Based upon the aforementioned authorities, it is respectfully submitted that the determination by the Court below should be reversed. The issue of Officer Lynn's termination should be remanded to the Commission to properly consider the rights of

Appellant to notice of any Hearing and calculation of time only for job related disability under Civil Service Law § 71. Likewise, any remand should provide instruction that the Appellant's rights pursuant to leave under FMLA should also be considered in calculating allowable time in applying Civil Service Law, Section 71. Additionally, the denial of GML Section 207-c benefits to Appellant should be annulled and remanded for further consideration.