NEGOTIATING GENERAL MUNICIPAL LAW SECTIONS 207-A & 207-C

BY: JOSEPH E. O'DONNELL, ADMINISTRATIVE LAW JUDGE
PUBLIC EMPLOYMENT RELATIONS BOARD

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NON-MANDATORY SUBJECT: EMPLOYER'S INITIAL DETERMINATION OF BENEFIT ELIGIBILITY.

SCHENECTADY POLICE BENEVOLENT ASS'N V. PERB, 85 N.Y.2D 480 (1995):

"Turning to the specific issues before us, we hold that General Municipal Law Section 207-c authorizes the City to require both light duty and, under appropriate circumstances, even surgery, where reasonable."

"As for light duty, [Section 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 specific types of light police duty,' the officer is entitled to receive salary and other benefits only is that light duty is performed."

"The PBA claims that [Section 207-c] does not authorize surgery absent bargaining. However, [Section 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."

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MANDATORY SUBJECT: PROCEDURES FOR CONTESTING THE EMPLOYER'S INITIAL ELIGIBILITY DETERMINATION.

CITY OF WATERTOWN V. PERB, 95 N.Y.2D 73, 76 (2000):

"As we held in Schenectady Police Benevolent Ass'n v. PERB, the City's authority under Section 207-c to make initial determinations as to these matters is not a mandatory subject of bargaining. Today, we decide the question explicitly left open in Schenectady: whether Section 207-c also removed the procedures for contesting those initial determinations from the strong and sweeping presumption in favor of mandatory bargaining. We conclude that it does not." (Emphasis added).

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NON-MANDATORY SUBJECT: *DE NOVO* REVIEW OF EMPLOYEE'S CLAIM FOR GML BENEFITS

CITY OF POUGHKEEPSIE, 33 PERB 3029 (2000) ("POUGHKEEPSIE I"):

"[The Union's] demands would establish a *de novo* binding arbitration procedure to appeal the initial determination of GML Section 207-a eligibility . . . . It is the inclusion of this language which renders nonmandatory the Association's demands 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 *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."

POUGHKEEPSIE PROFESSIONAL FIREFIGHTERS' ASSN., LOCAL 596 V. PERB, 6 N.Y.3D 514 (2006) ("POUGHKEEPSIE II"):

"Here, the [Union's] proposed language calls for an 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."

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MANDATORY SUBJECT: PROCEDURES FOR TERMINATING GML BENEFITS

CITY OF SYRACUSE V. PERB, 279 A.D.2D 98, 102-03 (4TH DEPT. 2000):

"Pursuant to GML 207-a, a firefighter injured in the line of duty may continue to receive salary and benefits. Here, when the firefighters failed to comply with the City's directive pursuant to GML 207-a to report for light duty assignments, the City conducted hearings to determined whether to terminate their GML 207-a benefits, but the hearing procedures were established solely by the City . . . . We must determine whether the City committed an improper practice by unilaterally implementing the procedures to be used in determining whether to terminate GML 207-a benefits."

"In this case, the firefighters did not contest the City's initial determination to direct them to report for light duty assignments. Instead, one failed to report for duty, while the other arrived late and left early, resulting in the determination of the City to hold hearings before it terminated the GML 207-a benefits of those firefighters. *The City could not, however, unilaterally implement the procedures to be used in determining whether to terminate section 207-a benefits. Those procedures were a subject of mandatory bargaining.*"

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ARBITRATION ISSUE: IS THE EMPLOYEE ENTITLED TO THE BENEFIT?

ARBITRATION MODEL

Determination made based upon the law and evidence before the Arbitrator.

Supporting Authority:

- Town of East Hampton, (ALJ Blassman, 2009)
- City of Syracuse, (ALJ Fitzgerald, 2014)

STANDARD OF REVIEW

ARTICLE 78 MODEL

Determination made based upon the law and evidence before the Employer.

Supporting Authority:

- Village of Highland Falls, (ALJ Quinn 2007)
- City of Middletown, (ALJ Fitzgerald 2009)
- City of Cortland, (ALJ Sergent 2017)

QUESTION: Should an arbitrator be allowed to consider evidence, medical or otherwise, which was not previously provided to the employer? If no, is there a due process violation? If yes, is the standard of review *de novo*?

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STANDARD OF REVIEW - ARTICLE 78 MODEL

"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 II], which was ultimately confirmed by the Court of Appeals."

> Village of Highland Falls PBA, Inc., 40 PERB ¶ 4525 (ALJ Quinn, Apr. 18, 2007) *rev. on other grounds*, 42 PERB ¶ 3020 (2009) (emphasis added).

"The Board expanded on its Watertown decision in [Poughkeepsie I], *holding that the appropriate arbitral review standard of an employer's § 207-c determination was limited to the standard of a [CPLR] Article 78 review*."

> City of Middletown, 42 PERB ¶ 4502 (ALJ Fitzgerald, Jan. 7, 2009) (citing Village of Highland Falls PBA, Inc., 40 PERB ¶ 4525 (ALJ Quinn, Apr. 18, 2007), *affd.* 42 PERB ¶ 3022 (2009) (emphasis added).

"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 [CPLR] Article 78 standard of review found to be mandatory by the Board in Poughkeepsie I*.

> City of Cortland, 50 PERB ¶ 4590 (ALJ Sergent Dec. 18, 2017) *affd.* 51 PERB ¶ 3014 (2018) (emphasis added).

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STANDARD OF REVIEW – ARBITRATION MODEL

"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 medial 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."

> Town of East Hampton, 42 PERB ¶ 4534 (ALJ Blassman, June 1, 2009).

"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 Section 207 eligibility determinations to final and binding arbitration, *without reference to any specific standard of review*."

> City of Syracuse, 47 PERB ¶ 4543 (ALJ Fitzgerald, Apr. 30, 2014).

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