# Negotiating Statutory Procedures in the Public Sector

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**Hon. Mary Thomas Scott**
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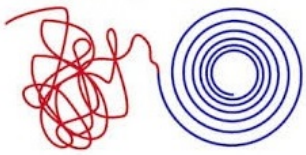
# Negotiating Statutory Procedures in the Public Sector §§ 71, 72, 73, 75

## A Practical Approach



**Mary Thomas Scott, ALJ***
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*Thanks to Rachel Wright, a PERB intern, who contributed to the research on this topic.

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## Topic Summary

A panel, comprised of a management attorney, a union attorney and PERB neutrals, will address public sector bargaining issues under the Taylor Law with respect to the negotiation of statutory procedures, specifically CSL §§ 71-73, CSL § 75 and GML §§ 207-a & 207-c.

- Moderator: Paul J. Sweeney & Nat Lambright
- Speakers: Rich Zuckerman (Management), Nolan Lafler (Union) and PERB ALJ's Joseph O'Donnell and Mary Thomas Scott (Neutrals)



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# Agenda

**1. Bargaining – Mandatory, Non-mandatory and Prohibited Subjects**

**2. Reviewing Statutes – A Preliminary Approach**

**3. Avenues by Which PERB Reviews Mandatory Bargaining Obligations**:

- Bad faith bargaining charges (§ 209-a.1(d) or § 209-a.2(b))
- Improper Proposal pursuant to Voluntary or Compulsory Interest Arbitration (§ 209.4 )
- Declaratory Rulings – purpose to provide a less adversarial means than an IP to resolve existing justiciable issues between parties : whether a party is covered by the Act, or whether a matter is a mandatory subject of negotiation

**4. CSL §§ 71-73, 75 – Due Process and Bargaining Theory**

- CSL §§ 71-73 Termination of public employees due to disability
- CSL § 75 Termination of public employees for misconduct or incompetence

**5. CSL § 209.4 Impasse and Petitions for Interest Arbitration**



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# Bargaining Fundamentals

- **Taylor Law: Public policy favoring bargaining of terms and conditions of employment**
- **Refusal to Bargain - Defenses**
  - Non-mandatory subject
    - Prohibited ("would not be enforceable and therefore cannot be negotiated,") *ultra vires*
    - Against public policy
    - Does not impact terms and conditions of employment unit employees
    - **Preempted by Law**
      - **Contrary to clear legislative intent that has removed the discretion of the employer to agree**
  - Impasse
  - Mandatory, but Permitted by Contract
    - Duty Satisfaction, Waiver, Management Prerogative-Rights



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## CSL § 71 WC Absence & Reinstatement -Disability Resulting From Occupational Injury or Disease

- Where an employee
  - has been separated from the [civil] 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.



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## CVL §§72 & 73 - LOA & Reinstatement - Ordinary Disability

- **NY Civil Service Law § 72. 4**
  - If an employee
    - Is placed on leave pursuant to this section
    - is not reinstated within one year after the date of commencement of such leave,
    - **his or her employment status may be terminated in accordance with the provisions of § 73.**
- **NY Civil Service Law § 73**
- When an employee
  - has been continuously absent from and
  - unable to perform the duties of his position
  - for one year or more
  - by reason of a disability, other than WC,
  - his
    - **employment status may be terminated and**
    - his position may be filled by a permanent appointment.



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## Taylor Law & CVS § § 72 & 73 – Ordinary Disability

- *Economico v Village of Pelham*, 13 PERB ¶ 7528, 50 NY2d 120 (1980) (§ 73): due process requires a **post-termination hearing** when the facts underlying the statute are in dispute.
- *Prue v. City of Syracuse*, 24 PERB ¶ 7540, 78 NY2d 364 (1991)(§ 73): due process additionally requires **pretermination notice and minimal opportunity to be heard,** following *Cleveland BOE v. Loudermill,* 470 US 532.
- *Hurwitz v. NYS Dept Social Services*, 26 PERB ¶ 7512, 81 NY2d 182 (1993)(§ 73): per *City of Syracuse*, **pretermination** due process amounts to no more than opportunity for employee to present opposing views on questions of duration and fitness.



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## Taylor Law & CVS § 71 – Occupational Disability

- ***Village of Old Brookville*, 16 PERB ¶ 4571 (1983) (§ 209-a.2(b)):**
  - "Where some state law **takes a matter out of the discretionary authority of an employer** and mandates alternative procedures or specific substantive provisions, there is no Taylor Law duty to negotiate."
  - "A demand relating to a subject treated by a statue is negotiable so long as the statute does not clearly preempt the entire subject matter and the demand does not diminish or merely restate the statutory benefits. "
  - "**Where there is any legitimate uncertainty that a statute covers the same ground as a demand, we will not determine the demand to be non-mandatory on the ground of statutory preemption."**



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## Taylor Law & CVS § 71 – Occupational Disability

- ***Greenburgh No. 11 UFSD*, 25 PERB ¶ 7518 (1991):**
  - "**CSL § 71 does not mandate the discharge of an employee nor does it specify the procedural step to be taken to effectuate discharge**."
- ***Allen v. Howe,* 84 NY2d 665 (1994**):
  - "§§ 71 and 73 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."
  - Although terminations under CSL § 71 promote a governmental interest in a productive and economically efficient civil service, we recognize substantial interests of employees in their continued employment.



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## Taylor Law & CVS § 71 – Occupational Disability

- ***Town of Cortlandt,* 30 PERB ¶ 3031 (1997), aff'd 30 PERB ¶ 7012 (1997):**
  - "The questions is whether the Town's exercise of the discretion bestowed under CSL § 71 must be bargained or whether CSL 71 plainly and clearly establishes a legislative intent to exempt an employer from a duty to bargain discharges …"
  - "**There is nothing in CSL § 71 which deals explicitly with collective negotiations under the Act, nor is there anything inescapably implicit in that statute which establishes the Legislature's plain and clear intent to exempt the Town from the State's strong public policy favoring the negotiation of all terms and conditions of employment.**"
  - "Mandatory collective negotiations is intended to permit and promote the mutual reconciliation of competing interests".
- NY Supreme Court (Westchester Co): "**While an employer is permitted to terminate an employee who has been disabled by an occupational injury for more than one year, there is no requirement that it do so and no express prohibition against negotiation of an employer's exercise of its prerogative**."



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## Taylor Law & CVS § § 72 & 73 – Ordinary Disability

- *Town of Wallkill,* 44 PERB ¶ 4529 (2011) (§73)(§209-a.1(d):
  - "The analysis in *Town of Cortlandt (§ 71 case)* is equally applicable to disability terminations due to non-occupational injuries or illnesses.
  - **"CSL § 73 has no language at all relating to collective negotiations, and legislative intent to exempt these kinds of terminations from the duty to bargain is not implicit in any language in the statute."**
- *City of New Rochelle*, 47 PERB ¶ 3004 (2014) (§72)(§ 209-a.1(d)
  - Procedures for granting and terminating sick leave and returning to work are mandatorily negotiable, unless there is merit to any of the employer's defenses.



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## Taylor Law & CVS § 71 – Occupational Disability

- ***City of Long Beach,* 50 PERB ¶ 4503 (2017)(§ 71 case):**
  - City provided notice to employee of intent to terminate and opportunity for hearing; it alleged that unilateral implementation of procedure for terminating employee under § 71 was proper since it provided DP
    - ALJ relied on *Town of Cortlandt and* on *Town of Wallkill*
    - **The requirements of due process operate independently of the requirements of the Act;**
    - **parties are obligated to meet the demands of each**
  - *Held*: City unilaterally established a DP procedure (notice, an opportunity to be heard) without bargaining
  - City's conduct demonstrated an intent to terminate the employee as well as create a process to pursue that aim.
- ***City of Long Beach,* 50 PERB ¶ 3036 (2017), aff'd 51 PERB ¶ 7002 (2018):**
  - City's statutory duties are independent of and exceed its constitutional obligation to provide due process
  - "The absence of pre-termination procedures in the statute cannot be read as preempting an employer's duty to bargain."



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## CSL §71-73 Chronology

| | | |
|---|---|---|
| Village of Pelham (§ 73) | 1980 | DP requires post-termination hearing when facts in dispute |
| Town of Brookville (§ 71) | 1983 | Any legitimate uncertainty of mandate defaults to mandatory |
| Prue v City of Syracuse (§ 73) | 1991 | DP requires pretermination notice & opportunity to be heard |
| Greenburgh # 11 UFSD (§ 71) | 1992 | § 71 does not mandate termination or specify procedures |
| Hurwitz v. NYS Dept SS (§ 73) | 1993 | DP pretermination permits evidence on duration and fitness |
| Allen v Howe (§ 71) | 1994 | §§ 71/73 – balance between state and employee interests |
| Town of Cortlandt (§ 71) | 1997 | Procedure for termination is not preempted by the statute |
| Town of Wallkill (§ 73) | 2011 | Applies Cortlandt to § 73 cases; no preemption re: procedures |
| City of New Rochelle (§ 72) | 2014 | LOA and termination procedures are mandatory subjects |
| City of Long Beach (§ 71) | 2017 | DP requirements are independent of obligation to bargain, the parties maintain a duty to satisfy both |



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## CVL § 75(1) Removal and other Disciplinary Action

- **1. Removal and other disciplinary action.**
  - A person described [below]
    - **Shall not be removed or otherwise subjected to any disciplinary penalty**
    - Except for
      - Incompetency or
      - Misconduct
      - Shown
        - After a hearing
        - Upon stated charges
        - Pursuant to this section



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## CVL § 75(2) Removal and other Disciplinary Action

- 2. **Procedure.**
  - An employee
    - who at the time of questioning
    - appears to be a
      - potential subject
      - of disciplinary action
    - shall
      - have
        - a right to representation by
        - his or her certified or recognized employee organization under article fourteen of this chapter and
      - be notified
        - in advance,
        - in writing,
        - of such right.



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## CVL § 76(4) Appeals from Determinations in Disciplinary Proceedings

4. Nothing contained in section seventy-five or seventy-six of this chapter
- shall be construed to repeal or modify any
  - general,
  - special or
  - local law or
  - charter provision relating to the removal or suspension of officers or employees in the competitive class of the civil service of the state or any civil division.
- Such sections may be
  - supplemented,
  - modified or
  - replaced
- by agreements negotiated between
  - the state and
  - an employee organization
  - pursuant to article fourteen of this chapter.



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## Taylor Law & CVL §§ 75 & 76 Removal and other Disciplinary Action and Appeals

***Antinore v. State of NY*** – 8 PERB ¶ 7501, 79 Misc2d 8 (1974), *revd* 8 PERB ¶ 7513, 49 AD3d 6 (1975), *affd* 9 PERB ¶ 7528, 40 NY2d 921 (1976).

- *NY Supreme Court (Monroe Co)* held that agreement between the State and employee organization as to disciplinary procedures for unit employees, absent waiver by individual, cannot replace Civil Service Law disciplinary procedures applicable to State employees or his constitutional right to due process and equal protection of laws.
- *Appellate Div (4th Dept)*, *revd*, held that the provision of an agreement as to disciplinary procedures are valid and constitutional to the extent they permit §§ 75 & 76 to be replaced as the sole disciplinary procedure.



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## Taylor Law & CVL §§ 75 & 76 Removal and other Disciplinary Action and Appeals

***City of Auburn*** – 10 PERB ¶ 3045 (1977), *revd* 11 PERB ¶ 7016, 91 Misc2d 909 (1977), *affd* 11 PERB ¶ 7003, 62 AD2d 12 (1978), *affd*, 12 PERB ¶7006, 46 NY2d 1034 (1979).

IP case: City filed § 209-a.2(b) against PBA for discipline proposals

- *PERB:* Held: §§ 75 & 76 may be supplemented, modified or replaced by agreements negotiated by NYS and its employee organizations
  - For all others public employers, §§ 75 & 76 are preemptive and the subject matter is not open to negotiation
- *NY Supreme Court (Albany Co)* held that PERB construction was unreasonable. § 76.4 does not clearly prohibit negotiations between a municipal employer and an employee organization regarding disciplinary procedures; discipline procedures not *per se* prohibited
- *Appellate Div (3rd Dept)* held that a public employer's power to bargain collectively, while broad, is not unlimited. An employer is free to negotiate any matter, but may do so only in the absence of a "plain and clear" prohibition in statute or controlling decision law or public policy; safeguards of §§ 75 & 76 can be waived by an employee without violating due process and equal protection.



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## Taylor Law & CVL §§ 75 & 76 Removal and other Disciplinary Action and Appeals

New York Attorney General's Opinion, 15 PERB ¶ 8003 (1981)

- Following the 1972 Amendments to § 76, we conclude that an agreement between a local government and an employee organization under the Taylor Law may include provisions on discipline and removal that supplement, modify or replace sections 75 and 76 of the Civil Service Law.
- An employee represented by such an employee organization would, through the employee organization's assent to the agreement, waive his rights under sections 75 and 76.
- It is logical that the holding in *Antinore* to the effect that an employee is bound by his union's agreement, should apply. We believe that this is what the Court decided in *Auburn*, when it cited *Antinore*.



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## § 209 Resolution of Disputes in the Course of Collective Negotiations - §209 and §209.4

4. On request
    - of either party or
    - upon its own motion, and
- in the event the board determines that
    - an impasse exists in collective negotiations between such employee organization and a public employer as to the conditions of employment of [affected employees],
- the board shall render assistance as follows:
    - (c) (i) upon petition of either party, the board shall refer the dispute to a public arbitration panel as ...provided:
    - (e)- (g) [for specified law enforcement]…shall only apply to the terms of collective bargaining agreements directly relating to compensation. .. , and shall not apply to non-compensatory issues…including disciplinary procedures, …



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## Taylor Law & CSL §§ 75 & 76 Removal and other Disciplinary Action

***PBA of the City of New York (NYCPBA)(sometimes Orangetown)*** 35 PERB ¶ 3034 (2002), *affd* 36 PERB ¶ 7014 (2003), *affd* 37 PERB ¶ 7012, 13 AD3d 879 (2004), *affd*, 39 PERB ¶ 7006, 6 NY3d 563 (2006).

*DR-072, -100, -101*: whether PO discipline contained in expired CBA is mandatorily negotiable (§ 76.4)

- *PERB:* Here, police discipline is subject of special laws that leave discipline of police to the discretion of the Police Commissioner; discipline is prohibited subject
- *NY Supreme Court (Albany Co)*: *affd* PERB; discipline and internal investigations were prohibited subjects of bargaining that are reserved to the Commissioner
- *Appellate Division (3rd Dept)*: *affd* trial court; the City charter evinced a clear legislative intent to vest the Commissioner with broad authority over police discipline
- *NY Court of Appeals: affd*, discipline may not be subject of bargaining when legislation has expressly committed authority to local officials; declared invalid a provision in parties expired CBA relating to police discipline



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## Taylor Law & CSL §§ 75 & 76 Removal and other Disciplinary Action and Appeals

***State of NY (Div State Police),*** 37 PERB ¶ 6601 (2004), *revd* 38 PERB ¶ 3007 (2005), *affd* 39 PERB 7013 (2006).

*DR-112*: whether proposals that reflect department policies that predate §§ 75 & 76 are mandatorily negotiable

- *ALJ:* mandatory, Executive Law § 215 does not remove discipline from negotiations
- *PERB:* *revd*, Superintendent possessed sole authority that predated §§ 75 & 76; proposal is prohibited; prior negotiation not act to change the nonmandatory nature
- *NY Supreme Court (Albany Co)*: *affd* PERB; previous negotiations regarding discipline not establish discipline as permissible



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## Taylor Law & CSL §§ 75 & 76 Removal and other Disciplinary Action and Appeals

***State of NY (Div of Police)*** 39 PERB ¶ 3023 (2006), *annulled* 40 PERB ¶ 7003 (2007), *pet dismissed,* 41 PERB ¶ 7503, 43 NY3d 125 (2008), *affd* 41 PERB ¶ 7511, 11 NY3d 96 (2008).

*IP*: whether NYS's denial of representative during critical incident review constituted a unilateral change in violation of § 209-a.1(d); under CSL §75, was change a mandatory subject of bargaining?

- *PERB: affd* ALJ, based on *NYCPBA*, unilateral change deals with a prohibited subject
- *NY Supreme Court (Albany Co)*: PBA petition to annul granted; process leading up to decision of discipline is not discipline, Executive Law not address investigations; proposal is mandatory subject
- *Appellate Division (3rd Dept)*: dismissed on other grounds (standing)
- *NY Court of Appeals*: *affd (presumed standing), pet dismissed;* parties' negotiated right to representation for administrative interrogations essentially waived representation rights during critical incident reviews



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## Taylor Law & CSL §§ 75 & 76 Removal and other Disciplinary Action and Appeals

***City of New York*** 40 PERB ¶ 6601 (2007), *affd* 40 PERB ¶ 3017 (2007), *pet to annul dismissed* 41 PERB ¶ 7001, 24 Misc3d 1240(A) (2008), *dismissed as moot*, 41 PERB ¶ 7004, 54 AD3d 480 (2008), *lv for appeal denied*, 42 PERB ¶ 7001, 12 NY3d 701 (2009).

*DR-119*: whether safety proposal related to staffing and premium pay proposal for lack of right to negotiate discipline were mandatory

- *ALJ:* staffing was non-mandatory, premium pay was mandatory since essence of demand was compensation
- *PERB: affd*, rejected *Cohoes* conversion theory; did not transform non-mandatory subjects outside expired CBA into mandatory subjects; essential nature of premium pay is compensation
- *NY Supreme Court (Albany Co)*: *affd*, premium pay proposal held mandatory, PERB's finding not unreasonable; petition to annul PERB's finding on premium pay dismissed
- *Appellate Division (3rd Dept)*: dismissed as moot (pending appeal, arbitration panel issued award)



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## Taylor Law & CSL §§ 75 & 76 Removal and other Disciplinary Action and Appeals

***Village of Tarrytown*** 40 PERB ¶ 4540 (2007 ), *affd* 40 PERB ¶ 3024 (2007).

*IP/209*: whether PBA violated § 209-a.2(b) by including PBA's "Bill of Rights" for police disciplinary procedures and procedures to investigate police misconduct that lead to discipline in interest arbitration petition

- *ALJ:* proposal prohibited, based on *NYCPBA*
- *PERB: affd*, PBA's claim that *NYCPBA* distinguished between police disciplinary proposals and procedures related to investigation rejected; proposal prohibited



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## Taylor Law & CSL §§ 75 & 76 Removal and other Disciplinary Action and Appeals

***Town of Wallkill*** 42 PERB ¶ 3017 (2009), *pet dismissed* 43 PERB ¶ 7005 (2010), *revd* 44 PERB ¶ 7506, 84 AD3d 968 (2011), *affd* 45 PERB ¶ 7508, 19 NY3d 1066 (2012).

*IP/209*: alleged violation of §209-a.1(d) when Town unilaterally implemented changes to Town Code that changed discipline procedures from expired CBA provisions to § 75; Town petitioned for judgment declaring, as valid, modifications to local law that predated §§ 75 & 76

- *PERB:* unilateral action violated § 209-a.1(d)
- *NY Supreme Court (Albany Co)*: *pet dismissed*, declared local law invalid to the degree inconsistent with CBA (*Auburn*)
- *Appellate Division (2nd Dept)*: *revd*, PO discipline is prohibited, based on *NYCPBA*
- *NY Court of Appeals: affd,* preexisting law vested PO disciplinary authority with Town Board; is a prohibited subject



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## Taylor Law & CSL §§ 75 & 76 Removal and other Disciplinary Action and Appeals

***City of Middletown*** 42 PERB ¶ 3022 (2009), *revd* 43 PERB ¶ 7002 (2010)

*IP/209*: did PBA interest arbitration proposal that included "Bill of Rights" and police discipline policy that included veterans and volunteer firefighter POs violate § 209-a.2(b)?

- *PERB:* proposal not prohibited for veterans and volunteer firefighters, no violation
- *NY Supreme Court (Albany Co)*: *revd*, it was error to exclude veterans and volunteer firefighter police officers from the general population; the City charter specifically vested local officers with discretion regarding discipline; proposal seeking bargaining over discipline affecting veterans and volunteer firefighters POs is prohibited
- Accord PERB no deference where it analyzes the relative weight to be given to competing policies



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## Taylor Law & CSL §§ 75 & 76 Removal and other Disciplinary Action and Appeals

***City of Schenectady*** 46 PERB ¶ 3025 (2013), *pet to annul dismissed* 47 PERB ¶ 7004 (2014), *affd* 49 PERB ¶ 7002, 136 AD3d 1086 (2016).

*IP*: alleged violation of §209-a.1(d) when Town unilaterally announced it would no longer apply the discipline procedures from expired CBA provisions and instead revert to § 75

- *PERB:* *affd* ALJ, held violation, preemption not clear
- *NY Supreme Court (Albany Co)*: *pet dismissed,* authority under Taylor Law superseded unilateral authority in SCCL
- *Appellate Division (2nd Dept)*: *affd*, no right to revert to SCCL what predates Taylor Law; SCCL not clear preemption



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## § 209 Resolution of Disputes in the Course of Collective Negotiations - §209 and §209.4

4. On request
   - of either party or
   - upon its own motion, and
- in the event the board determines that
   - an impasse exists in collective negotiations between such employee organization and a public employer as to the conditions of employment of [affected employees],
- the board shall render assistance as follows:
   - **(c) (i) upon petition of either party, the board shall refer the dispute to a public arbitration panel as ...provided:**
   - (e)- (g) [for specified law enforcement]…shall only apply to the terms of collective bargaining agreements directly relating to compensation. .. , and shall not apply to non-compensatory issues…including disciplinary procedures, …



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## § 209 Resolution of Disputes in the Course of Collective Negotiations -§ 209.4(c)

*City of Batavia*, 17 PERB ¶ 3007 (1984)

Employer filed petition for interest arbitration after the CBA expired; Union filed IP

- *Issue:* did Employer violate Triborough Amendment by filing the petition
- *Held:* § 209-a.1(e) does not make the filing of a petition an improper practice. The problem would arise only when an employer actually altered terms of an expired agreement



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## § 209 Resolution of Disputes in the Course of Collective Negotiations

*City of Kingston*, 18 PERB ¶ 8002 (1985)

- City filed petition for interest arbitration and Director of Conciliation determined that interest arbitration process should go forward, despite obligation to maintain status quo
  - *Held*: participation in the panel selection process will not be deemed a waiver of the labor organization's right to challenge filing of a petition in an improper practice charge

*City of Kingston*, 18 PERB ¶ 3036 (1985)

- Union filed IP alleging City committed an improper practice by filing the petition for interest arbitration
  - *Held*: City did not commit an improper practice by the mere filing of the petition
  - Under § 209-a.1(e), status quo could not be changed except by negotiated agreement
  - The Board declined to process the petition, as futile.



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## § 209 Resolution of Disputes in the Course of Collective Negotiations

*City of Yonkers*, 46 PERB ¶ 3027 (2013)

City filed a petition for interest arbitration; Director of Conciliation declined to process

- *Held:* Board declined to depart from its decades-long holding in *City of Kingston*, that an employer lacks an independent right to initiate interest arbitration without the employee organization' s consent.
- PERB noted that even with the 2013 amendments to §209 of the Act, the employer still has a statutory obligation to maintain the status quo and cannot make use of the newly enacted alternative arbitration procedure without the consent of the employee organization.



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## § 209 Resolution of Disputes in the Course of Collective Negotiations

*City of Ithaca (Ithaca I) 48 PERB ¶ 4568 (2015), affd 49 PERB ¶ 3030 (2016)*

*IP case* - The parties commenced negotiations in early 2012 for the CBA that expired 12/31/2011; the PBA declared impasse in July 2013 and opposed the City's interest arbitration petition filed in 2014, insisting on the § 209-a.1(e) status quo; in 2015 City filed § 209-a.2(b), claiming that PBA waived its right to negotiate for 2012-2013 when it refused consent

- *Held:* ALJ found no evidence of clear, unmistakable and unambiguous waiver by the PBA; no bad faith bargaining
- *Held:* Board affirmed the ALJ's finding of no waiver; no basis to find that either party failed to bargain in good faith, instead they exhausted the conciliation procedures; City had satisfied its duty to negotiate during the period following PBA's declaration of impasse.



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## § 209 Resolution of Disputes in the Course of Collective Negotiations

***City of Ithaca (Ithaca II) 50 PERB ¶ 3006 (2017)***

*Petition:* Director of Conciliation declined to process the PBA petition for interest arbitration for 2012-2013, based on the Board's decision in Ithaca I that the City satisfied its duty to negotiate in good faith for the for the duration of an award

- *Held:* Board reversed the Director, distinguished between questions of arbitrability (per § 205.6 pf the Rules) and questions of eligibility (related to procedural and substantive issues); remanded to the Director
  - Instant dispute is one of arbitrability, not eligibility because objections to arbitrability are directed at whether the subject matter of the dispute sought to be submitted to compulsory arbitration fall within the scope of interest arbitration
  - Arbitrability goes to the character of the dispute (what proposals may be submitted); eligibility goes to the character of the parties (who may petition for interest arbitration), reaffirming *Rensselaer*.



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## § 209 Resolution of Disputes in the Course of Collective Negotiations

***City of Ithaca (Ithaca III) 51 PERB ¶ 4503 (2018), affd 51 PERB ¶ 3020 (2018)***

*IP:* City filed IP alleging PBA violated § 209-a.2(b) when it submitted in 2016 a petition for interest arbitration for the 2012-2013 period after the Board found duty satisfaction by City

- *Held*: Board's refusal to process the interest arbitration petition pursuant to Kingston had the effect of denying finality to either the employer or employee organization, and does so in contravention of the statutory language."
- The Kingston Board erred in assuming that interest arbitration would be "futile" where the employee organization asserted its Triborough Amendment rights. The Kingston Board failed to recognize that processing an interest arbitration petition under circumstances such as those presented here could substantially advance the policies of the Act, even if the result would inevitably be an award confirming the status quo. It would, at a minimum, punctuate the end of negotiations and establish the status quo for the duration of the award. This avoids the delay that has left the parties caught up in procedural brinkmanship years after the declaration of impasse.



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## § 209 Resolution of Disputes in the Course of Collective Negotiations

*Village of Saranac Lake*, 51 PERB ¶ 3034 (2018)

*IP/209.4* Village filed a petition for interest arbitration for period and PBA declined; Director of Conciliation declined to process

- *Held:* Parties exhausted all available options regarding negotiation and were no longer required to negotiate over matters covered by the status quo, relying on *Ithaca III*; PBA violated Sec 209-a.2(b)

- From *Ithaca III*: "The policies underlying § 209.4 of the Act are best served by treating the status quo right as a shield, and not allowing it to be deployed as a sword to reopen the negotiations for which interest arbitration and its resultant finality was avoided."



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# Q&A



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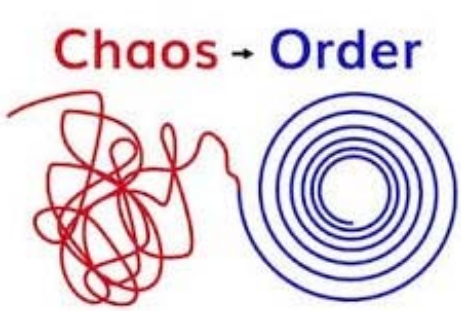




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# 2019 NEW YORK STATE BAR ASSOCIATION FALL MEETING

# NEGOTIATING STATUTORY PROCEDURES IN THE PUBLIC SECTOR

**September 20, 2019**

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[1] We would like to extend our appreciation to Lamb & Barnosky, LLP Law Clerk Leighann George, for her assistance in preparing this outline.

# I. NEGOTIABILITY OF STATUTORY PROCEDURES

## A. Background

1) PERB case law initially held that proposals seeking to incorporate statutory language into collective bargaining agreements were nonmandatory subjects of bargaining. *See e.g.*, *Chateaugay Cent. Sch. Dist.*, 12 PERB ¶ 3015 (1979); *City of New Rochelle*, 8 PERB ¶ 3071 (1975).

2) However, in *City of Cohoes*, PERB reversed this precedent, finding it "lacking in persuasive rationale." *City of Cohoes*, 31 PERB ¶ 3020 (1998), *confirmed*, 32 PERB ¶ 7026 (Sup. Ct., Albany Co.), *aff'd*, 276 A.D.2d 184, 33 PERB ¶ 7019 (3d Dep't 2000), *lv. denied*, 96 N.Y.2d 711, 34 PERB ¶ 7018 (2001).

3) PERB held that where "the bargaining proposal duplicates in whole or part the language of a statute [it] is not, by itself, reason to treat the proposal as a nonmandatory subject of negotiation." *City of Cohoes*, 31 PERB ¶ 3020 (1998). However, PERB left open the possibility that "the nature of the statutory provision sought to be incorporated into a contract or award might raise policy considerations significant enough to render a specific reiteration proposal nonmandatory or prohibited." *Id.*; *see also Town of Blooming Grove*, 51 PERB ¶ 3028 and 51 PERB ¶ 3029 (2018) (a proposal stating that General Municipal Law § 207-c benefits would not be included as taxable wages does not raise policy considerations about

tax expertise to be a prohibited subject); *see also Village of Washingtonville*, 43 PERB ¶ 4586 (2010) (a proposal reiterating union members' rights to be free from discrimination on the basis of union membership "is precisely such a policy consideration that would distinguish the proposed non-discrimination clause from other reiterations of statutory rights found to be mandatory in nature" because PERB has exclusive jurisdiction over claims of discrimination on the basis of union activities).

## II. GENERAL MUNICIPAL LAW (GML) §§ 207-A AND 207-C

### A. Background

1) General Municipal Law § 207-a: provides for the payment of the full regular salary or wages, medical and hospital expenses of paid firefighters injured in the performance of their duties.

    a) Paid Firefighters are defined as "any paid officer or member of an organized fire company or fire department of a city of less than one million population, or town, village or fire district…" *See* N.Y. GEN. MUN. LAW § 207-a(1).

2) General Municipal Law § 207-c: a parallel provision, provides the same benefits for police officers.

    a) The term "police officer" is defined broadly in the statute and includes, among other positions, any sheriff, undersheriff, deputy sheriff or corrections officer of the sheriff's department of any

county or any member of a police force of any county, city of less than one million population, town or village, any LIRR police officer, or any investigator or detective-investigator who is a police officer pursuant to the provisions of criminal procedure law. *See* N.Y. GEN. MUN. LAW § 207-c(1).

3) Benefits provided pursuant to these statutes: Firefighters and police officers are to be paid by the municipality "the full amount of [their] regular salary or wages," and "all medical treatment and hospital care furnished during [the] disability." *See* N.Y. GEN. MUN. LAW §§ 207-a(1), 207-c(1).

   a) If a firefighter is receiving benefits pursuant to General Municipal Law § 207-a(1) and receives an accidental disability retirement allowance pursuant to the Retirement and Social Security Law or retirement for line of duty disability, the § 207-a(1) benefits cease; however, he/she may be entitled to the difference between the amount of the allowance and the regular salary and wages until the mandatory retirement age is achieved. N.Y. GEN. MUN. LAW §§ 207-a(2), 207-a(4-a).

   b) Regular salary or wages defining accidental disability retirement allowance to be paid to disabled firefighter, includes salary increases paid to active firefighters that are negotiated after award

of disability allowance. *See Matter of Mashnouk v. Miles*, 15 PERB ¶ 7507, 55 N.Y.2d 80 (1982).

c) "Regular salary or wages" includes salary decreases applied to active firefighters following disability retirement allowance or pension award. *Whitted v. City of Newburgh*, 126 A.D.3d 910, 5 N.Y.S.3d 510 (2d Dep't 2015).

4) Statutory Medical Examinations: Pursuant to both statutes, the employer is entitled to have the employee examined and treated by a doctor selected by the employer and has the right to order an employee whose disability is not so severe as to permit retirement to report for light duty. *See* N.Y. GEN. MUN. LAW §§ 207-a(1), 207-c(1).

5) An employee receives benefits until any one of the following events occur:

a) the disability ceases; N.Y. GEN. MUN. LAW §§ 207-a(1), 207-c(1).

b) the employee retires pursuant to any applicable provision including reaching the statutory mandated retirement age; N.Y. GEN. MUN. LAW §§ 207-a(2), 207-a(4), 207-c(2), 207-c(5).

c) the employee refuses reasonable medical treatment or medical inspections; N.Y. GEN. MUN. LAW §§ 207-a(2), 207-c(2); *see also Kauffman v. Dolce*, 216 A.D.2d 298, 627 N.Y.S.2d 750, (2d Dep't 1995).

d) the employee refuses to perform light duty work after having been found able to do so; *See* N.Y. GEN. MUN. LAW §§ 207-a(3), 207-c(3); or

e) the employee engages in outside employment. *See* N.Y. GEN. MUN. LAW §§ 207-a(6) (firefighters only); *see Faliveno v. City of Gloversville*, 228 A.D.2d 19, 653 N.Y.S.2d 202 (3d Dep't 1997) (firefighter forfeited rights to § 207-a benefits by engaging in the operation of rental properties that he owned).

**B. <u>The Duty to Bargain</u>:**

1) <u>Initial Eligibility Determination</u>: An employer's authority to make initial determinations through its "right to conduct [employees'] medical examinations, prescribe treatment and order them back to work" is not a mandatory subject of collective bargaining. *See City of Schenectady,* 25 PERB ¶ 3022 (*3d Dep't* 1992), *aff'd, Schenectady Police Benevolent Ass'n v. New York State Pub Empl. Relations Bd.,* 85 N.Y.2d 480, 28 PERB ¶ 7006 (1995); *City of Watertown v. PERB,* 95 N.Y.2d 73, 711 N.Y.S.2d 99, 33 PERB ¶ 7007 (2000).

2) <u>Medical Examinations</u>: An employer has the unilateral authority to require a waiver for the release of the employee's medical records that are relevant to the injury. *City of Schenectady, Supra.* However, procedures for medical examinations that affect an employee's eligibility for, or receipt of, benefits (including the ability to record medical examinations

performed by employer doctors) are a mandatory subject of bargaining. *See Town of Orangetown*, 40 PERB ¶ 3008, *confirmed*, 40 PERB ¶ 7008 (Sup. Ct., Albany Co. 2007).

3) Challenging Initial Eligibility Determinations: While employers are not required to bargain over the initial determination, employers are required to bargain over the procedures that employees use to challenge the initial determination. *See City of Watertown v. PERB*, 33 PERB ¶ 7007, 95 N.Y.2d 73 (2000) (stating that, because the statutes are silent regarding the procedures for contesting an initial determination, "the strong and sweeping presumption in favor of bargaining applies").

    a) A demand for a *de novo* review of the initial eligibility determination is a non-mandatory subject of bargaining. *City of Poughkeepsie*, 33 PERB ¶ 3029 (2000) (a proposal for a procedure contesting an initial determination was mandatorily negotiable, but seeking a *de novo* standard of review was not mandatorily negotiable).

4) Refusal of Medical Examinations or Treatment: If an employee refuses to undergo a medical examination or treatment, he/she will be deemed to have waived his/her rights to receive continued benefits. *DiPaolo v. County of Schenectady*, 85 N.Y.2d 527 (1995). However, a waiver will be found only when the directive is reasonable. *Cf. Kaufman v. Dolce*, 216

A.D.2d 298 (2d Dep't 1995) (refusal to undergo surgery not unreasonable in light of previously unsuccessful surgery and treatment).

a) The procedure utilized to challenge a directive to undergo medical treatment is negotiable. *City of Watertown v. PERB*, 33 PERB ¶ 7007, 95 N.Y.2d 73 (2000) (stating that, if a municipality "orders an officer to undergo surgery (as is its right), the officer may wish to have the opinion of a personal physician considered, pursuant to a negotiated procedure, before submitting to the knife").

b) Similar to a challenge to an initial determination, the procedure to challenge a directive to undergo medical treatment is negotiable. *Id.*

5) Light Duty: If a physician finds that an employee is unable to perform regular duties, but is able to perform specified light duties, and refuses to do so, the benefits will cease and the employee must report for light duty. *See* GEN. MUN. LAW §§ 207-a(3), 207-c(3). While employers are not required to bargain over the determination to order an employee to work light duty, employers are required to bargain over the procedures that employees use to challenge these initial directives. *See City of Watertown v. PERB*, 95 N.Y.2d 73 (N.Y. 2000) (General Municipal Law § 207-c does not remove the procedures for contesting those initial determinations from the strong and sweeping presumption in favor of mandatory bargaining).

6) Termination of Benefits: Procedures used by an employer to determine whether to terminate Gen. Mun. Law §§ 207-a and 207-c benefits are mandatorily negotiable. *City of Syracuse v. Pub. Employment Relations Bd.*, 279 A.D.2d 98, 719 N.Y.S.2d 401 (4th Dep't 2000) (the city could not unilaterally implement hearing process to make determinations). The procedure to be used to challenge an employer's decision to terminate benefits is likewise mandatorily negotiable. *Id.*

7) Some Related Negotiable Issues Include:

   a) The deadline to file the appeal; *see City of Middletown Police Benevolent Association*, 42 PERB ¶ 3022 (2009) (the proposed 15-day time limitation for making the initial determination and filing an appeal of the determination was mandatorily negotiable).

   b) Procedure to request the appeal of the initial determination; *Town of Southampton*, 43 PERB ¶ 4547 (2010) (the procedure to request an appeal to the medical review board was mandatory).

   c) Who decides the appeal; *County of Chemung and Chemung County Sheriff*, 44 PERB ¶ 3026 (2011) (a procedure that allowed employees to request a hearing held by a rotating list of four potential hearing officers was mandatory); *Town of Southampton*, 43 PERB ¶ 4547 (2010) (the proposal for a medical review board to hear appeals of initial determinations, as well as the appointment

of a neutral third doctor in the event physicians are not able to agree, was mandatorily negotiable).

d) Standard of Review; *see City of Rye*, 46 PERB ¶ 4520 (2013) (the standard of review intended by the proposal was not a prohibited *de novo* standard); *Town of East Hampton*, 42 PERB ¶ 4534 (2009) (a proposal clarifying the standard of review was permissible).

e) Type of evidence to be considered by the decision-maker; *City of Middletown Police Benevolent Association*, 42 PERB ¶ 3022 (2009) (a procedure to request reconsideration of the initial determination through submission of additional information was mandatory); *Town of Southampton*, 43 PERB ¶ 4547 (2010) (finding the entire proposal for appealing initial determinations to be mandatorily negotiable; included a proposal about type of evidence to be considered by the neutral doctor).

f) Who pays the decision-maker's fees; *see County of Chemung and Chemung County Sheriff*, 44 PERB ¶ 3026 (2011) (proposal which contained this language was mandatory).

g) Transcript issues (*e.g.*, whether a hearing transcript is required; who pays the costs; *etc.*); *see County of Chemung and Chemung County Sheriff*, 44 PERB ¶ 3026 (2011) (proposed procedure

containing language that the parties would split the transcript costs found to be mandatorily negotiable).

h) Whether the decision is binding on the parties; *County of Chemung and Chemung County Sheriff*, 44 PERB ¶ 3026 (2011) (finding the entire proposal for 207-c hearing procedures mandatorily negotiable which stated that the decision was final and binding).

i) The procedure to appeal the final decision; *County of Chemung and Chemung County Sheriff*, 44 PERB ¶ 3026 (2011) (proposal that the hearing officer's decision only be reviewable pursuant to C.P.L.R. Article 78); *Town of Southampton*, 43 PERB ¶ 4547 (2010) (proposal that the neutral doctor's decision only be subject to review in a court or other forum of competent jurisdiction was mandatory).

8) Miscellaneous Issues

a) Taxation of Benefits*:* Whether to withhold federal income tax from § 207-c benefits is a mandatory subject of negotiations. *Westchester Cty. Corr. Officers*, 33 PERB ¶ 3025, *aff'd sub nom.*, *Cty. of Westchester v. PERB*, 33 PERB ¶ 7016 (Albany Co. 2000), *aff'd*, 278 A.D.2d 414, 33 PERB ¶ 7507 (2d Dep't 2000).

b) Employee Eligibility Status: The employer's right to recover benefits improperly paid to an employee is not a mandatory subject of collective bargaining. *Cty. of Westchester v. Westchester Cty.*

*Correction Officers Benevolent Ass'n, Inc*., 717 N.Y.S.2d 651 (2d Dep't 2000) (permitting the city to commence an action for improperly paid benefits even though the collective bargaining agreement was silent on the issue). A proposal for the continuation of benefits pending an appeal pursuant to a proposed GML § 207-c light duty assignment, however, is mandatorily negotiable. *Baldwinsville Police Benevolent Ass'n*, 44 PERB ¶ 3031 (2011) (the proposal sought a "contractual codification of a unit member's constitutionally protected property right of continued receipt of GML § 207-c benefits after contesting a light duty assignment through the submission of contrary medical evidence").

c) Cohoes Conversion Theory of Negotiability: Matters that are non-mandatory in nature may become mandatorily negotiable subjects of bargaining when the collective bargaining agreement covers them. *City of Schenectady*, 34 PERB ¶ 4505 (2001).

## III. CIVIL SERVICE LAW § 75

### A. Background

1) Civil Service Law § 75 states that covered employees may be disciplined or removed from their position only upon a finding of "incompetency or misconduct shown after a hearing upon stated charges." *See* N.Y. CIV. SERV. LAW § 75(1).

2) The employer has the burden of proving that the employee is incompetent or has engaged in misconduct. N.Y. CIV. SERV. LAW § 75(2). This provision also provides employees with "Weingarten rights" (*i.e.*, representation) during questioning when the employee may be a potential subject of disciplinary action. *See id.* If employees are not provided with representation, the evidence obtained during the meeting with supervisors, or any evidence or information obtained as a result of the questioning, may be excluded from the hearing record. *See id*.

3) A hearing held pursuant to this statute must be held by the officer or body having the power to remove the person against whom the charges are preferred (*i.e.*; the appointing authority) or by a hearing officer designated by the appointing authority in writing for that purpose. *See id*. The hearing officer is vested with all of the powers of the officer or body with removal power and must make a record of the hearing, which is referred to the officer or body for review and decision. *See id.*

4) Employees covered by Civil Service Law § 75 must receive written notice of the charges and specifications. Employees are given eight days to reply to the charges. *See id.* They also have the right to be represented at the hearing and to call witnesses. *See id.*; *see* N.Y. CIV. SERV. LAW § 209-a(1)(g).

5) Pending the *hearing and* determination of the § 75 hearing, an employee may be suspended without pay for a maximum of 30 calendar days (emphasis added). N.Y. CIV. SERV. LAW § 75(3).

6) If an employee is found guilty of one or more of the charges or specifications against them, the penalty or punishment may consist of a reprimand, a fine of up to $100, a suspension without pay for a period not exceeding 60 calendar days, a demotion in grade and/or title, or termination. *See id.* If the employee is found not guilty, the employee is entitled to full reimbursement of pay, less any unemployment insurance received, from the initial serving of the charges and specifications. *See id.*

**B. <u>Duty to Bargain</u>**

1) In general, discipline and discharge procedures are mandatory subjects of negotiation, absent legislative intent to the contrary. *See e.g., State of New York*, 37 PERB ¶ 6601 (2004), *citing City of Utica*, 31 PERB ¶ 3045 (1998).

2) The rights granted to employees in Civil Service Law §§ 75 and 76 (which relates to appeals of disciplinary actions pursuant to § 75) "may be supplemented, modified or replaced by agreements negotiated between the state and an employee organization pursuant to article fourteen of [the Civil Service Law]." N.Y. CIV. SERV. LAW § 76(4); *see also Antinore v. State*, 40 N.Y.2d 921, 358 N.E.2d 268 (N.Y. 1976) (affirming the 4th Dep't decision holding that negotiated provision for binding arbitration in

disciplinary proceedings was constitutional but does not require reading procedural safeguards into arbitration provisions); *Grippo v. Martin*, 257 A.D.2d 952, 686 N.Y.S.2d 118 (3d Dep't 1999) (holding that employees may, pursuant to the provisions of the collective bargaining agreement, waive rights granted pursuant to Civ. Serv. Law §§ 75, 76). *But see* part IV below regarding certain employers of police officers for whom bargaining is prohibited by local laws.

3) Alternate disciplinary procedures for employees who are entitled to the protections of § 75 are mandatory subjects of collective bargaining. *Auburn Police Local 195 v. Helsby*, 46 N.Y.2d 1034 (N.Y. 1979).

4) Issues that May Be Negotiated Include:

   a) Hearing Procedure

      i. The mechanism to appeal discipline (*e.g.*, a contract grievance; a hearing before an arbitrator; *etc.*); *City of Mount Vernon*, 31 PERB ¶ 4608, *aff'd*, 32 PERB ¶ 3030 (1999) (a proposal stating that written notice to appeal discipline must be filed with the Chief of Police within three days of a meeting to attempt to resolve disciplinary charges was mandatory).

      ii. Deadline to answer the charges; *Id.*

      iii. The scope of the decision-maker's authority; *see City of New Rochelle*, 13 PERB ¶ 3082 (1980) (a proposal

allowing the hearing officer to determine the employee's guilt or innocence and a penalty was mandatory);

iv. The standard of review; *City of Mount Vernon*, 31 PERB ¶ 4608, *aff'd*, 32 PERB ¶ 3030 (1999) (proposal containing a de novo standard of review based upon the evidence reviewed by the arbitrator at the hearing was mandatory).

v. Who pays decision-maker's fees; *see City of New Rochelle*, 13 PERB ¶ 3082 (1980) (proposal containing language splitting the fees of the hearing officer was mandatory); *City of Mount Vernon*, 31 PERB ¶ 4608, *aff'd*, 32 PERB ¶ 3030 (1999) (proposal containing language to split the fees of the arbitrator was mandatory).

vi. Transcript issues (*e.g.*, whether a transcript is required; who pays costs; *etc.*); *City of Mount Vernon*, 31 PERB ¶ 4608, *aff'd*, 32 PERB ¶ 3030 (1999) (stating that the cost of the arbitrator and necessary expenses of the hearings will be shared equally by the union and employer).

vii. Whether the decision is binding; *Incorporated Village of Malverne*, 42 PERB ¶ 4530 (2009) (proposal stating that the decision of the arbitrator for discipline in lieu of procedures pursuant to Section 75 of the Civil Service Law is binding was mandatory), *City of Mount Vernon*, 31

PERB ¶ 4608, *aff'd*, 32 PERB ¶ 3030 (1999) (proposal stating that the decision of the arbitrator is binding was mandatory).

## IV. POLICE DISCIPLINE

### A. Public Policy Conflicts

1) The existence of statutes governing police discipline that predate Civil Service Law § 75 can make police discipline a prohibited subject of bargaining. Cases involving these statutes generally hold that the policy favoring unilateral control over police disciplinary procedures prevails over the Taylor Law public policy to bargain over terms and conditions of employment, including employee discipline.

2) In *Patrolmen's Benevolent Association of the City of New York v. PERB*, the Court of Appeals held that, where a provision of law discloses a legislative intent to leave disciplinary authority to the employer, discipline is a prohibited subject of bargaining pursuant to public policy. *Patrolmen's Benevolent Association of the City of New York v. PERB*, 6 N.Y.3d 563, 815 N.Y.S.2d 1, 39 PERB ¶ 7006 (N.Y. 2006).

3) Statutes predating Civil Service Law § 75 are considered "special laws" because Civil Service Law § 76(4) states that, "[n]othing contained in section seventy-five or seventy-six of this chapter shall be construed to repeal or modify any general, special or local law or charter provision relating to the removal of suspension of officers or employees in the

competitive class of the civil service of the state or any civil division." N.Y. CIV. SERV. LAW § 76(4).

**B. <u>Examples of "Special Laws" Pursuant to which Discipline is a Prohibited Subject of Bargaining</u>**

1) Rockland County Police Act (L 1936, ch. 526) (applies to village police officers in Rockland County).

2) Westchester County Police Act (L 1936, ch. 104), N.Y. UNCON. LAWS § 5711-q (applies to village police officers in Westchester County).

3) Second Class Cities Law & Certain City Charters

   a) *City of Schenectady v. PERB*, 30 N.Y.3d 109, 64 N.Y.S.3d 644, 50 PERB ¶ 7006 (N.Y. 2017) (the Second Class Cities Law makes police disciplinary procedures a prohibited subject of bargaining).

   b) *Russo v. Burke*, 131 A.D.3d 969, 16 N.Y.S.3d 579 (2d Dep't 2015) (City of Mount Vernon's city charter provision relating to police discipline predated Civil Service Law §§ 75 and 76 and, thus, had control for matters concerning police disciplinary procedures).

4) City of New York. New York City Charter § 434 and Administrative Code of the City of New York § 14-115; *see also Patrolmen's Benevolent Association of the City of New York v. PERB*, 6 N.Y.3d 563, 815 N.Y.S.2d 1, 39 PERB ¶ 7006 (N.Y. 2006).

5) Town Law § 155 (with exceptions)

a) Local laws passed pursuant to Town Law § 155 will make police discipline a prohibited subject of bargaining. *Matter of Wallkill v. CSEA*, 19 N.Y.3d 1066 (N.Y. 2012); *see also Town of Goshen v. Town of Goshen Police Benevolent Ass'n*, 42 Misc. 3d 236, 976 N.Y.S.2d 342 (Orange Cty. Sup. Ct. 2013) (the Town's 2013 Local Law is a valid exercise of its authority to remove police discipline from the scope of the CBA), *aff'd, appeal dismissed sub nom., Town of Goshen v. Town of Goshen Police Benevolent Ass'n*, 142 A.D.3d 1092, 38 N.Y.S.3d 219 (2d Dep't 2016).

b) Note that the full implications of these decisions are uncertain. There is no reported case law stating whether the court's reasoning applies to other governmental subdivisions and there is an open question as to whether *Wallkill* applies to towns that have not passed similar laws. *See Town of Greece v. Uniformed Patrolmen's Ass'n of Greece Police Dep't*, 147 A.D.3d 1382, 48 N.Y.S.3d 560 (4th Dep't 2017) (town's newly-adopted disciplinary rules and regulations did not apply retroactively to disciplinary matter brought prior to their enactment). *Town of Harrison PBA v. Town of Harrison*, 69 A.D.3d 639, 892 N.Y.S.2d 495 (2d Dep't 2010) (grievances for failure to provide representation to police officers pursuant to Civ. Serv. Law § 75(2) were barred because

police discipline was governed by the Westchester County Police Act).

6) Village Law § 8-804

a) Village Law § 8-804 contains language mirroring Town Law § 155 with regard to disciplinary procedures. The predecessor of Village Law § 8-804 was Village Law § 188-f, which was enacted in 1924. *See* L. 1924 ch. 494; *see also Lewis v. Bd. of Trustees of Vill. of Canajoharie*, 13 A.D.2d 592, 593, 212 N.Y.S.2d 677, 678 (3d Dep't 1961) (noting that Village Law § 188-f and Town Law § 155 provide for similar punishments). As of the date of this presentation, there is no decision holding that procedures for police discipline in New York State villages subject to Village Law § 8-804 are a prohibited subject of bargaining. *But see Village of Tarrytown*, 40 PERB ¶ 3024 (2007) at n. 27 (stating Village Law § 8-804, enacted in 1972, is a general law that does not predate Civil Service Law §§ 75 and 76 and, therefore, does not render police discipline a prohibited subject of bargaining); *Incorporated Village of Malverne*, 42 PERB ¶ 4530 (2009) (discussing *Village of Tarrytown*).

7) Executive Law § 215 (New York State Police)

a) Discipline is a prohibited subject for New York State Police, even though Civil Service Law § 75 predated Executive Law § 215,

which provides in part, that members of the New York State Police can only be removed by the Superintendent of Police after a hearing. N.Y. EXEC. LAW § 215(3). This law also provides that the "superintendent will make rules and regulations subject to approval by the governor for the discipline and control of the New York State Police." *Id.*; *see also State of New York (Div. of State Police)*, 38 PERB ¶ 3007, *aff'd*, 39 PERB ¶ 7013 (2006).

b) One court, annulling PERB's decision that discipline was prohibited, has held that "the process leading up to the decision on whether or not to discipline, is not discipline" and is a mandatory subject of bargaining. *Police Benevolent Assn. of N.Y. State Troopers, Inc. v. New York State Pub. Empl. Relations Bd.*, 40 PERB ¶ 7003 (Sup Ct. Albany County 2007), *petition dismissed*, 41 PERB ¶ 7503, 43 A.D.3d 125, 840 N.Y.S. 2d 828 (3d Dep't 2008), *aff'd*, 41 PERB ¶ 7511, 11 N.Y.3d 96, 863 N.Y.S.2d 387 (2008).

## V. CIVIL SERVICE LAW §§ 71 AND 73

### A. Background

1) Civil Service Law § 71 allows a public employer to remove an employee from his/her position when the employee has been unable to perform the duties of the position for a cumulative year or more due to a work-related disability, or two years if the disability was caused by a work-related

assault. Within one year after the disability ends, the employee may apply to the appropriate municipal office for a medical examination so that he/she may be reinstated to his/her former position or a similar position if found to be fit to perform his/her job duties. N.Y. CIV. SERV. LAW § 71; *see also Jacobson v. N.Y. State Dep't of Labor*, 274 A.D.2d 809, 711 N.Y.S.2d 61 (3d Dep't 2000); *Allen v. Howe*, 84 N.Y.2d 665, 621 N.Y.S.2d 287 (1994).

2) Similarly, Civil Service Law § 73 enables a public employer to remove an employee who has been continuously absent from, and unable to perform the duties of, his or her position for a consecutive year or more by reason of a non-work-related disability. N.Y. CIV. SERV. LAW § 73. Within one year after the disability ends, the employee may apply to the appropriate municipal office for a medical examination so that he/she may be reinstated to his/her former position or a similar position if found to be fit to perform his/her job duties.

3) The separation of an employee pursuant to Civil Service Law § 71 or 73 does not result in a discontinuance of his/her benefits pursuant to General Municipal Law §§ 207-a or 207-c. *Stewart v. County of Albany*, 300 A.D.2d 984, 750 N.Y.S.2d 912 (3d Dep't 2002) (termination of employment pursuant to Civil Service Law § 71 does not involve termination of benefits pursuant to General Municipal Law § 207-c); *Connor v. Bowles*, 63 A.D.2d 956, 405 N.Y.S.2d 762 (2d Dep't 1978)

(General Municipal Law § 207-c benefits may only be discontinued pursuant to the statute).

4) A State employee who is terminated pursuant to Section 71 must be given pre-termination notice and an opportunity to be heard to contest the decision to be placed upon Section 71 leave. 4 N.Y.C.R.R. § 5.9. New York State Civil Service Regulations Section 5.9 requires that written notice be provided within 21 days of the employee's initial placement on a Section 71 leave of absence and at least 30 days before making the decision to terminate his/her employment. 4 N.Y.C.R.R. § 5.9. There is no similar regulation with regard to Section 73. *Id.*

5) Courts have reversed terminations pursuant to Section 71 due to the employer's failure to provide employees at least as extensive as those provided in the regulations. *See e.g., Cooke v. City of Long Beach,* 247 A.D.2d 538, 669 N.Y.S.2d 312 (2d Dep't 1998).

**B. <u>Duty to Bargain</u>**

1) The procedures for terminating an employee pursuant to Civil Service Law §§ 71 and 73, which permit, but do not require, an employer to terminate an employee after a one year leave of absence, are a mandatory subject of bargaining. *City of Long Beach,* 50 PERB ¶ 3036 (2017), *aff'd,* 51 PERB ¶ 7002 (N.Y. Sup. Ct.); *Town of Cortlandt,* 30 PERB ¶ 3031 (1997) (the employer was required to bargain prior to implementing a policy pursuant to Civil Service Law §§ 71 and 73), *confirmed sub nom.*

*Town of Cortlandt v. Public Empl. Relations Bd.*, 30 PERB ¶ 7012 (Sup. Ct. Westchester County 1997); *City of White Plains*, 49 PERB ¶ 4575 (2016) (a firefighters' union did not commit an improper practice when it refused to commence single-issue negotiations on Civil Service Law Section 71 and 73 procedures); *Town of Wallkill Police Benevolent Ass'n, Inc.*, 44 PERB ¶ 4529 (2011).

2) In *City of Long Beach*, the Board held that a unilaterally forced pre-termination procedure notifying an employee of a termination hearing was a mandatory subject of bargaining. 50 PERB ¶ 3036 (2017).

3) *But see matter of Enlarged City of Sch. Dist. Of Middletown N.Y. the Civil Serv. Empls. Assn., Inc.*, 148 A.D.3d 1146, 49 N.Y.S.3d 560 *(2nd Dep't 2017)* (upholding permanent stay of arbitration over employer's decision to separate employee pursuant to Civil Service Law § 71).

4) An analogy can be made to negotiable issues for General Municipal Law § 207-c procedures because there are no cases discussing these issues pursuant to Civil Service Law §§ 71 and 73:

    a) Procedure to Challenge the Employer's Decision to Terminate

        i. Deadline to Appeal; *Cf. City of Middletown Police Benevolent Association*, 42 PERB ¶ 3022 (2009) (deadline to appeal 207-c initial determinations).

        ii. Who Hears the Appeal; *Cf. Town of Southampton*, 43 PERB ¶ 4547 (2010) (proposal to establish medical review

board to hear appeals of 207-c determinations was mandatorily negotiable); *City of Rye*, 46 PERB ¶ 4520 (2013) (proposal that appeals be heard pursuant to a due process hearing before a hearing officer was mandatorily negotiable); *County of Chemung and Chemung County Sheriff*, 44 PERB ¶ 3026 (2011) (a procedure that allowed employees to request a hearing held by a rotating list of four potential hearing officers was mandatory).

iii. The type of evidence to be considered; *Cf. Town of Southampton*, 43 PERB ¶ 4547 (2010) (finding the entire proposal for appealing initial determinations to be mandatorily negotiable; included a proposal about type of evidence to be considered by the neutral doctor); *City of Middletown Police Benevolent Association*, 42 PERB ¶ 3022 (2009) (a procedure to request reconsideration of the initial determination through submission of additional information was mandatory).

iv. Standard of Review; *Cf. Town of East Hampton*, 42 PERB ¶ 4534 (2009) (a proposal clarifying the standard of review was permissible).

v. Whether the decision is binding; *Cf. County of Chemung and Chemung County Sheriff*, 44 PERB ¶ 3026 (2011)

(finding the entire proposal for 207-c hearing procedures mandatorily negotiable which stated that the decision was final and binding).

**THIS OUTLINE IS MEANT TO ASSIST IN GENERAL UNDERSTANDING OF THE CURRENT LAW. IT IS NOT TO BE REGARDED AS LEGAL ADVICE. INDIVIDUALS WITH PARTICULAR QUESTIONS SHOULD SEEK ADVICE OF COUNSEL.**

# GENERAL MUNICIPAL

# LAW SECTIONS

# 207-a & 207-c

# &

# THE TAYLOR LAW

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# CASE HISTORY

Prepared by PERB Administrative Law Judge
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&
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# PREFACE

The following document attempts to capture the chronological development of the relevant case history primarily associated with interest arbitration demands relating to Section 207-a & 207-c benefits. Excerpts from each case have been selected with certain language *italicized* for emphasis is hopes of lending clarity to the subject matter. Commentary is also presented via the insertion of footnotes in the text of certain cases (see Footnote Summary starting at pg. 28, *infra*).

**Statutory Interpretation**
**Applicable Standard of Review**

**City of Schenectady v PERB (Crt. of Appeals – March 28, 1995)**
**85 NY2d 480; 28 PERB ¶ 7005**

It is settled that the Taylor Law (Civil Service Law § 200 *et seq.)* generally requires bargaining between public employers and employees regarding terms and conditions of employment *(see, Matter of Board of Educ v New York State Pub Empl Relations Bd,* 75 NY2d 660, 667, quoting *Matter of Cohoes City School Dist v Cohoes Teachers Assn,* 40 NY2d 774, 778). The policy of such bargaining in this State is "strong" and "sweeping." Even that policy, however, is negated under special circumstances. It is unquestioned that the bargaining mandate may be circumscribed by "plain" and "clear" legislative intent or by statutory provisions indicating the Legislature's "inescapably implicit" design to do so *(Matter of Webster Cent School Dist v Pub Empl Relations Bd,* 75 NY2d 619, 627, *supra; see also, Matter of Board of Educ,* 75 NY2d 660, 667, 668, *supra).*

**Watertown v PERB (Crt of Appeals - May 9, 2000)**
**95 NY2d 73; 33 PERB ¶ 7007**

The Taylor Law (Civil Service Law § 200 *et seq.*) requires public employers to bargain in good faith concerning all terms and conditions of employment (*Matter of Schenectady Police Benev Assn v New York State Pub Empl Relations Bd,* 85 NY2d 480, 485, *supra; see also,* Civil Service Law §§ 202, 203, 204 [1]). As we have time and again underscored, the public policy of this State in favor of collective bargaining is "strong and sweeping" (*see, e.g., Matter of Board of Educ v New York State Pub Empl Relations Bd,* 75 NY2d 660, 667; *Matter of Cohoes City School Dist v Cohoes Teachers Assn,* 40 NY2d 774, 778). The presumption in favor of bargaining may be overcome only in "special circumstances" where the legislative intent to remove the issue from mandatory bargaining is "plain" and "clear" (*Matter of Schenectady Police Benev Assn v New York State Pub Empl Relations Bd, supra,* at 486), or where a specific statutory directive leaves "no room for negotiation" (*Matter of Board of Educ v New York State Pub Empl Relations Bd, supra,* at 667).

To be sure, where a statute clearly "forecloses negotiation" of a particular subject, that subject may be deemed a prohibited subject of bargaining (*see, Matter of Board of Educ v New York State Pub Empl Relations Bd, supra,* at 667; *see also, Matter of Cohoes City School Dist v Cohoes Teachers Assn, supra,* at 778 [school board's authority to make tenure decisions was a prohibited subject of negotiation]).

Generally, however, bargaining is mandatory even for a subject "treated by statute" unless the statute " 'clearly preempt[s] the entire subject matter' " or the demand to bargain " 'diminish[es] or merely restate[s] the statutory benefits' " (Lefkowitz, Osterman and Townley, Public Sector Labor and Employment Law, at 498 [2d ed 1998], quoting *Matter of City of Rochester [Rochester Police Locust Club],* 12 PERB ¶ 3010). Absent "clear evidence" that the Legislature intended otherwise, the presumption is that all terms and conditions of employment are subject to mandatory bargaining (*see,*

*of Educ v New York State Pub Empl Relations Bd, supra,* at 670).

**PERB's Role**

**City of Schenectady v PERB (Crt. of Appeals – March 28, 1995)**
***(supra)***

First, concerning the standard of review, we recognize that an administrative agency's determination requires deference in the area of its expertise *(see, Rosen v Pub Empl Relations Bd,* 72 NY2d 42, 47-48). Where, however, the matters at issue involve statutory interpretation, such deference is inapplicable *(id.; Matter of Webster Cent School Dist v Pub Empl Relations Bd,* 75 NY2d 619, 626). This case involves only statutory interpretation.

**Watertown v PERB (Crt of Appeals - May 9, 2000)**
***(supra)***

Because Section 207-c does not remove the review procedures from the scope of collective bargaining, bargaining is mandatory if the procedures qualify as a "term and condition" of employment. PERB, as the agency charged with interpreting the Civil Service Law, is "accorded deference in matters falling within its area of expertise" (*Matter of Board of Educ v New York State Pub Empl Relations Bd, supra,* 75 NY2d, at 666). Whether a dispute involves a "term and condition" of employment is generally committed to PERB's discretion, and we may not disturb PERB's determination unless the agency's ruling is irrational (*see, id.,* at 670-671).

Here, there is no basis to disturb PERB's determination that the grievance procedures are a term and condition of employment. PERB's finding fell well within the definition of terms and conditions adopted by this Court, in connection with the broad public policy favoring collective bargaining (*see, e.g., Matter of Newark Val Cent School Dist v Pub Empl Relations Bd,* 83 NY2d 315, 321-322 [issue of smoking ban on school buses subject to mandatory bargaining, because Public Health Law contained "no explicit or implied prohibition against smoking"]; *Matter of Board of Educ v New York State Pub Empl Relations Bd, supra,* 75 NY2d, at 670-671 [employee disclosure requirements held mandatory subject of negotiation]). Indeed, grievance and arbitration procedures have been "clearly recognized" as terms and conditions of employment subject to mandatory bargaining (Lefkowitz, Osterman and Townley, Public Sector Labor and Employment Law, *supra,* at 477).

**Dissenting Opinion ----------Rosenblatt, J**.

Normally, the scope of our review of matters within PERB's expertise, including the reach of mandatory bargaining, is limited (*see, Matter of Rosen v Pub Empl Relations Bd,* 72 NY2d 42, 47-48; *Matter of West Irondequoit Teachers Assn v Helsby,* 35 NY2d 46, 50-51). When the dispute, however, centers on whether a municipality's implementation of a statute was the subject of mandatory bargaining, this Court has declared the issue one

of statutory construction for a court's *de novo* review, warranting no special deference to PERB (*see, Matter of Schenectady Police Benev Assn v New York State Pub Empl Relations Bd,* 85 NY2d, at 485, *supra; Matter of Webster Cent School Dist v Pub Empl Relations Bd,* 75 NY2d 619, 626). This Court said as much in *Schenectady,* dealing with PERB's determination as to a municipality's implementation of General Municipal Law § 207-c (85 NY2d, at 485, *supra*).

**Poughkeepsie v PERB (Crt of Appeals March 28, 2006)**
**6 NY3d 514; 95 PERB ¶ 7005**

This appeal presents no question of statutory interpretation. Instead, the issue is whether PERB decided the City's improper practice charge based upon a reasonable reading of the Association's proposed contract language. PERB, as the agency charged with interpreting the Civil Service Law, is accorded deference in matters falling within its area of expertise, including the resolution of improper practice charges (*see Matter of County of Nassau [Nassau Community Coll] v New York State Pub Empl Relations Bd*, 76 NY2d 579, 585 [1990]). Because these matters are consigned to PERB's discretion, we may not disturb its determination unless irrational (*City of Watertown*, 95 NY2d at 81).

**GML § 207-a & c**
**Significant Holding**

**City of Schenectady v PERB (Crt. of Appeals – March 28, 1995)**
***(supra)***

The issue here is whether General Municipal Law § 207-c requires mandatory bargaining *before* a police officer who is injured in the line of duty or becomes ill during the performance of duty *can be forced to* (1) perform light duty, (2) undergo surgery at the direction of the City or (3) waive the confidentiality of medical records. Because the Appellate Division properly concluded that none of these matters is subject to mandatory bargaining, we affirm.

Turning to the specific issues before us, we hold that General Municipal Law § 207-c authorizes the City to require both light duty and, under the appropriate circumstances, even surgery, *where reasonable*.[1] As for light duty, General Municipal Law § 207-c (3) provides that where, in the opinion of a physician or health authority, a police officer is "unable to perform his regular duties as a result of ... injury or sickness but is able, in their opinion, to perform specified types of light police duty," the officer is entitled to receive salary and other benefits *only if that light duty is performed*. That the City ordered the officers to submit to light duty is consistent with the authority given in this provision.

The PBA claims that General Municipal Law § 207-c does not authorize surgery absent bargaining. However, General Municipal Law § 207-c (1) clearly provides otherwise. After stating that an officer who is injured in the performance of his duties or becomes ill in the performance of his duties is entitled to salary, wages and medical benefits, the statute provides that these benefits *may be withheld if the officer refuses to undergo surgery*. Regarding this claim, the statute provides, in part,

"Provided, however, and notwithstanding the foregoing provisions of this section, the municipal health authorities or any physician appointed for the purpose by the municipality, after a determination has first been made that such injury or sickness was incurred during, or resulted from, such performance of duty, may attend any such injured or sick policeman, from time to time, for the purpose of providing medical, *surgical* or other treatment" (emphasis supplied).

The section goes on to provide that anyone who refuses to accept "medical treatment or hospital care" waives the right to benefits under the section. Unquestionably the Legislature contemplated that municipalities would, *where appropriate and reasonable*, require police officers to submit to corrective surgery, or forfeit benefits under the statute. Although the waiver issue is not as clear, we determine that the Appellate Division reached the correct result by narrowing the City's waiver requirement to only those items necessary for the City's determination of the nature of the officer's medical problem and its relationship to his or her duties.[2]
*Finally, it should be clear that the procedures for implementation of the requirements of GML § 207-c are not before us. Those procedures may or may not be subject to bargaining*. For example, no reason has been shown here why officers *should not be permitted the opportunity to obtain and have considered the views of their personal*

*physicians as to surgery.*

**Prior History (in part)**

**Board Decision --- (April 30. 1992)**
**25 PERB ¶ 3022**

The City's third preemption theory raises an issue of legislative intent. The Legislature may, of course, exempt terms and conditions of employment from the scope of compulsory negotiations by sufficiently plain and clear evidence of that intent. Having reviewed GML § 207-c and the cases arising thereunder, we find sufficient evidence of that intent regarding *the City's imposition of a light duty assignment and its imposition of the requirement that employees submit to surgery as ordered by the City or forfeit GML § 207-c benefits.* In both of these respects, but not otherwise, *GML § 207-c by its terms defines both the employer's and employee's rights and obligations and it further specifies the consequences to the employee for noncompliance*. *Superimposed upon this statutory scheme in these respects is a judicially created system of due process hearing protections.*[3]

We express no opinion as to whether and to what extent *the procedural implementation of these two requirements might be mandatorily negotiable* because those questions are not raised in this case.

**DePoalo v County of Schenectady (Crt. of Appeals – May 2, 1995)**
**85 NY2d 527**

First, we conclude that the plain wording of General Municipal Law § 207-c authorizes the municipality to make a determination that the injury or illness was related to work performance.

We hold that General Municipal Law § 207-c authorizes a municipality to direct an applicant to undergo a medical examination to provide information upon which the municipality may make a determination that an injury or illness occurred in the performance of duty *prior to* the awarding of benefits. This conclusion results both from the plain wording of the statute and from the purpose of General Municipal Law § 207-c.

We therefore conclude that the language of General Municipal Law § 207-c clearly authorizes such municipalities to require an independent medical examination *prior to* a determination of eligibility for receipt of benefits under the statute.

The Appellate Division, in a single order, reversed in each proceeding and dismissed the respective petitions, finding that *an applicant for benefits under General Municipal Law § 207-c must establish both a disability and a causal connection between the injury or illness and the performance of the applicant's work duties.*[4] The Court found further that the applicant may be directed to submit to a predetermination examination to resolve uncertainty concerning either element, maintaining that to find otherwise would deprive

the municipality of its right to deny fraudulent or questionable claims (the order of the Appellate Division affirmed, with cost)

**Uniform Firefighters v City of Cohoes (Crt. of Appeals – May 9, 2000)**
**94 NY2d 686**

## Facts

In the fall of 1997, six members of the City of Cohoes Fire Department, who were receiving disability payments under General Municipal Law § 207-a, were examined by the City's physician for the purpose of evaluating their physical ability to return to full duty or to perform light duty assignments. The physician found that five of the firefighters were capable of performing light duty tasks and one was able to return to full duty. Each was then given a written order on October 31, 1997 to report for those assignments on November 10, 1997.

## Ruling

The first issue before us on this appeal is appellant firefighters' claim that an evidentiary hearing was required regarding their capability, medically, to perform light duty assignments *before* an order to return could be issued. It is not disputed by the City here, and we agree, that the right of a disabled firefighter to receive General Municipal Law § 207-a disability payments is a property interest giving rise to procedural due process protection, under the Fourteenth Amendment, *before* those payments are terminated.---- All that remains to be determined then, is what process is constitutionally due those appellants.

[A]lthough an administrative hearing may ultimately be required before Section 207-a payments are terminated), recipients are not entitled to a hearing -- as claimed by appellants here--*prior to* the issuance of a report for light duty order. Indeed, an order to report for duty made, as here, only after a medical determination of capability (*see,* General Municipal Law § 207-a [1], [3]) does not trigger a hearing *unless a firefighter on Section 207-a status has brought that determination into issue by the submission of a report by a personal physician expressing a contrary opinion. Once evidence of continued total disability has been submitted, we agree with the Appellate Division that the order to report for duty may not be enforced, or benefits terminated, pending resolution of an administrative hearing, which itself is subject to review under CPLR article 78.* We suggested this outcome in *Matter of Schenectady Police Benevolent Assn v New York State Pub. Empl. Relations Bd* (85 NY2d 480) in finding "no reason . . . why officers should not be permitted the opportunity to obtain and have considered the views of their personal physicians as to [the propriety of a public employer's order under General Municipal Law § 207-c to submit to] surgery" (*id.,* at 487).
While certainly disabled firefighters receiving Section 207-a benefits have an important private interest in continuing to receive them, they are protected in the first instance in that they cannot be ordered back to duty *before* the public employer's physician has found them capable of performing light duty (*see,* General Municipal Law § 207-a [3]). *Then, it*

*hardly seems unduly burdensome to require the firefighter to submit a medical report from a personal physician disputing the governmental physician's finding, as a condition for continued receipt of Section 207-a disability benefits pending a hearing*. Moreover, even in the unlikely event of a temporary cessation of benefits due, for example, to a delay in obtaining a physician's report, any loss ultimately found to be erroneously imposed can be rectified by "back pay for benefits lost or restoration of leave credits improperly used" (*Matter of DePoalo v County of Schenectady,* 85 NY2d 527, 532).

**Decided the Same day**

**Watertown v PERB (Crt of Appeals - May 9, 2000)**
***(supra)***

**Ruling**

Under General Municipal Law Section 207-c, disabled police officers who suffer injury or illness in the course of employment may continue to receive their salary, but the City has the right to conduct their medical examinations, prescribe treatment and order them back to work--for full or light duty--if it deems them capable. As we held in *Matter of Schenectady Police Benev Assn v New York State Pub Empl Relations Bd* (85 NY2d 480), the City's authority under Section 207-c to make initial determinations as to these matters is not a mandatory subject of collective bargaining. Today, we decide the question explicitly left open in *Schenectady:* whether Section 207-c also removes the procedures for *contesting those initial determinations* from the strong and sweeping presumption in favor of mandatory bargaining. We conclude that it does not.

Our holding today in no way diminishes the City's right to make *initial determinations* under Section 207-c, as recognized in *Schenectady,* or the City's right to conduct an initial medical examination, as recognized in *DePoalo*. No one disputes the City's right to make the *initial determination* as to whether an officer has been injured in the line of duty, to have a physician of its choosing examine the injured officer, to prescribe medical or surgical treatment indicated by its examination, to order any officer it deems capable back to work and to discontinue benefits if an officer ignores a back-to-work order.

These are significant rights. Indeed, *these rights give the City a distinct advantage over the officer, because the City has the discretion to set the criteria upon which these decisions will be made and to enter a final, binding order.*[5] The only question before us is what happens when an officer raises a genuine dispute concerning the City's determination. If the City, for example, orders an officer to undergo surgery (as is its right), the officer may wish to have the opinion of a personal physician considered, *pursuant to a negotiated procedure, before submitting to the knife.* As we noted in *Schenectady,* Section 207-c does not mandate the procedures to be followed in such a situation*. Rather, those procedures have been left by the Legislature to the arena of collective bargaining.* [In a corresponding footnote, the Court's majority stated:

> It is of no significance that, even under the dissent's view, an officer seeking

> to have a personal physician's opinion considered before submitting to surgery might be entitled to a due process hearing or article 78 review (*see,* dissenting opn, at 92-93). *The question before us is whether the parties are required to bargain the forum in which the physician's opinion will be considered. Since Section 207-c does not speak to that question, the presumption in favor of mandatory bargaining applies.*

**Dissenting Opinion ----------Rosenblatt, J**

The practical effect of the proposal is evident. The municipality's initial determination must be submitted to an arbitrator who would be entirely free to follow or overturn the municipality's determination. The arbitrator would not be bound by the decisional law protecting, both substantively and procedurally, the prerogatives of municipalities in determining eligibility for these statutory entitlements. Mandatory bargaining of the proposal before us would, in practice, negate the holdings in both *DePoalo* and *Schenectady.* In the end--and that is where it counts--a municipality's initial "determination" would be a matter of no consequence.

The majority finds it of "no significance that ... an officer seeking to have a personal physician's opinion considered before submitting to surgery *might* be entitled to a due process hearing or article 78 review" (majority opn, at 84, n 2 [emphasis added]). We left no doubt, however, on this point. We unanimously held today, in *Matter of Uniform Firefighters v City of Cohoes* (94 NY2d 686, 691), that "the right of a disabled firefighter to receive General Municipal Law § 207-a disability payments is a property interest giving rise to procedural due process protection, under the Fourteenth Amendment." Thus, although Section 207-c specifically authorizes municipalities to make eligibility determinations, applicants for disability benefits are still entitled to due process hearings. Accordingly, applicants have an opportunity to present their own evidence, including the opinions of their personal physicians. Moreover, if applicants are dissatisfied with the outcome of the hearing, judicial review through article 78 of the CPLR is available.

**Majority Opinion ------ Rebuttal**

[W]e conclude that the procedure for contesting the *City's determinations* under Section 207-c are a mandatory subject of bargaining.

The dissent insists, first, that Section 207-c represents a wholesale, unequivocal grant of unrestricted authority to municipalities. That premise is not supported by the statute. Section 207-c, in fact, was a legislative compromise that gave certain rights to employees and other rights to municipalities. As we held in *Schenectady,* the rights explicitly given to the City by the statute are outside the scope of mandatory bargaining. But in *Schenectady* we also unanimously recognized a distinction *between initial determinations and other matters. The statute does not remove from mandatory bargaining those other matters--such as review procedures--that the Legislature chose not to address.*

There is, moreover, no merit to the dissent's argument that, if Section 207-c disputes are

submitted to arbitration, arbitrators will ignore our decisional law and inflict a "legislatively unintended impact on the municipal purse" (*see,* dissenting opn, at 89). Rather, if the result of negotiation is that--as the union asks--Section 207-c disputes are submitted to arbitration, *arbitrators would resolve disputes where an employee submits evidence that the City's determination in a specific case was not in accord with the facts.* Such disputes are commonplace regarding *any* employee right or benefit, as the Legislature surely knew when it enacted Section 207-c. Yet the Legislature said nothing about the procedures for resolving Section 207-c disputes. Thus, since there is no "plain" and "clear" evidence that the Legislature intended otherwise, the grievance procedures for resolving Section 207-c disputes must be determined--just as any other grievance procedures are determined--through the collective bargaining process.

**Prior History**
**Demand at Issue**

Article 14, Section 12---Miscellaneous Provision---the PBA is not seeking to divest any (purported statutory) right the City may have under § 207(c) *to initially determine whether the officer was either injured in the line of duty or taken sick as a result of the performance of duty*, but rather, the PBA seeks to negotiate *the forum---and procedures* associated therewith---through which disputes related to *such determinations* are processed, to wit: should the officer disagree with the City's conclusion, the PBA proposes the expeditious processing of all disputes related thereto to final and binding arbitration pursuant to PERB's Voluntary Disputes Resolution Procedure.[6]

**ALJ Decision - J. Albert Barsamian ---- (June 27, 1997)**
**30 PERB ¶ 4609**

As to the City's argument that binding arbitration would replace judicial review in the form of a CPLR 78 procedure, that is also rejected for the reason that judicial review remains available even after binding arbitration, albeit, via Article 75 instead of Article 78. There is nothing contained in GML § 207-c that explicitly provides that Article 78 shall be the sole and exclusive appellate mechanism.

With Article 78 review, as is currently the standard appellate remedy for appeals from administrative decisions, a municipality's right to make the initial determination in § 207-c cases is not affected; nor is that right changed by an Article 75 review provided for in appealing decisions of arbitrators. That right remains whether or not an arbitration stage is added, and regardless of whether judicial review is provided by Article 78 or Article 75*. Neither the City's right to initially decide nor an appellant's right to judicial review are extinguished by a finding that a demand to insert binding arbitration to the § 207-c process is mandatorily negotiable*.

**Board Decision ---- (December 11, 1997)**
**30 PERB ¶ 3072**

As GML § 207-c provides no procedural framework for determining whether an employee

has been disabled in the line of duty, and as such eligibility determinations clearly affect terms and conditions of employment, a demand for a dispute resolution procedure ending in arbitration, which permits for subsequent judicial review under CPLR Article 75, rather than review under CPLR Article 78, is mandatorily negotiable.

**City of Syracuse v PERB (Appellate Div. 4th Dept – December 27, 2000)[7]**
**279 A.D. 98; leave to appeal denied, 72 4 N.Y.S.2d 143**
**(4th Dept – March 21, 2001); 96 N.Y.2d 717 (Crt. of Appeals – July 2, 2001)**

## Facts

Two firefighters employed by the City were injured in the line of duty and began receiving salaries and benefits pursuant to General Municipal Law § 207-a. The City received medical reports indicating that both firefighters were capable of performing light duty work. Pursuant to General Municipal Law § 207-a (3), the City's fire chief ordered them to report for light duty assignments. The fire chief scheduled hearings before a deputy chief concerning the possible termination of the General Municipal Law § 207-a benefits of both firefighters. Prior to the hearing, the Union sent a letter to the fire chief advising him that the procedures to determine whether General Municipal Law § 207-a benefits should be terminated were a subject of mandatory bargaining and that the implementation of any procedures, including these hearings, without the approval of the Union would constitute an improper practice. Nevertheless, the City went forward with the hearing. At the conclusion of that hearing, the deputy chief found that the firefighter had willfully failed to comply in a reasonable and prudent manner with the fire chief's directive. The fire chief terminated the General Municipal Law § 207-a benefits of both firefighters.

## Issue

We note that we do not address the issues whether the hearings were required to protect the due process rights of the firefighters (*see generally, Matter of Uniform Firefighters of Cohoes v City of Cohoes,* 94 NY2d 686, 691-693),*General Municipal Law § 207-a benefits,* or whether the hearings as conducted were fair and reasonable; *those issues are not before us. Rather, we must determine whether the City committed an improper practice by unilaterally implementing the procedures to be used in determining whether to terminate General Municipal Law § 207-a benefits.*

## Ruling

After a lengthy discussion regarding the Court of Appeals decisions in both *Schenectady and Watertown* (*supra*), the 4th Dept found that "*the City could not unilaterally implement the procedures to be used in determining whether to terminate the 207-a benefits. These procedures were a subject of mandatory bargaining*."
We conclude that, *under the Taylor Law, the procedures to be used in determining whether to terminate General Municipal Law § 207-a benefits are a subject of mandatory bargaining.* The City's unilateral implementation of such procedures constituted an improper practice (*see,* Civil Service Law § 209-a [1] [d]).

## Past Practice Defense - Rejected

The City next contends that it did not unilaterally change a term and condition of employment because the hearing procedures used here were an established past practice. At the improper practice hearing before the ALJ, the parties stipulated that there were no negotiated hearing procedures in place concerning the termination of General Municipal Law § 207-a benefits. There was no evidence that the hearing procedures used by the City for the firefighters had previously been used for General Municipal Law § 207-a issues. The fire chief testified that the hearing procedures used by the City were also used for disciplinary matters. PERB's determination that those disciplinary hearing procedures do not constitute a "past practice" for issues of termination of General Municipal Law § 207-a benefits is supported by substantial evidence (*see generally, 300 Gramatan Ave. Assocs. v State Div. of Human Rights,* 45 NY2d 176).

## Prior History (in part)

**Board Decision --- (April 27, 1999)**
**32 PERB ¶ 3029**

The Board reversed the ALJ (Mayo)[8] who had dismissed the Union's charge finding, *inter alia*, that the "plain language of GML § 207-a as it relates to light duty circumscribes any bargaining mandate."

## Issue

[W]hether the hearing procedures which the City fashioned are mandatorily negotiable subjects and, if so, whether those procedures change the City's practice.

## Ruling

Having reviewed the record and considered the parties' arguments, including those at oral argument, we reverse the ALJ's decision. *The GML § 207-a hearing procedures are mandatory subjects of negotiation, the City was not exempted by law or policy from its duty to negotiate and the hearings held by the City unilaterally changed its practice.*

## Discussion

If a hearing of some type is required as a matter of constitutional due process before benefits can be terminated, as the Association claims and as appears likely,[9] and assuming the City satisfied its constitutional obligations, *it would still not be exempt from its duty to negotiate those hearing procedures nor would it have satisfied its statutory duty*. *The City's statutory duties are independent of and exceed its constitutional obligations.* As was explained in *County of Greene,*[10] the judicial decisions set only the constitutional due process minimums. *The City is still obligated to satisfy its separate statutory duty to negotiate the procedures pursuant to which decisions are made as to whether the wages and economic benefits which are the subject of GML § 207-a will be*

*paid.*

In holding that the hearing procedures the City fashioned for use under GML § 207-a need not be negotiated, the ALJ drew a distinction between the hearing procedures used to determine an employee's initial eligibility for GML § 207-a benefits and ones used to assess continuing eligibility in a light duty context, noting that the former are mandatorily negotiable, but the latter are not. *There is not, however, any difference in negotiability analysis whether the decision involves an initial determination of GML § 207-a eligibility or a subsequent determination regarding an employee's continuing eligibility for benefits*. Whether benefits are denied upon a determination that the injury or illness was not duty related, either initially or upon reexamination after an initial grant of benefits, or upon a determination that an employee has refused a light duty assignment which the employee is capable of performing, the result is still a loss of salary and economic benefits. *All are simply procedures used to determine whether wages and economic benefits will be paid and are mandatorily negotiable for that reason.*

**Poughkeepsie v PERB (Crt of Appeals March 28, 2006)**
***(supra)***

**Ruling**

After examining the language in the Association's proposal in light of these related, established principles, PERB concluded that the disputed demands afforded a firefighter *de novo* review—in effect, a fresh determination of the claim by an arbitrator—rather than arbitral review of the City's initial determination, *using a procedure and standard of review tailored by the parties.*

Here, the proposed language calls for the arbitrator to resolve the firefighter's claim, not review the City's initial determination, and to decide all allegations and defenses, including assertions regarding timeliness; contemplates trial-type evidentiary hearings with witnesses; and even assigns burdens of proof according to the type of determination at issue. *We therefore find no irrationality in PERB's conclusion that the disputed demands set forth not a review procedure, but a redetermination procedure in derogation of the City's nondelegable statutory right to make initial determinations.*

**Demand at Issue – Poughkeepsie 1**

The Arbitrator shall have the authority to decide, *de novo,* the claim of entitlement [or continued entitlement][11] to GML 207-a benefits. The Arbitrator shall have the authority to consider and decide all allegations and defenses made with regard to the GML 207-a claim, including but not limited to assertions regarding the timeliness of the GML 207-a claim. In the event of a dispute between the parties as to the nature of the proceeding, the Arbitrator shall first decide whether the proceeding presents an issue of an applicant's initial entitlement to GML 207-a benefits or whether the proceeding presents an issue of termination of GML 207-a benefits. The burden of proceeding with evidence as to the nature of the issue(s) presented shall be on the member. In the event the Arbitrator decides that the matter presents an initial GML 207-a claim, the member shall have the

burden of proof by a preponderance of the evidence that he is entitled to receive the benefits set forth in GML 207-a with respect to an injury alleged to have occurred in the performance of his duties or to a sickness resulting from the performance of duties which necessitated medical or other lawful remedial treatment. In the event the Arbitrator decides the matter presents a termination of GML 207-a benefits, the Fire Department shall have the burden of proof by a preponderance of the evidence that the member is no longer eligible for GML 207-a benefits.

The Arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the provisions of this procedure. The Arbitrator shall have no authority to make a decision on any issue not submitted or raised by the parties.

The decision and award of the Arbitrator shall be final and binding on all the parties.

**ALJ – J. Albert Barsamian ---- (April 16, 1999)**
**32 PERB ¶ 4556**

Applying ***Watertown***, the ALJ found that the demand was mandatorily negotiable.

**Board Decision ---- (June 21, 2000)**
**33 PERB ¶ 3029**

Board reverses the ALJ: "the [Union] demanded a *de novo* hearing …[i]t is the inclusion of this language which renders nonmandatory the Association's demand for *de novo* review. Such demands are contrary to our decision in ***Watertown*** because we did not hold in ***Watertown*** that the union would be entitled to a *de novo* second hearing. *We merely determined that the union's demand to appeal to arbitration disputes over the initial determination were mandatorily negotiable as a reasonable substitute for Article 78 review.*

Our decision today *in no way affects our prior decision in Watertown regarding the ability of the parties to negotiate a review procedure which ends in arbitration*.

## Demand at Issue – Poughkeepsie 2

The Union's demand remained unchanged except for the wording of the first sentence which eliminated the "*de novo*" reference and restructured the sentence to read: "The arbitrator shall have the authority to review the claim of entitlement [or continued entitlement] to GML 207-a benefits."

**ALJ – Gordon R. Mayo ----- (December 12, 2002)**
**35 PERB ¶ 4616**

Noting that the proposed review procedure "appears to be in accordance with the Board's decision in ***Poughkeepsie 1*** and the Court of Appeals' decision in ***Watertown***, [and] is not

*de novo* in nature," the ALJ found the demand to be mandatorily negotiable.

**Board Decision ----- (February 28, 2003)**
**36 PERB ¶ 3014**

The Board reverses the ALJ stating:

At issue here is whether the Association's demands seek review of the City's determination regarding eligibility for GML § 207-a benefits or whether the demands seek review of the employee's underlying claims for GML § 207-a benefits. In *City of Watertown*, we determined that the PBA demand acknowledged the City's right to make the initial determination and merely requested that any such dispute over that initial determination be processed to arbitration pursuant to PERB's Voluntary Dispute Resolution Procedure. *The demand was a substitute appeal procedure in order to avoid commencing an Article 78 proceeding and was found on that basis to be a mandatory subject of negotiations.* Here, Section 12 of the Association's proposals also seeks arbitration, not of the City's initial determination of ineligibility, but of the employee's GML § 207-a claim. The ALJ erred in determining that the proposal seeks a review of the City's determination when the language in the section clearly seeks arbitration of the claim itself. Because the demand still seeks review of the merits of the claim, it is still, in essence, a demand for a *de novo* review.

*Here, the Association's proposal regarding Section 12 is not a substitute for an Article 78 review, but a procedure for a determination on the merits of the employee's claim of eligibility for benefits*. That this is the Association's intent is made clear by the language of Section 13, which, among other things, gives the arbitrator the authority to review the claim of entitlement to GML § 207-a benefits and sets forth the scope of the arbitrator's jurisdiction and the employee's and City's burdens of proof.

A similar conclusion must be reached with respect to Sections 18 and 19, which seek the same level of review of the termination of GML § 207-c benefits and Sections 21 and 22, which provides for review of light duty. None of the demands seek the review of the City's determination; what is sought is review of the underlying claims of the affected employee. Our decisions in *Watertown* and in *Poughkeepsie 1* make clear that a demand for a dispute resolution procedure ending in arbitration, which permits for subsequent judicial review under CPLR Article 75, rather than review under CPLR Article 78, is mandatorily negotiable. *Both decisions also make clear that it is the employer's determination, not the underlying claim, which is subject to review.*

## Park v Kapica (Crt of Appeals – March 27, 2007)
**8 NY3d 302**

## Facts

Petitioner, John Park, a police officer employed by the Town of Greenburgh, underwent surgery in June 2002 as the result of an injury he sustained while in the line of duty. He

was certified disabled from his duties pursuant to General Municipal Law § 207-c (1).

In March 2003, the Town's medical examiner concluded that Park could return to work in a sedentary capacity. Park's supervisor, Greenburgh Chief of Police John A. Kapica, directed him to return to light duty starting April 21, 2003. Park objected to the medical examiner's determination, submitted a report from his treating physician indicating that he had a "permanent total disability" and requested a hearing on the issue of his ability to return to work, which was granted. The hearing officer concluded that Park was fit to return to light duty, that his refusal to do so was without justification, and that the Town could recoup any section 207-c benefits paid to Park dating back to April 21, 2003, the date Kapica directed him to return to work in a light duty capacity.

## Ruling

The right of a disabled officer to receive section 207-c disability payments constitutes "a property interest giving rise to procedural due process protection, under the Fourteenth Amendment, *before those payments are terminated*," and a due process hearing is triggered when an officer on section 207-c status submits evidence from his treating physician supporting the officer's claim of "continued total disability" (*Matter of Uniform Firefighters of Cohoes, Local 2562, IAFF, AFL-CIO v City of Cohoes*, 94 NY2d 686, 691, 692 [2000] [pursuant to the analogous provision General Municipal Law § 207-a, firefighters who contest a light-duty determination are entitled to a due process hearing]).

*We have previously stated that section 207-c provides no definitive procedure that must be followed, and that such procedures may be the subject of collective bargaining* (*see Matter of City of Watertown v State of N.Y. Pub. Empl. Relations Bd.*, 95 NY2d 73, 80-81 [2000]). *The parties here have not collectively bargained a procedure to be followed when an officer contests a light-duty determination.*[12] Therefore, the Town was free to fashion a hearing remedy so long as its procedure afforded Park due process.

Here, Park's interest in the continued receipt of disability benefits was adequately protected by the Town's due process procedure. Although he chose not to participate in the hearing, he was nevertheless given the opportunity to contest the medical examiner's light-duty determination by presenting his own witnesses and cross-examining the Town's witnesses. Moreover, the Town did not terminate his disability benefits at any time prior to his hearing [and] the procedure followed by the Town sufficiently met the dictates of due process.

[A] municipality is not permitted to *recoup* section 207-c payments where, as here, the officer avails himself of due process protections by challenging the medical examiner's determination because such a challenge cannot be equated with a refusal to return to duty.[13]

## SUBSEQUENT APPLICATION

**ORANGETOWN POLICEMEN'S BENEVOLENT ASSN – Board Decision (June 27,**

**2007)[14] 40 PERB ¶ 3008; *confirmed*, 40 PERB ¶ 7008 (Sup. Ct. Albany Co. 2007).**

## Issue

[T]he only issue before us is whether the scope of negotiable procedures under GML § 207-c, as interpreted by relevant case law, includes the video or audio taping of a medical examination. The ALJ [Comenzo] found that was negotiable and we hereby affirm that finding.

## Discussion

It is well-settled that pursuant to GML § 207-c, a municipality is granted the authority to make an initial eligibility determination about an officer's entitlement to the benefit (citing *DePoalo v County of Schenectady*, *supra*). Various subjects that are part of the municipality's initial determination under GML § 207-c are not negotiable, such as the waiver of confidentiality by the employee for the release of medical records relevant to the injury or illness for which the employee seeks GML § 207-c benefits (citing *City of Schenectady, supra*). In contrast, an employer's demand for an overbroad confidentiality waiver relating to a GML § 207-c examination is negotiable (*id*). Other procedural aspects of the initial determination have also been found to be mandatory subjects of negotiations (citing pre-*Watertown and Poughkeepsie* cases: *See Police Assn of New Rochelle*, 13 PERB ¶ 3082 (1980*); Local 589, Int Assn of Firefighters, v City of Newburgh*, 17 PERB ¶ 75 06 (Sup Ct Orange County 1984).[15]

It is incumbent upon the municipality when unilaterally adopting a policy or procedure beyond the statutory language of GML § 207-c to establish that its action is merely the codification of existing practice or policy. Absent such proof, as is the case here, an employer's unilateral implementation of GML § 207-c procedures is mandatorily negotiable (citing *Town of Cortlandt*, 30 PERB ¶ 3031 (1997) *conf sub nom Town of Cortlandt v Pub Empl Rel Bd*, 30 PERB ¶ 7012 (Sup Ct Westchester County 1997).
The Board has characterized the receipt of GML § 207-c benefits as akin to wages and, therefore, mandatorily negotiable:
. . . as GML § 207-c benefits are a form of wages, *procedures which condition, restrict or potentially deny an employee's receipt of those benefits are terms and conditions of employment within the meaning of the Act, which must be negotiated before they are adopted or implemented except as negotiations are preempted by law or public policy* (id).

In doing so, the Board has rejected arguments that GML § 207-c generally preempts any duty to bargain over the procedures by which the statutorily mandated payments of wages and health care expenses are made. In *Village of Hamburg,* 36 PERB ¶ 3030 (August 18, 2003), we held that "[t]he duty to bargain over GML § 207-c is not limited solely to procedures for the review of light-duty assignments or procedures for the termination of benefits." The Board's holding in *Village of Hamburg*, *supra*, quoted language from the decision of the Court of Appeals in *City of Watertown,* that "matters related to section 207-c, but not specifically covered by the statute, are mandatory subjects of bargaining." In

the *City of Watertown*, *supra*, the Court upheld our determination that a demand for arbitration of disputes involving eligibility for benefits under GML § 207-c was a mandatory subject of negotiations.

## Ruling

Based on the exception filed in this case, the Board affirms the ALJ's conclusion that the video or audio taping of the medical examination under GML § 207-c is a mandatory subject of bargaining *not only because it is a procedure for accumulating evidence to be utilized by the PBA and employee in the review of the initial determination, but also because such a procedure for making the initial determination is not precluded from negotiations by the specific statutory language of GML § 207-c.*

Finally, the Board rejects the Town's reliance on the Court of Appeals' decision in *Poughkeepsie Professional Firefighters' Association v New York State Public Employment Relations Board.* In that decision, the Court confirmed our decision that the demand for a particular *de novo* review procedure regarding an employee's claim under GML § 207-a, rather than an employer's initial eligibility determination, was a nonmandatory subject of negotiations. *The Court's decision in Poughkeepsie Professional Firefighters' Association, supra, cannot be reasonably construed as prohibiting negotiations regarding a blanket prohibition against a procedure for accumulating evidence to be utilized in a procedure for challenging the employer's initial determination under GML § 207-c.*

Based on the foregoing, we deny the Town's exception and affirm the decision of ALJ.

**CITY OF MIDDLETOWN – ALJ Fitzgerald (January 7, 2009)**
**42 PERB ¶ 4502, *affd* 42 PERB 3022 (September 17, 2009)**

## Demand at Issue

In the charge, the City asserts that the demand would limit the City's right to make an initial determination as to § 207-c eligibility and would substantially expand existing rights of employees by providing for a review by an arbitrator of the employer's initial decision of eligibility and light duty determinations, while employees continue to receive benefits. In its brief, the City essentially argues that the proposed timeline for processing an application, would deny it any meaningful review of the claim, while allowing an expanded record for review in an arbitration hearing. The City objects to the following language:

Section 3, *Application for Benefits*, at subsection 2(B):

The Claimant shall be permitted to file documentation to supplement the original application for benefits under the following circumstances:

1. After filing the application, but before the determination of the Claims Manager; and

2. As set forth in section 11 [hearing procedures].

Section 4, *Authority and Duties of Claims Manager*, at subsection 3:

A determination of initial eligibility by the Claims Manager shall be made within fifteen (15) calendar days of the date of the application, based upon the investigation without holding a hearing.

Section 7, *Performance of Regular of Specific Light Duty Assignments*, at subsection 2:

A Recipient who disagrees with the order to report and perform his/her regular or specific light duty and has conflicting medical documentation . . . shall submit the medical documentation to the Claims Manager within fifteen (15) calendar days . . . The Claims Manager shall review said medical evidence and within fifteen (15) calendar days of its receipt shall issue to the Chief and Recipient a decision as to whether the order to return . . . should be confirmed, modified or withdrawn. If the Recipient is dissatisfied with the decision he/she may, in writing, notify the Claims Manager of the need for a third (3rd) independent medical examination to be conducted pursuant to Section 11(2) of this procedure.

Section 11, *Hearing Procedures*, at subsection 1:

After requesting a hearing, the Claimant shall be permitted to submit additional information to the Claims Manager so long as said submission is made no later than thirty (30) calendar days prior to the date of the scheduled hearing. The Claims Manager shall review the documentation and inform the Claimant in writing within seven (7) calendar days of the submission, as to whether the determination that is the subject of the hearing will be modified. So long as the Claimant meets the time requirements in this provision, should the Claims Manager's determination remain unchanged, the record before the Arbitrator may include the additional submission of Claimant.

## Ruling

**Demands Found to be Mandatory**

The Board expanded on its *Watertown* decision in *Poughkeepsie Professional Fire Fighters' Association, Local 596*, 33 PERB ¶ 3029 (2000), *holding that the appropriate arbitral review standard of an employer's § 207-c determination was limited to the standard of a Civil Practice Law and Rules (CPLR) Article 78 review[16] and that a demand for de novo review, or a new determination of eligibility by an arbitrator, was therefore nonmandatory.*

Evaluating the demand at issue within the above parameters, I find the demand does not infringe upon any rights reserved by statute to the City. *Those portions of the demand which would establish timelines for submission of documentation by the employee and determinations of the claims manager do not usurp the City's right to make eligibility determinations.*

As to the challenged language in the hearing procedure, the City argues that the procedure would provide for an improper review of its initial determinations, citing to the Court of Appeals decision in *Poughkeepsie II*. The assertion that the proposal at issue is so restrictive as to effectively provide for a *de novo* review by an arbitrator is rejected. *By the clear language of the demand, the scope of the arbitrator's review would be whether the City had a reasonable basis for its determination on the record before it. The proposal would allow the submission of further documentation to the claims manager only while the matter is pending decision or reconsideration by the claims manager. The record on review before the arbitrator is not greater than that record before the claims manager, thus, there is no improper scope of review in the arbitration hearing.*

**Affirmed by Board Without Reference to CPLR Article 78**

In the present case, PBA's GML 207-c proposal is mandatory under both *Watertown* and *Poughkeepsie*. Like the proposal in *Watertown*, *it seeks an arbitral process to resolve dispute over GML § 207-c benefits while at the same time recognizing the City's statutory right to determine initial eligibility. Contrary to the City's argument, permitting reconsideration by the claims examiner of the initial eligibility determination does not render the proposal nonmandatory; rather, it constitutes a further recognition of the City's statutory right under GML § 207-c.*

*In addition, the proposal is mandatory under Poughkeepsie. It expressly proposed that the arbitrator's scope of review will be limited to determining whether the claims manager had a reasonable basis for the eligibility determination based upon the record before him or her. The mandatory nature on the proposal under Poughkeepsie is further bolstered by the proposed prohibition against either party presenting any new documentary evidence at arbitration.*

**TOWN OF EAST HAMPTON – ALJ Blassman (June 1, 2009)**
**42 PERB ¶ 4534**

**Demand at Issue**

PBA proposals 15(B) through (D), denominated "GML § 207-c," propose a procedure for resolving disputes regarding an officer's eligibility for benefits for line-of-duty injuries under General Municipal Law (GML) § 207-c. The Town objects not only to the allegedly nonmandatory nature of the proposals, but to the fact that the PBA has modified them. The language of the proposals is set forth below . . . :

> B) An officer may elect to have all controversies regarding initial determinations by the Town over eligibility for benefits pursuant to GML § 207-c be decided at a hearing conducted by a neutral arbitrator selected pursuant to the Collective Bargaining Agreement's grievance procedure. The Arbitrator shall decided, based on a review of the law and the record, whether the Town's determination was proper. The decision of the Arbitrator shall be final and binding on the Town, the PBA and the officer,
>
> C) In disputed cases, where the Town decides an officer has sufficiently recovered from an injury to perform either light-duty or full-duty police work, the officer may elect to have the dispute resolved, in lieu of an evidentiary hearing, by a medical doctor mutually agreed upon by both parties. The doctor shall review all relevant medical documentation submitted by the Town and the police officer. Based on the medical documentation, the doctor shall determine whether the Town's decision was proper. The decision of the medical doctor shall be final and binding on the Town, the PBA and the officer.
>
> D) The officer may elect to have all controversies, other than disputes over an officer's fitness to return to work, regarding the discontinuation of § 207-c benefits, e.g. whether the officer refused corrective medical treatment or medical inspections, be decided at a hearing conducted by a neutral arbitrator selected pursuant to the Collective Bargaining Agreement's grievance procedure. The Arbitrator shall decided, based on review of the law and the record, whether the Town's determination was proper. The decision of the Arbitrator shall be final and binding on the Town, the PBA and the officer.

## Ruling

### Demands Found to be Mandatory

The Town argues that PBA proposals 15(B) through (D) are not mandatory because they require *de novo* review of the Town's original determination . . . . *The Town argues that the finding in City of Poughkeepsie, supra, means that the only type of GML § 207-c procedure that is mandatorily negotiable is one that is equivalent to a proceeding initiated pursuant to Article 78 of the Civil Practice Law and Rules.* It argues that, since new evidence cannot be considered in such a proceeding, GML § 207-c procedures that permit the consideration of new evidence are also nonmandatory.

I find that the Town's reading of *City of Poughkeepsie*, *supra*, is in conflict with *City of Watertown v. New York State Public Employment Relations Board* (" *Watertown* ") and

the Board's decision in *Town of Orangetown,* which was issued after *City of Poughkeepsie.*

In *Watertown*, *supra*, the Court of Appeals determined that, in contrast to a municipality's initial eligibility determinations, procedures to contest those initial determinations are mandatory. The Court stated that it was deciding the question it left open in *Schenectady Police Benevolent Association v. New York State Public Employment Relations Board* (" *Schenectady* "). In that case, the Court did not reach the question of whether procedures for the implementation of GML § 207-c requirements were mandatorily negotiable, but stated that it saw no reason "*why officers should not be permitted the opportunity to obtain and have considered the views of their personal physicians as to surgery*." Since the Court in *Watertown, supra,* answered the question left open in *Schenectady, supra*, in the affirmative, procedures challenging a municipality's initial determination are mandatorily negotiable even if they permit officers to submit the views of their personal physicians after the initial determination is reached. Further, in *Town of Orangetown,* the Board clearly stated that GML § 207-c procedures, including demands for the "arbitration of disputes involving eligibility for benefits under GML § 207-c," are mandatory.

*If only Article 78 equivalent procedures were mandatorily negotiable, procedures that challenge initial eligibility determinations could not include the submission of new evidence. Then, the employee organizations would never have the opportunity to mandatorily negotiate procedures that would permit officers to submit medical evidence from their personal physicians, since municipalities may unilaterally issue eligibility decisions. Such a finding would not only make a nullity of the Court's finding in Watertown, supra, but would violate due process* ----- Based upon the forgoing, the proposals are mandatory.

**COUNTY OF CHEMUNG – Board Decision (August 19, 2011)**
**44 PERB ¶ 3026**

**Demand at Issue**

Section 11 of the GML § 207-c proposal is entitled " Hearing Procedures," and states:

Hearing requests under the provision of this procedure shall be conducted by a neutral Hearing Officer, from a list of four Hearing Officers mutually agreed upon by the parties. The names of the Hearing Officers will be placed on a list numbered 1-4. When a hearing is requested, the Employer will request the first Hearing Officer on the list. Each name will be moved to the bottom of the list after each hearing. The fees and expenses of the Hearing Officer shall be borne equally by the parties. The Claimant/Recipient may be represented by a designated representative and may subpoena witnesses. Each party shall be responsible for all fees and expenses incurred in their representation. Either party or the Hearing Officer may cause a transcript to be made. The Claimant/Recipient and the Employer agree to share equally the costs of the transcript. After the hearing, the Hearing Officer shall render a determination which shall be final and binding upon all

parties.[17]

*Any such decision of the Hearing Officer shall be reviewable only pursuant to the provisions of Article 78 of the Civil Practice Law and Rules.*[18]

## Ruling

### Demand found to be mandatory

In the present case, we conclude that the proposed GML §207-c hearing procedure in §11 is mandatory under *Watertown.* Unlike *Poughkeepsie*, the proposed hearing procedure does not expressly or implicitly call for a *de novo* review of the Joint Employer's determination of a claim for statutory benefits subject to limited judicial review under CPLR Article 75. Instead, it proposes a hearing before a hearing officer resulting in a binding decision with the ultimate authority for resolving the dispute resting with the courts under CPLR Article 78. *In interpreting the proposal, we rely upon other provisions of the Association's GML §207-c proposal that expressly recognize the Joint Employer's statutory rights and authority including the right to render an initial determination.*

**CITY OF RYE – ALJ Blassman (March 11, 2013)**
**46 PERB ¶ 4520**

## Demand at Issue

Also included in the PBA' s interest arbitration petition is proposal 17.ii which states:

> Adopt a GML section 207-c policy which provides for (a) the full accrual of all benefits payable by reason of the collective bargaining agreement while the member of the Police Association is disabled from performing his/her duties and (b) a procedure where once a member is determined by the City of Rye to be disabled pursuant to the provisions of GML section 207-c(1) [sic], and is subsequently directed to perform a full or light-duty assignment, he/she receive [sic] a due process hearing before an independent hearing officer.[19]

## Ruling

### Demand found to be mandatory

The City objects to PBA proposal 17.ii(b), which seeks a GML §207-c procedure that includes a "due process hearing before an independent hearing officer" to resolve disputes that arise when the City directs the officer to return to work from GML § 207-c leave. *The City argues that the demand is vague because it does not include a standard of review*. I find the City's argument to be without merit. In *City of Watertown v. New York State Public Employment Relations Board* ("*Watertown*") the Court of Appeals found mandatory a demand seeking to negotiate "*the forum-and procedures*" by which disputes regarding an employer's GML §207-c decisions can be heard. That demand, like the one

here, did not include a specific standard of review.[20]

The City alternatively argues that the demand is overbroad because it can be interpreted as including a prohibited standard of review that is inconsistent with GML §207-c. Pursuant to GML §207-c and GML §207-a, which accords similar benefits to another class of employees, municipalities have the authority to make initial eligibility determinations about an employee's entitlement to benefits under those statutes. Procedures seeking to review a municipality's determination pursuant to GML §207-c and GML § 207-a have been found to include a prohibited standard of review and to be nonmandatorily negotiable where the procedure grants an arbitrator a right to perform a *de novo* review of the statutory claim of entitlement to GML §207-a statutory benefits, "rather than limiting the arbitrator's binding power to reviewing the employer's determination." In *Chemung, supra*, the Board noted that the procedure found to be mandatory in *Watertown*, *supra*, was a proposed general arbitration clause.

The demand in this matter is similar to those found to be mandatory in *Watertown* and *Chemung, supra*. It is a general arbitration clause that does not "expressly or implicitly call for a *de novo* review" of the City's determination. Further, it does not seek a review procedure for the City's initial eligibility decision, but only its subsequent decisions directing officers to return to work from GML § 207-c leave. *Moreover, the Board has held that bargaining proposals are to be read as consistent with the law, "except in those circumstances in which the demand as written is patently unlawful." Therefore, I may not presume that the standard of review intended by the proposal is inconsistent with GML §207-c.*

**CITY OF SYRACUSE – ALJ Fitzgerald (April 30, 2014)**
**47 PERB ¶ 4543**

**Demand at Issue**

**General Municipal Law § 207-a(a) Review Procedure**

Local 280's revised proposal for a General Municipal Law (GML) § 207-a(a) Determination Review Procedure, dated May 16, 2013, reads as follows:

**Section 9. Determination Review Procedure**

1. In the event that a Firefighter wants to compel a review of the Chief' s Determination made pursuant to Section 6 hereof [Initial Determination], the applicant shall arrange for the appointment of a neutral arbitrator for such purpose through the procedures set for [sic] by PERB.[21]

2.The arbitrator will review the Chief's determination. After the hearing, the arbitrator shall

render a determination which shall be final and binding upon all parties. [Emphasis added][22]

3. Each party's counsel fees (if any) shall be the responsibility of the party incurring such services. The City shall bear the costs, fees and expenses of the arbitrator, except as provided herein.

4. The Arbitrator's Decision may only be reviewed pursuant to the standard of review set forth in Article 75 of the [Civil Practice Law and Rules (CPLR)].[23]

The above language is a modification of Local 280's original proposal on this issue, dated February 7, 2013, which provided, at § 9.2, as follows:

The arbitrator will review the Chief's determination *de novo* and shall give no deference to the Chief's original determination.[24]

## City's Arguments

The City asserts in the charge that Local 280's amendment to the original proposal providing for a *de novo* review of the Chief's decision was only cosmetic in nature and that the proposal continues to be one for a *de novo* review. In its brief, the City asserts that the proposed language implicitly allows the arbitrator to conduct a *de novo* review, *and to consider evidence beyond that considered by the Chief*. It argues that the removal of the words *de novo* does not alter the nature of the proposal, *which sets no standard or limitation on the arbitrator's authority to review the determination or to consider new evidence,* citing to *Poughkeepsie Professional Firefighters Association, Local 596, IAFF, AFL-CIO (Poughkeepsie).* It also argues that a reading of the change from the existing language to that in the proposal supports its argument as to the nonmandatory nature of the demand, *because the language eliminates the existing arbitrary and capricious standard while providing no standard of review in its place.*

## Ruling

### Demand found to be mandatory

The City's claim that the revision to the initial proposal is merely cosmetic and that the language continues to constitute a *de novo* review of the firefighter's claim is without merit. The decision in *Poughkeepsie* is not on point, in that the language at issue in that matter expressly provided for the arbitrator to resolve the merits of a firefighter's underlying claim without any recognition of, or reference to, the City's initial determination. The proposal here, in providing that "[t]he arbitrator will review the Chief's determination," is not one for a *de novo* review, but a demand for an appeal process whereby the Chief's determination may be challenged. *Nor does the lack of a defined standard of review cause the demand to be nonmandatory*. In *City of Watertown*, the Court of Appeals upheld the Board's decision finding a proposal mandatory which provided for the processing of all disputes regarding the City's GML § 207 eligibility determinations to final and binding arbitration,

*without reference to any specific standard of review.*[25]

Further, language similar to that at issue here was found mandatory in *Chemung County Sheriff's Association, Inc.*, where the demand provided that hearings would be conducted by a neutral hearing officer, that the employee "may be represented by a designated representative and may subpoena witnesses", and that " [a]fter the hearing, the Hearing Officer shall render a determination which shall be final and binding upon all parties*...reviewable only pursuant to the provisions of Article 78 of the [CPLR]." Finding other provisions of the proposal to clearly recognize the employer's statutory right and authority to render the initial determination*, the Board found nothing in this language to expressly or implicitly call for a *de novo* review of the employer's decision. In this matter, as the City's right to make the initial determination in accordance with the GML is recognized in the parties' negotiated procedure, and the demand is *for an arbitral review procedure of that determination*, it is mandatory.

**CITY OF CORTLAND – ALJ Sergent (December 18, 2017)**
**50 PERB ¶ 4590**

**Demand at Issue**

**General Municipal Law § 207-c**

[T]he City objects to Section 10 of the PBA's General Municipal Law (GML) § 207-c proposal as it relates to arbitral review of the claim. This section provides, in relevant part:

Section 10 Determination Review Procedure
(a) In the event that an employee appeals from a determination of the Chief made pursuant to this policy, the appeal will be heard by one of the following arbitrators in rotating order: [to be agreed upon] . . .

(b) In the case where an employee is appealing the denial of an award of Section 207-c benefits, either as a result of an initial injury or illness or the recurrence of an injury or illness the burden of proof shall be on the employee and will constitute a preponderance of the evidence. In the case where the City has made a determination that the employee is no longer eligible for Section 207-c benefits or that the employee is eligible to work light duty, the burden of proof shall be on the City and shall be by a preponderance of the evidence.[26]

(c) The employee may be represented by representative [sic] of his/her choice and may subpoena witnesses[27]. . .A transcript shall be made, the cost of which shall be shared equally between the PBA, or in the event the employee is represented by a representative other than the PBA, the employee and Village. After the hearing, the Arbitrator shall render a determination which shall be final and binding upon all parties. Any such decision of the Arbitrator shall be reviewable only pursuant to the provisions of Article 75 of the Civil Practice Law and Rules. . .

## City's Argument

The City asserts that . . . the proposal is nonmandatory because it allows the arbitrator to review an employee's claim in full, and impedes the employer's right under GML § 207-c to determine if an employee can return to work in a light duty capacity.

## PBA's Argument

In response, the PBA "concedes that its demand calls for de novo arbitration to contest a City determination upon a GML § 207-c disability issue that is adverse to a unit employee. It further concedes that such demands under [*City of Poughkeepsie*] are nonmandatory." Nevertheless, the PBA asks that I disregard the Board's decision in *City of Poughkeepsie* and apply the Board's prior decision in *City of Watertown*, asserting that the two cases are fundamentally in conflict.

## Ruling

**Demand found to be nonmandatory**

After extensively discussing *Watertown* and *Poughkeepsie 1 and 2,* ALJ Sergent stated:

In the instant matter, I find, *and the PBA concedes*, that the proposal seeks *de novo* review of the underlying GML § 207-c claim. *The proposal permits a hearing to be held before an arbitrator where the employee may subpoena witnesses and present new evidence. This level of inquiry goes beyond the Civil Practice Law and Rules (CPLR) Article 78 standard of review found to be mandatory by the Board in Poughkeepsie 1 and 2.*[28] Therefore, the proposal is nonmandatory.

**CITY OF CORTLAND – Board Decision (July 27, 2018)**
**51 PERB ¶ 3014**

Affirmed the ALJ's ruling regarding the PBA's GML § 207-c demand stating:

The ALJ engaged in a thorough examination of the Board's case law in this area, which we affirm and do not repeat here. As the ALJ explained, procedures for contesting a public employer's determinations under GML § 207-c are a mandatory subject of bargaining pursuant to *City of Watertown*. Proposals, however, that either on their face or implicitly seek to establish *de novo* binding arbitration procedures to appeal the underlying claim are nonmandatory.

The ALJ found that the PBA's proposal was nonmandatory because it sought *de novo* review of the underlying GML § 207-c claim. In this respect, the PBA conceded in its post-hearing brief to the ALJ that its proposal sought "a *de novo* arbitration to contest a City determination upon a GML § 207-c disability issue that is adverse to a unit employee." The PBA further conceded that such demands are nonmandatory pursuant to *City of Poughkeepsie*. The PBA asked the ALJ to disregard the Board's decision in *City of Poughkeepsie*, which the ALJ correctly declined to do.

Between the filing of the post-hearing briefs and the release of the ALJ's decision, the PBA's representative changed. In its exceptions, the PBA no longer asserts that the Board should not apply *City of Poughkeepsie*, and we consider it to have abandoned that argument. The PBA now asserts, however, that its proposal does not seek *de novo* review of a City determination upon a GML § 207-c disability issue.

Initially, having not raised this argument or factual precedent to the ALJ, the PBA may not raise the issue to us for the first time on exceptions. Although the PBA's representative has changed, the PBA did not seek to reopen the record before the ALJ to change its position or present any new arguments. In these circumstances, we find that the PBA has not presented any compelling reasons for us to consider this previously unraised argument for the first time on exceptions.

Even were we to consider this argument, we would find that the proposal here seeks review of the employee's underlying claim and is nonmandatory pursuant to *City of Poughkeepsie*. *The PBA's proposal makes no reference to the City's determination and does not recognize the City's right to make the initial determination.* Instead, the proposal here, like the proposal found nonmandatory in *City of Poughkeepsie*, seeks arbitration not of the City's initial determination of ineligibility, but of the employee's underlying claim itself. In sum, we find that the PBA's proposal seeks review of the merits of the employee's claim and is a nonmandatory demand for de novo review.

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**FOOTNOTE SUMMARY**

[1] Applied by the Appellate Division, 2nd Dept. in *Kaufman v Dolce*, 216 A.D.2d 298 (June 5, 1995).

[2] In its decision below, the Appellate Division, Third Dept. stated:

> Turning to the requirement that an injured officer must execute a medical confidentiality waiver, a matter which PERB found to be a subject of mandatory negotiation but which Supreme Court held is inherently authorized by the other provisions of General Municipal Law § 207-c, we begin by noting that the statute explicitly authorizes the municipality to cease paying benefits if its physician certifies that the disability is at an end, if the officer refuses treatment, or if the officer is found by the municipal physician to be capable of light duty yet refuses such duty when it is offered. Exercise of these rights would be impossible if the physician were unable to report to the municipality his opinion, and the findings giving rise to it, as to (1) whether the officer remains disabled, (2) whether he or she is capable

> of light duty, and if so what type, and (3) whether treatment or inspection has been refused.
> For this reason, we agree with Supreme Court that General Municipal Law § 207-c necessarily implies that the employer is entitled to a waiver, and that to allow mandatory negotiation of this item would thwart the statute's intent. We are of the view, however, that the municipality only has the right to obtain information which is absolutely necessary to implementation of the statutory provisions; *a municipal employer cannot require that an officer consent to any disclosure beyond the narrow scope previously noted, nor may it constrain the officer to authorize a transfer of information from his or her treating physicians for the purpose of aiding the municipality's physician in diagnosis or treatment; the municipalities' ability to compel this more extensive disclosure is a matter for collective bargaining.*

[3] *See* *Uniform Firefighters v City of Cohoes* (Crt. of Appeals – May 9, 2000), *infra*.

[4] Addresses the applicant's burden.

[5] Under *Uniform Firefighters v City of Cohoes*, *supra*, once triggered pursuant to the submission of a conflicting medical report, the employer's decision to terminate a benefit previously granted, does not become *final and binding* until the affected employee has been afforded his constitutionally protected right of due process.

[6] Note – the scope of this demand is limited to the Employer's initial determination to grant the benefit or not and, pursuant to its express terms, does not extend to procedures associated with stopping the benefit once granted.

[7] This is not an interest arbitration case.

[8] 31 PERB ¶ 4568.

[9] This decision was written prior to the Crt of Appeals decision in *Uniform firefighters v City of Cohoes*, *supra*, issued on May 9, 2000, which clarified the applicable constitutional due process requirement.

[10] 25 PERB ¶ 3045 (1992).

[11] Made as a separate demand. Note – it goes beyond the scope of the demand presented in *Watertown*, which was limited to a review of the employer's initial determination to grant the benefit or not.

[12] *See* *City of Syracuse v PERB*, *supra*.

[13] The Town could not recoup section 207-c benefits paid to Officer Park dating back to April 21, 2003, the date Chief Kapica directed him to return to work in a light duty capacity. Rather, the Town's recoupment of benefits could only retroactively extend to August 4,

2003, the date after the conclusion of the due process hearing when Office Park had been directed to return to work.

[14] This is not an interest arbitration case.

[15] In *Police Assn of New Rochelle*, an interest arbitration case, the demand at issue was as follows:

> There shall be a Medical Review Board *to determine* whether an individual officer has an illness or injury which is job-related. Such board shall be comprised of a physician selected by the individual officer, a physician selected by the City and in the event that these physicians cannot agree, then a physician shall be selected by the mutual agreement of the individual's physician and the City's physician *to make a determination.*

In finding the demand to be mandatory, the Board stated:

> The City contends that the demand is nonmandatory because the subject matter is covered by General Municipal Law §207-c. That statute deals with payments to policemen who suffer job-related injuries or illnesses. In pertinent part, it authorizes the employer to appoint a doctor to examine the injured or sick policeman to ascertain whether he has recovered and when he is able to work again. *This statutory provision does not preclude the establishment of a procedure for the medical determination, either initially or on review, as to whether an illness or any injury is job-related.* The General Municipal Law §207-c does not preclude the negotiation of such procedures any more than does Civil Service Law §75 in dealing with employee discipline. Section 75 does not preclude negotiations concerning designation of the hearing officer who makes determinations in disciplinary proceedings. *Board of Education of Huntington, supra.*

[16] In footnote 25 of her decision, ALJ Fitzgerald stated:

> As explained by the administrative law judge in *Highland Falls PBA, Inc.*, 40 PERB ¶ 4525 (ALJ Quinn, 2007); rev, in part, 42 PERB ¶ 3020 (July 23, 2009), the scope of review in a CPLR Article 78 proceeding, which is the statutory process of review of virtually all administrative determinations made by public employers, '"is limited to whether the employer's determination was arbitrary, capricious, affected by an error of law, or not sufficiently supported by the evidence in the record before it," as compared to the standard in arbitration, where "the issue is whether the employee is entitled to the benefits, given the law and the evidence before the arbitrator," further noting that an arbitrator's decision is reviewable pursuant to CPLR Article 75 under a different scope of review than Article 78.

In *Highland Falls PBA, Inc, supra*, ALJ Quinn held:

> In effect, under *Poughkeepsie I*, arbitration is mandatorily negotiable concerning the receipt of GML § 207-c benefits *only if it provides the same limited scope of review that would be available in an Article 78 proceeding*; a position that it unequivocally reiterated three years later in *Poughkeepsie Professional Fire Fighters Association* (hereinafter "*Poughkeepsie II*"), which was ultimately confirmed by the Court of Appeals.

On exceptions, however, the Board never addressed this issue directly, instead finding that the PBA's demand was unitary and, therefore, nonmandatory for that reason alone.

[17] Note: The demand, as written, is general in nature and does not distinguish between a review of an employer's initial eligibility determination verses a review of an employer's decision to rescind a benefit that has been previously granted.

[18] Does not address the question left open by the Board in *Highland Falls PBA, Inc., supra*.

[19] Under *Uniform Firefighters v City of Cohoes*, *supra*, the affected employee is constitutionally entitled to a due process hearing before the employer's directive becomes final & binding, but only if the affected employee submits a conflicting medical report. *See also City of Syracuse v PERB* (Appellate Div. 4th Dept – December 27, 2000), *supra*.

[20] Note – In *Watertown*, unlike here, the demand was limited to a review of the employer's initial determination regarding benefit eligibility.

[21] Consistent with *Watertown* (i.e., the proposed procedure is limited to a review of the employer's initial determination regarding eligibility and does not extend to a review of an employer's decision to rescind a benefit that has been granted previously).

[22] *Id*.

[23] *Id*. Compare to the at-issue demand in *County of Chemung, supra*, which provided that the decision of the Hearing Officer "*shall be reviewable only pursuant to the provisions of Article 78 of the Civil Practice Law and Rules*."

[24] Similar to the demand in *Poughkeepsie 1*, which was found to be nonmandatory by the Board and affirmed by the Crt. of Appeals.

[25] Compare to ALJ Fitzgerald's earlier decision in *City of Middletown, supra*, decided approximately five years earlier.

[26] Broadly stated demand, which applies to a review of both the employer's initial eligibility determination and a review of the employer's decision to rescind a benefit previously granted.

[27] Consistent with fundamental due process.

[28] Compare to *Town of East Hampton*, ALJ Blassman – 42 PERB ¶ 4534 (June 1, 2009).

# Negotiating Statutory Procedures in the Public Sector – CSL §§ 71, 72, 73, 75
## A Practical Approach

This presentation intends to provide practitioners with a practical approach to assessing bargaining obligations in connection with issues covered by CSL §§ 71, 72, 73, and 75.[1] The outline for this study will begin with a review of negotiability, i.e., the duty to bargain and any defenses raised as they relate to terms and conditions of employment; followed by a review of related major cases that provide guidance for determining whether or not bargaining is required; and finally a review of impasse resolution procedures.

Fundamentally, the question that always is presented in connection with bargaining obligations is whether a topic or proposal is a mandatory subject of bargaining. Determinations of whether bargaining proposals are mandatorily negotiable come before PERB through three avenues. The first is through the filing of improper practice charges alleging bad faith bargaining in violation of § 209-a.1(d) or § 209-a.2(b) of the Act. Second and third, PERB also reviews the mandatory nature of proposals in connection with collective bargaining and compulsory arbitration processes, where a party either may assert bad faith bargaining through an improper practice charge alleging violations of § 209-a.1(d) or § 209-a.2(b) of the Act or, short of an adversarial proceeding, may file a petition for a Declaratory Ruling, pursuant to PERB's Rules of Procedure, § 210, provided that the justiciable issues are limited to whether a

[1] This paper is intended to be instructive only and to provide direction for further study. It does not purport to be exhaustive research, nor is it intended to be a substitute for reading the cases in full. While the case holdings cited are intended to be faithful to the texts as reported, any unattributed observations or opinions expressed, as well as any misrepresentations, are my own and do not reflect necessarily the position of the New York's Public Employment Relations Board.

party is covered by the Act or whether a matter is a mandatory subject of bargaining. *City of New York*, 37 PERB ¶ 3034 (2004).

Whether or not a bargaining proposal is a mandatory subject of bargaining begins with the underlying tenet of the Taylor Law: the "strong and sweeping" public policy favoring bargaining of terms and conditions of employment. *Webster Cent Sch Dist,* 75 NY2d 619, 627, 23 PERB ¶ 7013, 7018 (1990). Unjustified refusals to bargain mandatory subjects may result in findings of violations of bargaining obligations - § 209-a.1(d) if committed by a public employer, and § 209-a.2(b) if committed by a labor organization, where no affirmative or justifiable defense is established.

Generally, the legitimate defenses for refusing to bargain can be categorized as three types. The first cluster of defenses purport that the subject of a proposal or topic is non-mandatory. Examples of non-mandatory subjects include those that are prohibited subjects by virtue of the subject matter itself – those subjects that are *ultra vires*, "outside the power of a government to agree to" (Public Sector Labor and Employment Law, 3rd Edition, Revised 2014, Lefkowitz, at 641), are not enforceable, and therefore cannot be negotiated (e.g., retirement pensions, teacher tenure). In addition, non-mandatory subjects include those subjects determined to violate public policy (e.g., parity clauses), subjects that do not impact terms and conditions of employment of unit employees (e.g., applicants, benefits for current retirees), and those that are preempted by law, i.e., contrary to a clear legislative intent that has removed the discretion of the employer to agree. Most of the discussion that follows falls into this category of preemption.

The second type of defense is that an impasse has been declared by a party, thus absolving the duty to continue bargaining. The third category of defenses includes those cases

when the topic or proposal is mandatory, but a refusal to bargain is permitted by contract terms or practice (e.g., duty satisfaction, waiver, management prerogative, etc.).

**CSL § 71 WC Absence and Reinstatement - Disability Resulting From Occupational Injury or Disease**
**CSL §§ 72 and 73 - LOA and Reinstatement - Ordinary Disability**

Examination of the intersection of the Taylor Law's mandate (that requires bargaining over procedures affecting employees' terms and conditions of employment) and any another statutory scheme always begins with a review of the statutory language in question. The examination herein begins with the language of CSL § 71, the statute that provides for separation from employment due to occupational injuries or diseases.[2] For our purposes, that statute 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.** Notwithstanding the foregoing, where an employee has been separated from the service by reason of a disability resulting from an assault sustained in the course of his or her employment, he or she shall be entitled to a leave of absence for at least two years, 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. Such employee may, within one year after the termination of such disability, make application to the civil service department or municipal commission . . . (emphasis added)

The statute goes on to outline the steps to be taken that will trigger the application process for reinstatement. Nowhere does the statute speak directly regarding pre-leave

[2] The review that follows examined cases that relate solely to §§ 71, 72 and 73 and does not include review of cases that were grounded in GML § 207-a or § 207-c.

procedures for commencing a leave of absence nor, following a leave for occupational disability, for initiating or executing the termination.

The termination language in CSL § 72 is similarly opaque. CSL § 72 subsections 1-3 deal extensively with the authorities vested in each party, but not the steps and procedures, preliminary to an employer's decision, to execute any of its rights related to an involuntary leave of absence. Moreover, the only language in CSL § 72 referencing termination appears in sub-section 4:

> 4. If an employee placed on leave pursuant to this section is not reinstated within one year after the date of commencement of such leave**, his or her employment status may be terminated in accordance with the provisions of section seventy-three of this article.** (emphasis added)

However, §73 is no more instructive, in that the statute contains a single statement of fact as to termination:

> When an employee has been continuously absent from and unable to perform the duties of his position for one year or more by reason of a disability, other than a disability resulting from occupational injury or disease as defined in the workmen's compensation law, **his employment status may be terminated,** and his position may be filled by a permanent appointment. (emphasis added)

The remaining 260 words contained in § 73 deal with reinstatement rights.

The development of bargaining obligations related to procedures precedent to the execution of an employer's rights have come before PERB as bad faith challenges to bargaining. The early cases reported by PERB involving CSL §§ 71-73 were not grounded in the Taylor Law but reached the New York Court of Appeals as constitutional challenges to due process. In *Economico v Village of Pelham*, 50 NY2d 120; 13 PERB ¶ 7528 (1980), a § 73 case involving separation following ordinary disability, the court held that due process requires a post-

termination hearing when the facts underlying the statute are in dispute. A decade later, in *Prue v. City of Syracuse*, 78 NY2d 364; 24 PERB ¶ 7540 (1991), another § 73 case, the high court held that due process additionally requires pretermination notice and a minimal opportunity to be heard, citing *Cleveland BOE v. Loudermill*, 470 US 532. Two years later, the Court re-visited pretermination procedures in *Hurwitz v. NYS Dept Social Services*, 81 NY2d 182; 26 PERB ¶7512 (1993) and held, in accordance with *City of Syracuse*, that pretermination due process amounts to no more than an opportunity for an employee to present opposing views on questions of duration and fitness. None of these cases addressed Taylor Law bargaining obligations. Nevertheless, these due process cases and their holdings often were cited by employers in early PERB cases as defenses to bargaining.

An early case involved the negotiation of proposals related to employees on extended sick leave. In *Village of Old Brookville*, 16 PERB ¶ 4571 (1983), the PBA refused to negotiate the Village's proposal language modifying the duration and reinstatement language of §§ 72 and 73. When the PBA refused to negotiate, the Village alleged a violation of § 209-a.2(b). On the issue of statutory preemption, the ALJ noted that, where a state law takes a matter out of the discretionary authority of an employer and mandates alternative procedures or specific substantive provisions, there is no Taylor Law duty to negotiate, citing *City of Binghamton*, 9 PERB ¶ 3026 (1976), *affd* 9 PERB ¶ 7019 (Sup Ct Albany Co) (1976). Further, he relied on *City of Rochester*, 12 PERB ¶ 3010 (1979), noting that a demand relating to a subject treated by a statute is negotiable so long as the statute does not clearly preempt the entire subject matter. Where there is any legitimate uncertainty that a statute covers the same ground as a demand, will not be deemed non-mandatory on the ground of statutory preemption, citing *Town of*

*Mamaroneck*, 16 PERB ¶ 3037 (1983). Stated differently, the presumption of the mandatory nature of a bargaining proposal is a rebuttable one.

*Town of Cortlandt*, 30 PERB ¶ 3031 (1997), *affd* 30 PERB ¶ 7012 (Sup Ct Westchester Co) (1997) provides definitive guidance regarding the parties' bargaining obligations. In it, PERB expressly addressed the Taylor Law duty to bargain terminations in the case of work-related disabilities. There, the Town claimed that since § 71 allows termination of an employee after a cumulative absence from work for one year, its exercise of that right should not be subject to any bargaining obligation under the Act. The Board framed the issue:

> The question before us is whether the Town's exercise of the discretion bestowed under CSL § 71 must be bargained or whether CSL § 71 plainly and clearly establishes a legislative intent to exempt an employer from a duty to bargain discharges based upon the length of absence.

In finding that the Town had an obligation to bargain over the termination, the Board followed a classic preemption analysis and noted:

> There is nothing in CSL § 71 which deals explicitly with collective negotiations under the Act, nor is there anything inescapably implicit in that statute which establishes the Legislature's plain and clear intent to exempt the Town from the State's strong public policy favoring the negotiation of all terms and conditions of employment. . .

Citing *Allen v. Howe*, 84 NY2d 665 (1994), the Board went on to say:

> Although …terminations under CSL § 71 promote a governmental interest in a productive and economically efficient civil service, it also recognized the substantial interest of employees in their continued employment. The system of mandatory collective negotiations under the Act is intended to permit and promote the mutual reconciliation of precisely these types of competing interests. By requiring the negotiation of decision to terminate employees from employment based upon the length of time they are away from work due to occupational injuries or illnesses, and in the absence of plain and clear legislative intent to the contrary, we give effect to the State's declared public policy favoring collective negotiations. The Town's unilateral adoption of a policy requiring termination of employment and contractual benefits

> after one year of occupational disability is permitted but not required by CSL § 71 and constituted a change in terms and conditions of employment.

The New York Supreme Court, in affirming PERB, recognized the competing interests of the employer and employee, again citing *Allen v. Howe*, and explicitly held:

> While an employer is permitted to terminate an employee who has been disabled by an occupational injury for more than one year, there is no requirement that it do so and no express prohibition against negotiation of an employer's exercise of its prerogative.

In *Town of Wallkill,* 44 PERB ¶ 4529 (2011), a § 73 case, PERB reviewed a bad faith bargaining improper practice charge, alleging that the Town unilaterally adopted a policy and procedure for termination of employees after a one-year absence, in violation of § 209-a.1(d). There, the ALJ reviewed the bargaining obligation in light of *Town of Cortlandt's* preemption standard, noting:

> Though the Board has not directly addressed termination pursuant to CSL § 73, the analysis in *Town of Cortlandt* is equally applicable to disability terminations due to non-occupational injuries or illnesses . . . CSL § 73 has no language at all relating to collective negotiations, and legislative intent to exempt these kinds of terminations from the duty to bargain is not implicit in any language in the statute.

In *City of New Rochelle*, 47 PERB ¶ 3004 (2014), a § 72 case, where the city unilaterally ordered a police officer on sick leave to submit to an independent medical examination and to return to work, over his objection, PERB held that, unless there is merit to any of the employer's defenses, procedures for granting and terminating sick leave and returning to work are mandatorily negotiable, citing *Plainedge UFSD*, 7 PERB ¶ 3050 (1979).

More recently, in *City of Long Beach*, 50 PERB ¶ 4503 (2017), when the City provided notice to an employee of its intent to terminate him and provided him an opportunity for a hearing, it defended the action, claiming that unilateral implementation of a procedure for

terminating the employee under § 71 was proper since it had provided due process. However, the ALJ relied on *Town of Cortlandt* and on *Town of Wallkill*, considering fully the due process and bargaining paradigms. There, she held that the requirements of due process operate independently of the requirements of the Act and that the parties are obligated to meet the demands of each. She found that the City's conduct demonstrated an intent to terminate the employee as well as create a process to pursue that aim and held that the City unilaterally established a due process procedure (notice, an opportunity to be heard) without bargaining in violation of § 209-a.1(d). In *City of Long Beach*, 50 PERB ¶3036 (2017), *affd* 51 PERB ¶ 7002 (2018), the Board affirmed the ALJ's holding, explicitly reiterating that the City's statutory duties are independent of, and exceed, its constitutional obligation to provide due process. It noted that the absence of pre-termination procedures in the statute cannot be read as preempting an employer's duty to bargain. The New York Supreme Court (Nassau County), without commenting on the merits of the issue, declined to dismiss the city's petition and held that PERB's decision was not arbitrary or affected by an error of law.

Thus, at this point, it appears that the parties' obligations to engage in bargaining over procedures preliminary to an employer's execution of its rights embodied in CSL §§ 71-73 leaves little room for doubt. Going forward, refusals by parties to bargain over the procedures related to an employer's exercise of its discretion pursuant to the statutes, based on a non-mandatory argument, likely will be found to violate its bargaining obligation.

## CSL § 75 Termination for Misconduct or Incompetence

A review of the statutory scheme for CSL § 75, like CSL §§ 71-73, similarly provides little guidance regarding procedures related to removal and discipline:

> 1. Removal and other disciplinary action. A person described in paragraph (a) or paragraph (b), or paragraph (c), or paragraph (d), or paragraph (e) of this subdivision **shall not be removed or otherwise subjected to any disciplinary penalty** provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section. (emphasis added)

CSL § 76 expressly provides parties, subject to preemption, the right to negotiate alternative procedures to § 75's statutory provisions for discipline and removal:

> 4. Nothing contained in section seventy-five or seventy-six of this chapter shall be construed to repeal or modify any general, special or local law or charter provision relating to the removal or suspension of officers or employees in the competitive class of the civil service of the state or any civil division. Such sections may be supplemented, modified or replaced by agreements negotiated between the state and an employee organization pursuant to article fourteen of this chapter.

In *Antinore v State of New York*, 8 PERB ¶ 7501, 79 Misc2d 8 (1974), *revd* 8 PERB ¶7513, 49 AD3d 6 (1975), *affd* 9 PERB ¶ 7528, 40 2d 921 (1976), when a tenured civil service employee, a child care worker for the New York State Division for Youth, was charged with sodomy and sexual acts endangering morals of minors and advised to appeal his pending termination through the CBA's negotiated grievance and arbitration procedure that replaced §§ 75 and 76, the employee challenged the constitutionality of the CBA and sought a declaratory judgment, claiming an ultimate right to judicial review. The issue raised was whether an employer and union can agree to an alternate disciplinary procedure without the consent of the individual. The New York Supreme Court held they could not. It noted the inevitable collision between commendable statutory policies favoring settlement of public employment labor disputes by consensual arbitration and time-honored constitutional concepts of due process and equal protection of the laws. It concluded that the statute had permitted the establishment of a constitutionally impermissible agreement, denying the employee due process and equal

protection of the laws. It held that the agreement between the State and union as to disciplinary procedures, absent waiver by individual, cannot replace § 75. However, the Appellate Division, upon review of the statute's amended history permitting the statutory provisions to be supplemented or modified or replaced by collective bargaining, and based on the statutory representative role of the labor organization, found waiver by individual members of the bargaining unit:

> The agreement represents a reciprocal negotiation between forces with strengths on both sides, reflecting the reconciled interests of employer and employees, voluntarily entered into. CSEA, as designated bargaining agent for a group of public employees in which plaintiff was included, was agent for plaintiff, such that its assent to the agreement was plaintiff's assent. "* * * [T]he union represents all the employees as to all covered matters * * *" (Chupka v. Lorenz-Schneider Co., 12 NY2d 1, 6). The fact that this plaintiff did not himself approve the agreement negotiated by his representative and now disclaims satisfaction with one aspect of the agreement makes it no less binding upon him.

In *City of Auburn*, 10 PERB ¶ 3045 (1977), *revd* 11 PERB ¶ 7016, 91 Misc2d 909 (1977), *affd* 11 PERB ¶ 7003, 62 AD2d 12 (1978), *affd*, 12 PERB ¶ 7006, 46 NY2d 1034 (1979), the City alleged a violation of § 209-a.2(b) against the PBA for its bargaining proposals related to discipline. PERB, based on a narrow construction of the statutory language, held that §§ 75 and 76 may be supplemented, modified or replaced by agreements negotiated only by the employer New York State and its employee organizations, but that for all other public employers, §§ 75 and 76 are preemptive and the subject matter is not open to negotiation. Upon review, the New York Supreme Court (Albany County) held that PERB's construction was unreasonable. Instead, it held that § 76.4 does not *clearly* prohibit negotiations between a municipal employer and an employee organization regarding disciplinary procedures and held that discipline procedures for municipal employers other than the State of New York were not

*per se* prohibited subjects of bargaining. The Appellate Division (3rd Dept), citing from *Matter of Board of Educ. v Yonkers Federation of Teachers* (40 NY2d 268, 273), held that a public employer's power to bargain collectively, while broad, is not unlimited and that an employer is free to negotiate any matter, but may do so only in the absence of a "plain and clear" prohibition in a statute or controlling decision, law, or public policy. Moreover, citing *Antinore,* it held that the due process safeguards of §§ 75 and 76 can be waived by an employee without violating due process and equal protection. The Court of Appeals affirmed the Appellate Division, without comment.

Subsequently, the New York Attorney General issued an Attorney General's Opinion, 15 PERB ¶ 8003 (1981), resolving any remaining doubt as to the constitutional and due process status of alternatively-negotiated discipline procedures. There, the AG affirmed that an agreement between a local government and an employee organization under the Taylor Law may include provisions on discipline and removal that supplement, modify or replace §§ 75 and 76 of the Civil Service Law, and that an employee represented by such an employee organization would, through the employee organization's assent to the agreement, waive his rights under §§75 and 76. It stated:

> It is logical that the holding in Antinore to the effect that an employee is bound by his union's agreement, should apply. We believe that this is what the Court decided in Auburn, when it cited Antinore. . . We conclude that an agreement between a local government and an employee organization under the Taylor Law may include provisions on discipline and removal that supplement, modify or replace sections 75 and 76 of the Civil Service Law. An employee represented by such an employee organization would, through the employee organization's assent to the agreement, waive his rights under §§ 75 and 76.

Since then, most challenges to alternatively-bargained discipline and termination procedures present themselves pursuant to the preemption language stemming from the first sentence in §76.4:

> Nothing contained in section seventy-five or seventy-six of this chapter shall be construed to repeal or modify any general, special or local law or charter provision relating to the removal or suspension of officers or employees in the competitive class of the civil service of the state or any civil division.

These preemption cases are grounded in State, County and Town statutes that expressly reserve to local officials the unfettered right to discipline, usually uniformed law enforcement, personnel. Many of these latter cases come before PERB through the avenue of procedures related to compulsory arbitration.

**§ 209 Resolution of Disputes in the Course of Collective Negotiations**

> On request of either party or upon its own motion, as provided in subdivision two of this section, and in the event the board determines that an impasse exists in collective negotiations between such employee organization and a public employer as to the conditions of employment of [affected employees], . . . the board shall render assistance as follows:
>
> > (c) (i) upon petition of either party, the board shall refer the dispute to a public arbitration panel as ...provided….
> >
> > (e)- (g) **[for specified law enforcement]**…shall only apply to the terms of collective bargaining agreements directly relating to compensation. .. , **and shall not apply to non-compensatory issues…including disciplinary procedures, …**

In *PBA of the City of New York (NYCPBA)(sometimes reported under Town of Orangetown)* 35 PERB ¶ 3034 (2002), *affd* 36 PERB ¶ 7014 (2003), *affd* 37 PERB ¶ 7012, 13 AD3d 879 (2004), *affd*, 39 PERB ¶ 7006, 6 NY3d 563 (2006), the PBA filed petitions for Declaratory Rulings (DR-072, -100, -101) to determine whether police officer discipline provisions contained in an expired CBA were mandatorily negotiable under § 209.4. Upon

review, PERB found that, in this case, the discipline proposals were subject to special laws that leave discipline of police to the discretion of the Police Commissioner and, pursuant to § 76.4, held that police officer discipline was a prohibited subject. The New York Supreme Court (Albany County) affirmed PERB's finding. In affirming the trial court, the Appellate Division noted that since the City charter predated CSL § 75, the charter evinced a clear legislative intent to vest the Commissioner with broad authority over police discipline. The New York Court of Appeals affirmed that police discipline could not be the subject of bargaining when legislation has expressly committed authority to local officials:

> When a special state law, that pre-existed CSL §§ 75 and 76, specifically commits the discipline of police officers to local government officials, New York's public policy favoring strong disciplinary authority over police officers outweighs New York's strong and sweeping policy supporting collective negotiations under the Act.

In *State of New York (Div of State Police)*, 37 PERB ¶ 6601 (2004), *revd* 38 PERB ¶3007 (2005), *affd* 39 PERB 7013 (2006), the PBA presented proposals seeking to modify existing administrative disciplinary rules and regulations and incorporate them into the CBA. A petition for a Declaratory Ruling (DR-112) was filed, seeking a determination whether the PBA's proposals that reflect department polices that predate § 75 were mandatorily negotiable. The ALJ ruled that they were mandatory, finding that Executive Law § 215 did preempt the bargaining obligation. The Board reversed, finding that the Police Superintendent's authority over discipline predated § 75. It held that the proposal was a prohibited submission to interest arbitration, noting that prior negotiation did not act to change the non-mandatory nature of the proposal. The New York Supreme Court (Albany County) affirmed PERB, agreeing that previous negotiations regarding discipline did not establish discipline as permissible.

In *State of New York (Div of Police)* 39 PERB ¶ 3023 (2006), *annulled* 40 PERB ¶ 7003 (2007), *pet dismissed,* 41 PERB ¶ 7503, 43 NY3d 125 (2008), *affd* 41 PERB ¶ 7511, 11 NY3d 96 (2008), the State denied a member union representation during a disciplinary interrogation that was related to critical incident reviews. The PBA claimed that the denial constituted a unilateral change in violation of § 209-a.1(d). Subsequent efforts at resolution presented the issue of whether the alleged change was a mandatory subject of bargaining. PERB, affirming the ALJ, found that the unilateral change, dealing with discipline, nonetheless was a prohibited subject based on *NYCPBA.* The New York Supreme Court (Albany County), in granting the PBA's petition to annul PERB's holding, found a distinction between the process leading up to a decision of discipline and the decision to discipline. Moreover, the court found that the New York Executive Law section in question did not address investigations, was not preemptive, and thus the proposal was a mandatory subject of bargaining. The Appellate Division (3rd Dept) dismissed the petition on other grounds (standing). The New York Court of Appeals, presuming standing, affirmed the Appellate Division and dismissed the petition. It held that the parties' narrowly negotiated CBA right to representation for administrative interrogations essentially waived representation rights during critical incident reviews.

In *City of New York,* 40 PERB ¶ 6601 (2007), *affd* 40 PERB ¶ 3017 (2007), *pet to annul dismissed* 41 PERB ¶ 7001, 24 Misc3d 1240(A) (2008), *dismissed as moot*, 41 PERB ¶ 7004, 54 AD3d 480 (2008), *lv for appeal denied*, 42 PERB ¶ 7001, 12 NY3d 701 (2009), the City petitioned for a Declaratory Ruling (DR-119) as to whether an alleged safety proposal related to staffing, and a proposal claiming premium pay as compensation for the lack of the right to negotiate discipline both were mandatory subjects. The ALJ held that the safety/staffing proposal was non-mandatory on the basis of management prerogative and that the premium pay

proposal was mandatory since the essence of the demand was compensation. PERB affirmed the ALJ on both proposals and, on the safety/staffing proposal, rejected the PBA's *Cohoes* conversion theory argument, holding that the non-mandatory proposal was not converted under *Cohoes* into a mandatory proposal. The New York Supreme Court (Albany County) affirmed the premium pay proposal as mandatory, holding that PERB's finding was not unreasonable and dismissed the petition to annul PERB's finding on premium pay. Pending appeal to the Appellate Division, an arbitration panel issued an award and the 3rd Department dismissed the petition to annul as moot.

In *Village of Tarrytown*, 40 PERB ¶ 4540 (2007), *affd* 40 PERB ¶ 3024 (2007), in connection with submission of proposals for interest arbitration, the Village filed an improper practice charge alleging the PBA violated § 209-a.2(b) by including the PBA's bill of rights seeking procedural safeguards for police interrogations leading to disciplinary. The ALJ held that the proposal was prohibited, based on *NYCPBA.* In affirming the ALJ, PERB rejected the PBA's claim that *NYCPBA* distinguished between police disciplinary proposals and those procedures related to investigation. It held that the proposal for procedures related to the investigation of police misconduct was a discipline proposal subject to § 209.4 and a prohibited proposal in connection with interest arbitration.

In *Town of Wallkill,* 42 PERB ¶ 3017 (2009), *pet dismissed* 43 PERB ¶ 7005 (2010), *revd* 44 PERB ¶ 7506, 84 AD3d 968 (2011), *affd* 45 PERB ¶ 7508, 19 NY3d 1066 (2012), where the PBA's improper practice charge alleged a violation of §209-a.1(d) when Town unilaterally implemented changes to the Town Code that changed discipline procedures from the expired CBA provisions to CSL § 75. The Town petitioned for a judgment declaring, as valid, modifications to a local law that predated §§ 75 and 76. PERB held that the unilateral action

violated § 209-a.1(d). The New York Supreme Court (Albany County), dismissed the City's petition to annul, declaring the local law invalid to the degree it was inconsistent with CBA, per *Auburn.* On appeal, based on *NYCPBA*, the Appellate Division (2nd Dept) reversed the trial court, and held that negotiation of police officer discipline was a prohibited subject. The New York Court of Appeals affirmed the Appellate Court, holding that the Town's action was a proper exercise of its authority, noting that the preexisting law vested police officer disciplinary authority with the Town Board, and held police discipline as a prohibited subject of bargaining.

In *City of Middletown*, 43 PERB ¶ 7002 (2010), the PBA submitted to interest arbitration, *inter alia*, a police bill of rights seeking protections during interrogations related to discipline, as well as a proposal on disciplinary procedures. There, PERB outlined the mandatory nature of these proposals:

> In general, the subject of police disciplinary procedures is mandatorily negotiable under the Act because it is a term and condition of employment. Furthermore, the Legislature, in a series of amendments to the Act since 1974, has demonstrated a clear and explicit public policy choice for the subject of police disciplinary procedures to be, in general, negotiable but excluded from the subjects that can be resolved in compulsory interest arbitration for specifically defined negotiations units. In *Auburn*, the Court of Appeals affirmed the reversal of a Board decision and held that a proposal to negotiate a grievance/arbitration procedure for a unit of police officers, as an alternative to CSL §§ 75 and 76, was not a prohibited subject of negotiation. Subsequently, in *NYCPBA*, the Court reaffirmed the holding in *Auburn*, but held that the New York City Charter and Administrative Code, State police disciplinary laws pre-dating CSL §§75 and 75 delegating police disciplinary authority to City officials, demonstrate a public policy that outweighs the strong and sweeping policy supporting collective negotiations under the Act. . . . Since *NYCPBA*, both the Courts and the Board have held, consistent with Auburn, that where CSL § 75 or analogous general disciplinary statutes are applicable to police officers, the subject of police discipline is not a prohibited subject of negotiations under the Act.

There, the Board, in reversing the ALJ, concluded that the PBA's proposals were not prohibited under *Auburn* and *NYCPBA* to the extent they were seeking to replace CSL § 75 for unit members who were eligible, as a matter of law, to those disciplinary procedures, i.e., honorably discharged veterans and volunteer firefighters. Therein, the Board cited its earlier case in *Town of Wallkill*, 42 PERB ¶ 3017 (2009), where it held that a negotiated procedure to replace CSL §75 for honorably discharged veterans and volunteer firefighters was not prohibited under *Auburn* and *NYCPBA*, based on judicial precedent and early 20th century legislation granting special disciplinary procedural protections for honorably discharged veterans and volunteer firefighters. However, the New York Supreme Court (Albany County) found that the Board committed an error of law by excluding honorably discharged veterans and volunteer firefighters from the general prohibition of collective bargaining and reversed the Board's decision. It noted that the City charter specifically vested local officers with discretion regarding discipline, without distinguishing honorably discharged veterans and volunteer firefighters. It held that the proposal seeking bargaining over discipline affecting police officers who were veterans and volunteer firefighters was prohibited. Finally, though it conceded deference to PERB's authority to interpret the Act, it cautioned that it would accord PERB no deference where PERB analyzes the relative weight to be given to competing policies.

In *City of Schenectady*, 46 PERB ¶ 3025 (2013), *pet to annul dismissed* 47 PERB ¶ 7004 (2014), *affd* 49 PERB ¶ 7002, 136 AD3d 1086 (2016), the PBA filed an improper practice charge alleging a violation of §209-a.1(d) when the Town unilaterally announced it would no longer apply the discipline procedures from the parties' expired CBA provisions and instead revert to § 75. PERB, affirming the ALJ, determined that preemption was not clear in the Second-Class City Law (SCCL), and found the City in violation. The New York Supreme Court (Albany

County), dismissed the City's petition, and held that the authority under the Taylor Law superseded unilateral authority in SCCL. The Appellate Division (2nd Dept) affirmed the trial court and held that there was no right to revert to SCCL that predates Taylor Law since preemption is not clear.

**§ 209 Resolution of Disputes in the Course of Collective Negotiations**

> 4. On request of either party or upon its own motion, as provided in subdivision two of this section, and in the event the board determines that an impasse exists in collective negotiations between such employee organization and a public employer as to the conditions of employment of [affected employees], . . . the board shall render assistance as follows:
>
> > (c) (i) upon petition of either party, the board shall refer the dispute to a public arbitration panel as ...provided:

CSL § 209.4(c) of the Act intends to expedite the process of bargaining and closure through its interest arbitration procedures. However, a procedural tension has been recognized in case law during the period following a CBA's expiration and a PBA's declaration of impasse when, under *Triborough* and § 209-a.1(e), an employer is required to maintain the *status quo* and cannot expedite the bargaining process, without the PBA's consent, toward the conclusion of an award through interest arbitration.

In *City of Batavia*, 17 PERB 3007 (1984), PERB held that enactment of the § 209-a.1(e) of the Act, which declares it improper for a public employer to refuse to continue terms of an expired agreement until the new agreement is negotiated, does not make the filing of a petition for interest arbitration as to such terms improper. It held that a problem would arise, if at all, only when the employer actually altered the terms of an expired agreement pursuant to an arbitration award. A year later, in *City of Kingston,* 18 PERB ¶ 8002 (1985), when the City filed a petition for interest arbitration, the Director of Conciliation determined that the interest

arbitration process should go forward, despite the City's obligation to maintain the *status quo* under § 209-a.1(e). The Director held that participation in the panel selection process would not be deemed a waiver of the labor organization's right to challenge a filing of a petition in an improper practice charge. Later that year, in *City of Kingston*, 18 PERB ¶ 3036 (1985), the firefighters association filed an improper practice charge alleging the City committed an improper practice by filing the petition for interest arbitration. PERB held that the City did not commit an improper practice by the mere filing of the petition, noting that under § 209-a.1(e), the *status quo* could not be changed except by negotiated agreement. There, the Board declined to process the petition, as it deemed it futile.

In *City of Yonkers*, 46 PERB ¶ 3027 (2013), when the City filed a petition for interest arbitration, the Director of Conciliation declined to process it. Dismissing the City's exceptions, the Board declined to depart from its "decades-old holding" in *City of Kingston* that an employer lacks an independent right to initiate interest arbitration without the employee organization' s consent.

More recently, PERB has had occasion to review this tension and impediment to effecting closure to bargaining following contract expiration and impasse. In *City of Ithaca (Ithaca I) 48 PERB ¶ 4568 (2015), affd 49 PERB ¶ 3030 (2016),* the parties commenced negotiations in early 2012 for the CBA that expired at the end of 2011. The PBA declared impasse in July of 2013 and opposed the City's interest arbitration petition filed in 2014, insisting on the § 209-a.1(e) *status quo.* In late 2014, the City requested that the parties commence bargaining for a new contract beginning 2014. The PBA demanded to continue bargaining for a successor agreement effective 2012. In 2015, the City filed an improper practice charge alleging a violation of § 209-a.2(b), claiming that the PBA waived its right to

negotiate for 2012-2013 when it refused consent to interest arbitration. The ALJ found no evidence of a clear, unmistakable and unambiguous waiver by the PBA and, thus, no bad faith bargaining. The Board affirmed the ALJ's finding of no waiver, noting there was no basis to find that either party failed to bargain in good faith, but instead, that they had exhausted the conciliation procedures. It found that the City had satisfied its duty to negotiate during the period following PBA's declaration of impasse.

In *City of Ithaca (Ithaca II) 50 PERB* ¶ 3006 *(2017)***,** the Director of Conciliation declined to process the PBA's petition for interest arbitration for 2012-2013, based on the Board's decision in *Ithaca I* that the City satisfied its duty to negotiate in good faith for the duration of an award. In a case of first impression, the Board discussed the tension between questions of arbitrability (per § 205.6 of the Rules) and questions of eligibility (related to procedural and substantive issues). It held that the instant dispute is one of arbitrability, not eligibility, because objections to arbitrability are directed at whether the subject matter of the dispute sought to be submitted to compulsory arbitration fall within the scope of interest arbitration. Arbitrability, it explained, goes to the character of the dispute (what proposals may be submitted), while eligibility goes to the character of the parties (who may petition for interest arbitration). The Director's ruling was reversed, and the petition was remanded to the Director.

In *City of Ithaca (Ithaca III), 51 PERB* ¶ 4503 *(2018), affd 51 PERB* ¶ *3020 (2018),* the City filed an improper practice charge alleging the PBA violated § 209-a.2(b) when it submitted in 2016 a petition for interest arbitration covering the 2012-2013 period, despite the Board's finding of duty satisfaction by City. The ALJ found the PBA's proposals contained in the petition to violate § 209-a.2(b), based on the union's proposal to change the date of the CBA (a material terms and conditions of employment) for the 2012 and 2013 calendar years, thus finding

the proposals were outside the permissible scope of arbitration. The Board, again in a case of first impression, overruled *Kingston* and *Yonkers* to the limited extent that those decisions stand for the proposition that an employer's interest arbitration petition will not be processed once a union invokes its *Triborough* rights to maintain the *status quo* under 209-1(e). Going forward, the invocation of *Triborough* rights merely acts to limit the scope and enforceability of any award issued by the interest arbitration panel, but does not negate the statutory right of an employer to petition for interest arbitration. The Board noted that allowing the processing of the petition, even if it resulted in an award that confirmed the *status quo*, would "avoid the sort of delay that has left the parties here caught up in procedural brinkmanship more than five years after the declaration of impasse." PERB explained that "at a minimum [interest arbitration would] serve to punctuate the end of negotiations of an immediate successor agreement to the expired contract and would establish the *status quo* for the duration of the award, as determined by the interest arbitration panel within the statutory time frame, based upon the parties' bargaining history and other appropriate factors."