STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD
INTEREST ARBITRATION PANEL

In the Matter of the Interest Arbitration between

THE CITY OF YONKERS
Public Employer,

INTEREST ARBITRATION
OPINION AND AWARD

-and-

YONKERS FIRE FIGHTERS, LOCAL 628, IAFF, AFL-CIO
Employee Organization.

PERB Case No. IA2019-013; M2018-131

BEFORE:

Timothy S. Taylor, Esq.
Public Panel Member and Chairperson

Richard S. Corenthal, Esq.
Employee Organization Panel Member

Paul J. Sweeney, Esq.
Public Employer Panel Member

APPEARANCES:

For Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO
Archer, Byington, Glennon & Levine LLP
By: Paul K. Brown, Esq.

For the City of Yonkers
Coughlin & Gerhart, LLP,
By: Angelo D. Catalano, Esq.

BACKGROUND

Under the provisions in Section 209.4 of the Civil Service Law, the undersigned Panel was designated by the Chairperson of the New York State Public Employment Relations Board ("PERB") to make a just and reasonable determination of a dispute between the City of Yonkers ("City") and the Yonkers Fire Fighters , Local 628, IAFF, AFL-CIO ("Union" or "Local 628").

The City of Yonkers is a municipal employer in Westchester County with an estimated population of 200,370 according to the 2020 census. The City has over 2,500 employees with approximately 300 employees holding the title of Fire Fighter, which make up Local 628's unit. The Union does not represent the fire officers holding the titles of lieutenant, captain or assistant chief. The Fire Department operates 24 hours a day, every day of the year.

The City and Union are parties to a duly negotiated collective bargaining agreement ("CBA") which covered the period July 1, 2009 through June 30, 2019. The CBA contains a negotiated General Municipal Law ("GML") § 207-a procedure addressing the terms under which Union members injured in the line of duty may apply and receive GML§ 207-a benefits. Since 2002, the parties have entered into memoranda and stipulations. None of the agreements, memoranda, or stipulations contain a procedure addressing New York State Civil Service Law ("CSL") § 71.

On June 30, 2017, the Union filed an Improper Practice Charge ("IP charge"), U-35820, alleging that the City refused to bargain over a CSL § 71 procedure. In its Answer to the IP charge, the City asserted that it had no duty to bargain over CSL § 71 procedures. The Union then submitted a demand to bargain over a CSL § 71 procedure.

Following an impasse in negotiations, on December 20, 2018, the Union filed a Declaration of Impasse with PERB. There was only one issue for impasse resolution: a procedure to address the separation of an employee's employment under CSL § 71. No terms or conditions of employment relative to CSL § 71 had been agreed upon during bargaining or mediation. After one year of impasse, the City served the underlying Petition for compulsory interest arbitration ("Petition"), dated December 5, 2019.

On January 16, 2020, PERB assigned Timothy S. Taylor, Esq. ("Chair"), Paul J. Sweeney,Esq. (public employer representative), and Richard S. Corenthal, Esq. (public employee organization representative) as members of the Public Arbitration Panel ("Panel") to hear the interest arbitration proceeding.

On August 6, 2020, the parties convened, via Zoom, to exchange exhibits in this Interest Arbitration proceeding. On September 8 and 9, 2020, a hearing was conducted via Zoom before the Panel. At the hearing, counsel represented the parties. A transcribed record was taken. Both parties were afforded the opportunity to present oral and documentary evidence supporting their respective positions. Both parties submitted numerous and extensive exhibits and documentation, including written closing arguments. The Record was closed on September 9, 2020 with the parties directed to submit closing briefs and any additional exhibitsby December 4, 2020.

On October 7, 2020, the Second Department reversed PERB's prior decision (finding that a municipality had to bargain over CSL § 71 procedures) and held to the contrary that a municipality need not negotiate over pre-termination CSL § 71 procedures given the express wording of the CSL§71 statute and certain its regulations, 4 NYCRR 5.9. *Matter of City of Long Beach v New York State Pub. Empl. Relations Bd.*, 187 A.D.3d 745 (2d Dept. 2020). On April 29, 2021, the

Court of Appeals granted PERB's motion for leave to appeal to the Court of Appeals. As of the date of this Award, PERB's appeal to the Court of Appeals remains pending. In addition, as of the date of this award, the parties have not received a decision relating to the pending IP Charge U-37312.

The Panel reviewed all data, evidence, arguments, and issues submitted by the parties. Despite significant discussion and deliberations during an Executive Session, the Panel could not reach consensus on an Award. This Award represents the determination of the Panel Chair, who was joined by one Panel members on the sole item.

The parties' positions are adequately specified in the Petition and the Response, numerous hearing exhibits, and post-hearing written submissions, which are incorporated by reference into this Award. Such positions will be summarized for this Opinion and Award. Set out herein is the Panel's Award as to what constitutes a just and reasonable determination of the parties' Award setting forth the terms for the CSL§ 71 procedure.

In arriving at such determination, the Panel has individually reviewed and considered the following criteria, as detailed in Civil Service Law Section 209.4(c)(v):

> (v) the public arbitration panel shall make a just andreasonable determination of the matters in dispute. In arriving at such determination, the panel shall specify thebasis for its findings, taking into consideration, in additionto any other relevant factors, the following:
>
> a. comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services or requiring similar skills under similar working conditions and with other employees generally in public and private employment in comparable communities;
>
> b. the interests and welfare of the public and the financialability

of the public employer to pay;

c. comparison of peculiarities in regard to other trades or professions, including specifically, (1) hazards of employment; (2) physical qualifications; (3) educational qualifications; (4) mental qualifications; (5) job training;

d. the terms of collective bargaining agreements negotiated between the parties in the past providing for compensation and fringe benefits, including, but not limited to, the provisions for salary, insurance and retirement benefits, medical and hospitalization benefits, paid time off and job security. CSL § 209(4)(c)(v).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

CSL § 71 provides,

> 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.

4 NYCRR 5.9 provides,

> Restoration to duty from workers' compensation leave, termination of service upon exhaustion or termination of workers' compensation leave, or reinstatement following termination due to disability arising from occupational injury or disease.
>
> (a) Applicability.
> These rules shall govern procedures for restoration to duty from workers' compensation leave, termination of service upon exhaustion or termination of workers' compensation leave, reinstatement to service, or entitlement to placement upon a preferred eligible list, for all State employees who are subject to section 71 of the Civil Service Law.
>
> (b) Notice upon granting workers' compensation leave.
> After notice that payment of compensation has begun, and no later than the 21st day of absence due to an occupational injury or disease as defined in the Workers' Compensation Law, the appointing authority shall notify the employee in writing of the effective date of beginning of that leave; the right to leave of absence from the position during continued disability for one year unless extended; the right to apply to the appointing authority to

return to duty pursuant to subdivision (d) of this section at any time during the leave; the right to a hearing to contest a finding of unfitness for restoration to duty; the termination of employment as a matter of law at the expiration of the workers' compensation leave; and the right thereafter to apply to the Civil Service Department within one year of the end of disability for reinstatement to the position if vacant, to a similar position, or to a preferred list pursuant to section 71 of the Civil Service Law and subdivision (e) of this section.

(c) Termination of service upon exhaustion or termination of workers' compensation leave.

(1) Upon the exhaustion of leave for disability resulting from an occupational injury or disease as defined in the Workers' Compensation Law, or upon termination of such leave upon a finding that the disability is of such a nature as to permanently incapacitate the employee from performance of the duties of the position, the service of the employee shall be terminated as a matter of law.

(2) However, no such termination of service, if not the result of a hearing, shall be effective until 30 days from the service upon the employee, in person or by mail, of a notice of such impending action, which shall notify the employee of the proposed effective date of the termination; the right to apply to the appointing authority pursuant to subdivision (d) of this section for reinstatement to duty if medically fit; the obligation to submit to a medical examination to determine fitness to perform the duties of the position, the right to a hearing to contest a finding of unfitness for restoration to duty; and the right after termination of employment to apply to the Civil Service Department within one year of the end of disability for reinstatement to the position if vacant, to a similar position, or to a preferred list, pursuant to section 71 of the Civil Service Law and subdivision (e) of this section.

(3) The final notice of termination shall notify the affected employee of the right to apply to the Civil Service Department within one year of the end of disability for reinstatement to employment or a preferred list pursuant to Civil Service Law, section 71 and subdivision (e) of this section.

(d) Restoration to duty from workers' compensation leave.

(1) Upon request by the employee, the appointing authority, if satisfied that the employee is medically fit to perform the duties of the position, shall restore the employee to duty. If not satisfied that the employee is medically fit to perform the duties of the position, the appointing authority shall require the employee to undergo a medical examination, by a physician designated by the appointing authority, before the employee may be restored to duty. Prior to the medical examination, the appointing authority shall provide the designated physician and the

employee with a statement of the regularly assigned duties of the position from which the employee is on leave.

(2) The employee, if found by the examining physician to be fit to perform the duties of the position from which the employee is on leave, shall be restored to duty.

(3) An employee who is not certified by the examining physician to be fit, may in the discretion of the appointing authority, upon the request of the employee, be restored to duty notwithstanding that finding, based upon all information available.

(4) An employee who is certified by the physician designated by the appointing authority to be unfit for duty at that time or to be permanently incapacitated from performing the duties of the job, and whom the employer proposed to refuse to restore to duty, shall be given written notice by the appointing authority of such refusal, the reason therefor, the right to a hearing if the employee wishes to contest that refusal, the procedures and time limit to apply for a hearing, and a copy of the medical report and any other records on which that decision is based, which shall be delivered personally, or mailed by certified mail to the employee at the employee's address of record. The employee may apply in writing to the appointing authority within 10 working days of the personal service or service by mail of the notice of refusal, for a hearing before a hearing officer who, except as specified herein, shall be appointed and shall conduct the proceedings in accord with article 3 of the State Administrative Procedure Act. The employee may be represented or assisted by an attorney or by a representative of the labor organization, if any, certified or recognized to represent the employee's bargaining unit. The hearing officer shall receive documents and testimony as well as written and oral argument on the issues of the medical condition of the employee, the duties of the position, and the ability of the employee to perform those duties, and shall submit the record of the proceeding, together with recommendations, to the appointing authority.

(5) The appointing authority shall issue a written finding of facts and determination restoring the employee to duty, continuing the workers' compensation leave, or terminating the workers' compensation leave upon a finding of permanent incapacitation from the duties of the position pursuant to Civil Service Law, section 71. The determination of the appointing authority shall be based upon the record as a whole, assembled by the hearing officer, and shall be final, subject only to judicial review pursuant to article 78 of the Civil Practice Law and Rules.

(6) The appointing authority shall not be required to entertain more than one such application for restoration to duty from any single employee during any six month period. However, nothing herein shall limit the right of the employee to submit, and the duty of the appointing authority to consider, one application made during the final 30 days of the workers' compensation leave. If the appointing authority has not rendered a decision prior to the expiration of the workers' compensation leave, and except to the extent that delay has been occasioned by any action or inaction on the part of the employee, that leave shall be extended to include the date of decision by the appointing authority.

(e) Reinstatement after termination of leave.

(1) At any time after termination of workers' compensation leave and within one year after termination of the disability resulting from the State employment related occupational injury or disease as defined in the Workers' Compensation Law, the former employee may apply to the Civil Service Department for a medical examination to be conducted by a physician selected by the department. Upon application for examination, the former employing agency shall be requested to provide a statement of the duties regularly required of incumbents in the title to which restoration to duty is requested. If obtaining that statement would unduly delay proceedings, the official duty statement on file with the department shall be used. The duty statement to be used shall be served upon the applicant together with the notice of the date, time and place of the medical examination. The applicant shall be notified in writing of the findings of the physician, by certified mail addressed to the applicant's address of record.

(2) The applicant, if certified by the examining physician to be fit to perform the duties of the former position, shall be reinstated or placed on a preferred list in accord with section 71 of the Civil Service Law.

(3) Any applicant medically examined pursuant to paragraph (1) of this subdivision and certified not to be fit to perform the duties of the former position, may apply in writing for a hearing, to the President of the Civil Service Commission, acting as the head of the Department of Civil Service. Such application shall be made within 10 working days from the date of service of the notice of an adverse medical finding. The hearing shall be held before a hearing officer who, except as specified herein, shall be appointed and shall conduct the proceedings in accord with article 3 of the State Administrative Procedure Act. The applicant may be represented or assisted by an attorney or by a representative of the labor organization, if any, certified or recognized to represent the bargaining unit to which the position to which the applicant seeks

reinstatement is assigned. The hearing officer shall receive documents and testimony as well as written and oral argument on the issues of the medical condition of the applicant, the duties of the position, and the ability of the applicant to perform those duties, and shall submit the record of the proceeding, with recommendations, to the President of the Civil Service Commission, acting as the head of the Department of Civil Service.

(4) The President of the Civil Service Commission, acting as the head of the Department of Civil Service, shall issue a written finding of facts and determination either directing or denying the reinstatement or placement upon a preferred list of the applicant in accord with section 71 of the Civil Service Law. The determination of the President of the Civil Service Commission shall be based on the record as a whole, assembled by the hearing officer. It shall be subject to review by the Civil Service Commission, upon written application by a party aggrieved within 30 days of service of the determination, pursuant to subdivision 5 of section 6 of the Civil Service Law, on the issue of manifest error only, and solely upon the record of the proceeding before the president. The decision of the commission shall be final, subject only to judicial review pursuant to article 78 of the Civil Practice Law and Rules.

(5) The Department of Civil Service shall not be required to entertain more than one application for reinstatement hereunder from any applicant during any six-month period.

THE CITY'S PROPOSAL

The City has set forth a very straightforward proposal for CSL§ 71 that complies with CSL § 71 and 4 NYCRR 5.9, the regulation implementing CSL § 71. The City seeks to exercise its statutory rights under CSL § 71 when a firefighter is absent for one year or is permanently disabled, as described in the law. The City has proposed a procedure which essentially mirrors Rule 5.9—the same procedure that certain public sector employers use and which was cited by the Second Department in its recent *Long Beach* decision. The City's proposed procedure is detailed in C-2, the Petition for Compulsory Interest Arbitration, and is as follows:

1. Purpose. The purpose of this procedure ("Procedure") is to implement a policy pertaining to the termination of employees under Civil Service Law ("CSL") Section 71. This Procedure

does not affect, modify or waive any statutory rights that the Cityof Yonkers ("City") may have, including its rights to determinethat an employee should be terminated under CSL Section 71 orto exercise its rights to affect that termination.

2. Definitions. For purposes of this Procedure, the following definitions apply:

"Appointing Authority" means the Mayor, Deputy Mayor, Commissioners or Department Heads of the City, as well as those subordinates who act in their place from time to time.

a. "City" means the City of Yonkers.
b. "Employee" means an employee who is subject to termination under CSL Section 71.
c. "Hearing" means the due process hearing required prior to termination of an employee under CSL 71 and NYCRR 5.9or the current regulation in effect.
d. "Notification" means the notices required to be sent to an employee under CSL Section 71 and NYCRR 5.9 or the current regulation in effect.
e. "Union" means the certified labor organization to which theemployee belongs.

3. Notifications. Following the making of a determination that theemployee should be terminated under CSL Section 71, City, theAppointing Authority shall issue to the employee those notifications required by NYCRR 5.9 or the current regulation in effect.

4. Request for Hearing. The employee, within ten working (10) days of his/her receipt of the notification advising the employee that s/he will be terminated within thirty (30) days, may make a written request for a hearing to contest his/her termination under CSL Section 71.

5. Hearing Process.
   a. The Appointing Authority shall appoint an independent hearing officer in writing.
   b. To the fullest extent possible, the hearing officer shall be vested with the powers of and will utilize the hearing procedures set forth in the NYS Administrative Procedures Act. The strict rules of evidence or civil procedure shall notapply.
   c. The employee may be represented by a representative of

his/her union or his/her personal attorney at no expense to the City.

d. The hearing officer shall cause a stenographic record to be made of the hearing and shall provide the employee with a copy without cost.
e. After the closure of the hearing, the hearing officer shall promptly generate a written report and recommendation and

shall transmit the hearing transcript, exhibits and other evidence in the record to the Appointing Authority.
f. The sole issue before the hearing officer shall be whether theCity's determination to terminate an employee under CSL Section 71 is supported by substantial evidence.

6. Final Determination. Following receipt of the hearing officer's report and recommendation, the Appointing Authority shall issue a written final determination and serve same on the employee and his/her representative, if any.

7. Appeal. The final determination shall only be challenged by wayof CPLR Article 78.

8. Miscellaneous.
   a. Disputes under this Procedure are not subject to grievance arbitration. Any dispute under this Procedure will be resolved by the hearing officer and may only be challenged by way of CPLR Article 78.

City's Position

The City asserts that the City's proposal is the more logical, practical procedure. The first two sections of the City's proposal are very straightforward and address definitions. Sections 2.d and 2.e are the only sections subject to any dispute. The City proposes that the term "Hearing" means a due process hearing as required by CSL § 71 and Rule 5.9. Likewise, the City proposes the term "Notification" under proposal 2.e and 3 be read synonymous with the notifications set forth in CSL § 71 and Rule 5.9.

In terms of hearing requests, the City proposes, under Section 4, that the member must

request a hearing within ten working days. This ten working day timeline is identical to the timeline of Rule 5.9.

The next section of the City's proposal is the hearing process under Sections 5 through 8. The City's proposal provides for the City to appoint an independent hearing officer to conduct a hearing under the State Administrative Procedure Act and to issue a report and recommendation to the City wherein the hearing officer will indicate whether the hearing officer finds substantial evidence to supports the City's proposed termination. The City will then issue a final determination after a review of the report and recommendation from the hearing officer. The affected employee may then appeal the final determination via CPLR Article 78.

The City's proposed hearing procedure tracks virtually verbatim with the requirements of Rule 5.9, a regulation which the Second Department found to be important in *Long Beach* . Likewise, the City's proposal substantially conforms to the Sleepy Hollow MOA, the only detailed CSL§ 71 negotiated procedure before this Panel. The Sleepy Hollow MOA provides two basic rights to the employees above and beyond what is required by CSL 71 and Rule 5.9. First, in paragraph 2, the Sleepy Hollow MOA provides "no later than 30 calendar days following an employee's absence because of a disability resulting from occupational injury or disease...the Village will...notify the employee that he/she may be separated from service under Civil Service Law § 71." Paragraph 6 of the Sleepy Hollow MOA continues: "no later than 45 days before the expiration of the employee's Section 71 leave of absence, the Village will...remind the employee that he/she may be separated from service under Civil Service Law § 71 and that he/she may challenge his/her proposed termination under the procedures outlines in Exhibit 'C.'" Exhibit "C" provides, in relevant part:

> If you wish to contest my preliminary decision to terminate your employment on these or any other bases appropriate pursuant to

> [CSL 71], you must file a written statement with my office.... This statement must specifically provide the reasons you are disputing my findings and include copies of doctors' reports or any other evidence you believe supports your claim.
>
> In addition, or in the alternative, an opportunity will be provided foryou to have an informal due process hearing with me to discuss your reasons for disputing my findings and/or preliminary decision to terminate your employment.

The only negotiated CSL §71 procedure in the record is less formal and provides fewer rights than that which the City has proposed. Likewise, the City's proposals track CSL 71 and Rule 5.9. The City's proposals are justified and reasonable and the City'sproposal should be awarded in its entirety.

THE UNION'S PROPOSAL

1. The City shall not issue a CSL 71 notice to any employee/member who is undergoing medical treatment, including physical therapy, for a temporary injury or illness with the expectation of returning to full duty based upon a medical opinion from the employee/member's treating physician.

2. The City shall not issue a CSL 71 notice until at least three (3) years has elapsed from **the date a Firefighter was unable to work due to an** ~~date of the employee/member's~~ injury or illness which was approved under the 207-a Procedure set forth in the parties' collective bargaining agreement and only if the employee/member has not filed an application for an accidental and/or performance of duty retirement with the NYS Retirement System.

3. The City shall continue to pay the full regular salary and benefits, including longevity, contractual increases, check-in pay, night differential, holiday payand individual and family health insurance benefits, to any employee/member**who challenges a** ~~terminated pursuant to~~ CSL 71 **notice until the City issues a final determination after a recommendation of a Hearing Officer pursuant to paragraph 8(a) below or after an Award by an Arbitrator pursuant to paragraph 8(b) below**~~exhaustion of any hearings and/or appeals~~.

4. The City agrees to cooperate and assist member(s) with any application for adisability retirement with the NYS Retirement System ("Retirement System"), including requesting the System to expedite processing of the application and to promptly furnish any information requested by the member,the Retirement System and/or the member's attorney/representative.

5. The City shall not seek to terminate the employment of an employee/memberpursuant to CSL 71 if the employee/member has filed for accidental and/or performance of duty disability retirement with the Retirement System.

6. Local 628 and the City shall agree to the form of the CSL 71 notice before it is issued. A copy of any CSL 71 notice must be furnished to Local 628 promptly after it is personally served upon an employee/member.

7. The employee/member, within ninety (90) days of his/her personal receipt of the CSL 71 notice, may request a hearing to contest his/her termination underCSL 71.

8. The employee/member shall have the following options with respect to the hearing process to challenge a CSL 71 notice:

    a. Independent Hearing Officer appointed by the City from a list agreed by Local 628 and the City. All costs of the hearing, includingthe furnishing of a transcript and Hearing Officer's compensation tobe fully paid for by the City; or

    b. *De novo* arbitration pursuant to the arbitration procedure set forth inthe collective bargaining agreement between the City and Local 628.The costs of the arbitrator shall be shared evenly between the employee/member and the City.

    The employee/member shall be afforded the opportunity to obtain amedical report from his/her physician prior to the scheduling of a hearing. The City shall cooperate fully and comply with anyrequests for information, records and reports relating to the Section71 notice upon request.

9. The employee/member shall retain all rights under all federal, state and local laws, including CSL 71 to challenge a termination of his/her employment pursuant to CSL 71.

10. Local 628 retains any and all of its rights to challenge any action by the City to terminate its members pursuant to CSL 71. Local 628 retains any and all of its rights applicable to the charges pending in PERB Case No. U-35820 if a settlement is not reached. Nothing contained herein shall prejudice in any way Local 628 and its members with respect to the charges pending in PERB Case No. U-35820.

Local 628 reserves the right to amend, modify, add to or subtract from the above proposals.

(Union Ex. 1) (emphasis in original).

Union's Position

The Union's proposal sets forth a fair and equitable CSL § 71 procedure prior to the termination of disabled fire fighters many of whom can return to work after medical evaluations

and treatment and strongly desire to do so.

There is evidence that using CSL § 71 to summarily terminate disabled fire fighters immediately after one (1) year presents any cost savings. But there is evidence in the record that the City's use of CSL § 71 actually costs more.

The Union argues its proposal would allow fire fighters with a reasonable expectation of returning to duty, based on medical evidence and opinion, to not be automatically terminated after a one (1) year period.

The Union contends its proposal recognizes the types of injuries City fire fighters suffer in the line of duty, such as back injuries requiring multiple surgeries before an initial assessment can even be made regarding whether the fire fighter is permanently disabled. (T. 226). Paragraph 2 of the Union's proposal would provide the City shall not issue a CSL §71 notice until at least three (3) years has elapsed from the date a firefighter could not work due to an injury or illness.

The Union's proposal also recognizes the City's and its third-party agents' roles in delaying medical evaluation and treatment, which can effectively lengthen and prolonging courses of treatment beyond one (1) year.

The Union's proposal allows time for injured firefighters to apply for and obtain disability retirements with the New York State Retirement System. Paragraph 3 of the Union's proposal maintains the status quo level of benefits while a determination on the CSL § 71 termination is pending. (T. 228) Paragraph 4 of the Union's proposal attempts to address the City's lack of cooperation and lack of timely responses to the New York State Retirement System. The Union asserts a firefighter's successful application for a disability retirement is in the best financial interests of the City.

Paragraph 5 of the Union's proposal is designed to incentivize Union members to apply promptly for disability retirement with the retirement system and not remain on GML § 207-a leave for an extended period without making such applications.

Paragraphs 6 through 10 of the Union's proposal provides a notice, challenge and appeal procedure which harmonizes the protection afforded to Union members under the negotiated GML § 207-a procedure in the CBA with the processes of appealing a notice of termination issued by the City under CSL § 71. The Union is proposing a procedure culminating in review by a neutral to ensure impartially or fairness.

The Court in *City of Long Beach v. New York State Public Employment Relations Bd., (2nd Dept. Oct. 7, 2020)* did not conclude CSL § 71 procedures are a prohibited or illegal subject of bargaining. The City waived any agreement it might have had that the panel does not have jurisdiction to resolve the interest arbitration because the City voluntarily petitioned PERB to have this interest arbitration panel resolve this dispute. Nothing precludes the City form negotiating with the Union regarding permissive, non-mandatory subjects of negotiations.

COMPARABILITY

Section 209.4 of the Civil Service Law requires that in order to properly determine wages and other terms and conditions of employment, the Panel must engage in a comparative analysis of terms and conditions with "other employees performing similar services or requiring similar skills under similar working conditions with other employees in generally in public and private employment in comparable communities."

Union's Position

There is no comparable to the City of Yonkers fire Department. There are no comparables

under CSL § 209 (4)(c)(v)(a). There is no evidence of comparable fire departments with CSL § 71 procedures in the record. Barry McGoey testified:

> Well, basically no other city has the population, the housing stock, the density, the diversity, the hazards that the City of Yonkers does. And in the past in interest arbitrations, there never has been a comparable found to the City of Yonkers. The closest comparables we would have would be the cities of Rochester, Syracuse, and perhaps Buffalo. However, they're in such a differenteconomic climate than we are. Yonkers is a growing city,we're expanding. Our close proximity to New York City has been an economic boom; and high-rise buildings are going up, there's cranes in the air...

As for White Plains, President McGoey testified,

> White Plains is a heavily commercial -- a heavy commercial city. Their population doubles during the daytime. Sometimes estimates are that it triples. It's mainlya residential city. The vast majority of the city is actually single family and two family homes on large lots and the density of the city is in the downtown. One small section of the city where the commercial, it's the county seat so there's many office buildings. But other than the office buildings, the majority of the city is like a small sliver of Yonkers. It's not as diverse and built up as the City of Yonkers and it's mainly daytime population.

The City introduced no evidence of comparables or comparable CSL § 71 procedure used to terminate firefighters anywhere. No Collective Bargaining Agreements inform the Panel as comparables under CSL § 71. For the purpose of the Taylor Law, CSL § 2019 (4) (c) (v) (a), there are no comparable fire departments or districts to the City of Yonkers Fire Department, nor are there comparables CSL § 71 procedures in the record.

City's Position

The City asserts that every municipality in Westchester County which maintains a paid

fire department is somewhat comparable, at least for the purpose of this proceeding as all must address the separation or continuation of an injured firefighter. CSL § 71 does not differentiate in its application among large or small municipal employers and it does not differentiate between types of employees or types of injuries. CSL § 71 has been held to apply to all employees in the classified service in New YorkState. It is undisputed that Union members are part of the classified service.

The City maintains not a single paid fire department in all of Westchester County has a CSL§71 procedure. The City could only find one paid fire department in all of New York State with a CSL §71 policy: the City of Long Beach which was the subject of *Long Beach* . The Long Beach CSL procedure notes that the City retains all of its rights under CSL § 71 to terminate employees.

The City could identify only one Westchester County police department with a negotiated CSL § 71 procedure: the Village of Sleepy Hollow, which has a policy more similar to the City's proposals than the Union's proposals. Thus, the only relevant CSL § 71 policies before this Panel are from the City of Long Beach (C-42) and the Village of Sleepy Hollow (C-46). Without waiving its objections over the non-mandatory nature of a CSL § 71 procedure, a review ofthese two policies demonstrates that the City's proposed CSL §71 procedure is appropriate and consistent with the other two policies, while the Union's proposal is an extreme outlier.

Panel Determination on Comparability

There is a dispute on comparability. The Panel Chairperson has determined there are no cities with the municipal characteristics of the City of Yonkers. The geographic

dimensions and mix of commercial and residential properties make Yonkers unique. The Village of Sleepy Hollow has a CSL § 71 but it relates to police. The City of Long Beach has a CSL § 71 procedure but it was imposed not negotiated. The Panel determines there is no comparable to the City of Yonkers, however the Village of Sleepy Hollows' notice provisions are somewhat helpful to develop a working framework to address statutory and due process concerns.

INTERESTS AND WELFARE OF THE PUBLIC

This criterion encompasses the public in general and the residents of the City in particular.

Union's Position

The Fire Fighters maintain that it is beyond dispute the "public", however broadly or narrowly that word is construed, is best served by having a professional, well-trained fire department staffed with qualified and experienced Fire Fighters. The Union contends that Fire Fighters can only be attracted and retrained when wages and benefits are at a level sufficient.

The Union argues that when a municipality, such as the City, is fortunate enough to be in a sound financial condition, the interests and welfare of the public compel an award at a level which will entice persons to become and remain members of the City's fire department and one that will reflect the Fire Fighters" relative status and position in the City and the surrounding community.

It is exceptionally rare for injured City Fire Fighters to be in line of duty injury leave over one (1) year. Out of the approximately three hundred (300) City firefighter, only one had been on a line of duty injury leave over one (1) year. It is an uncommon occurrence for the City Fire

Fighters to be out on line of duty injury leave for months, let alone over a year. For the vast majority of firefighters it is usually a few days. If a Fire Fighter is awarded a performance of duty disability retirement, 50% of the Fire Fighter's salary is paid by the New York State Retirement System, and not the City. (Tr. 175). If that Fire Fighter is awarded an accidental disability retirement, 75% of the Fire Fighter's salary is paid by the New York State Retirement System, and not the City. (Tr. 175). However, if the City terminates a Fire Fighter prematurely, through its proposed CSL § 71 procedure, while the Fire Fighter is on line of duty injury leave, the City must continue to pay 100% of the Fire Fighter's salary. GML § 207-a; (*See*, Tr. 105). The City's budget director, John Jacobson testified:

> Q...Isn't in the City's financial interest for a firefighter who is on 207-a to apply and obtain a disability retirementbecause it will save the City money for that firefighter?
>
> A Yes. We -- we hate the fact that the state holds up the process for us. If someone is not working, we would preferthat the state grant them that. Yes, we do. (Tr. 105).

It is in the City's financial interest for its injured Fire Fighters to successfully apply to the New York State Retirement System for performance of duty disability retirements and accidental disability retirements.

The City's budget director appeared to make his hypothetical cost projections while under the misconception that the City's obligations under GML §207-a to pay regular salary or wages to Fire Fighters injured in the line of duty is discharged when a Fire Fighter is terminated under CSL § 71. (Tr. pp. 61-64).Notwithstanding Mr. Jacobson's apparent confusion, the City does not actually believe that it is relieved from paying GML § 207-a benefits upon a Fire Fighter's termination under CSL § 71. For example, in response to a grievance filed by the Union

pertaining to the City's attempt to use CSL § 71 against a Union member,the City clarified its position:

> [T]o be clear, a former fire fighter who is terminated underCivil Service Law 71 who had been in receipt of GML 207-a(1) benefits would continue to receive base pay, longevity and negotiated wage increases consistent with the statute and interpretive case law until s/he reaches themandatory retirement age. (Union Ex. 11) (*see also*, Tr. 189-190).

City's Position

The City has established that the City's proposed CSL § 71 procedure follows available negotiated procedures, conforms to the current law and is justified and reasonable when compared to the Union proposals. Not a single paid fire department in Westchester County has a CSL § 71 procedure that differs from the statutory framework of CSL § 71 and Rule 5.9.

But the City has identified only two municipalities which have a negotiated CSL § 71 procedure. The Sleepy Hollow MOA (C-46), like the City's proposal, tracks the plain language of CSL § 71 and Rule 5.9 and does not limit how or when the employer can exercise its CSL § 71 rights nor does it provide for a *de novo* arbitration review. The City of Long Beach procedure simply provides that the City retains all rights relating to terminations under CSL71.

Here, the City's proposed procedure tracks CSL § 71 and Rule 5.9. As such, the City's proposed procedure conforms to the controlling case law as established in *Middletown*, *Long Beach*, and *Economico*.

Conversely, the Union has proposed an extraordinarily unique and burdensome procedure contrary to law and policy. It is premised on a host of non-mandatory subjects. The Union has provided no justification for its proposals which would curtail the City's ability to maintain

adequate firefighter staffing. The Union's proposals seek to prohibit the City from exercising its non-delegable, statutory rights under CSL § 71 and Rule 5.9. Accordingly, and for reasons set forth above, the City requests this Panel impose a CSL § 71 procedure consistent with the City's statutory-based proposals.

Panel's determination on Interest and Welfare of the Public

The Panel determines that Fire Fighters serve a vital and essential function. The public is best served by a well-trained department staffed with qualified and experienced Fire Fighters.

ABILITY TO PAY

The Panel is required under CSL § 209.4(c)(v)(b) to consider in its award "the financial ability of the public employer to pay."

Union's Position

Under any of the many factors interest arbitration panels may consider under this criterion, the City easily can pay the wages and economic benefits sought by the Union on behalf of the Fire Fighters it represents.

City's Position

The cost of keeping an employee out of work for more than one year is substantial. John Jacobson, , the City's Budget Director, testified at length as to the cost of keeping a firefighter out of work on General Municipal Law § ("GML") 207-a status and covering their shifts while they cannot work. (T. 36-37). Jacobson testified as to the costs to the City to keep an inactive firefighter on the payroll for a single year. Jacobson testified that the average new firefighter is paid approximately $71,000; a five year veteran approximately $97,000, a ten year veteran

approximately $102,000, a fifteen year veteran approximately $107,000, and a twenty year veteran approximately $110,000. In addition to the base pay, all of the firefighters received additional "special pays" and benefits which cost the City more money on top of the wages. (T. 38-45). Pursuant to GML 207-a and the negotiated CBA, these individuals would continue to receive the same pay and benefits if they were injured or taken to perform their duties, despite being incapable of working for the City. *See* Gen. Mun. Law § 207-a(1).

Jacobson testified that the City must have 57 firefighters on duty. (T. 49). Jacobson testified that whenever a firefighter misses work due to a job related injury the position is filled by an individual paid overtime, at a higher rate of pay. (T. 50-51). Jacobson explained that if a single firefighter misses a single year of work due to a GML 207-a qualifying injury, it will cost the City approximately $165,000 in overtime to fill that one individual's role. (T. 52). That $165,000 in overtime is besides the wages and benefits provided to the individual already out of work on GML 207-a status. (T. 55-57). As such, any proposal that would prohibit the City from terminating an individual who has been absent from work for more than one year is not only nonmandatory, but also a gross waste of City finances and tax payer dollars. The City cannot be prohibited from terminating a firefighter under the terms the Union has set forth in its proposals.

Panel's determination on ability to pay

The Panel Chair has carefully considered the statutory criteria regarding ability to pay as provided through the positions of the parties from the testimony, exhibits and post- hearing briefs filed, forming the record.

The Panel Chair knows our economy has rebounded from the 2008 through 2010 national recession. The national, New York State and local economy have adjusted to the new

normal of lower state and local taxation, low inflation, and moderate increases in real property valuation. The Panel Chair finds that the record establishes that the fundamental economic conditions of the City are good.

The City has done an excellent job of managing its resources. It has a healthy fund balance according to industry standards. Its residents own moderately valuable properties, and its residents have good employment. The Panel Chair is convinced that the City's current conservative fiscal management, along with its improving economic conditions, will allow it to maintain a good position. The Panel Chair finds that the City can pay for this Award and it constitutes a fair and reasonable Award.

COMPARISON OF PECULIARITIES OF THE FIRE FIGHTING PROFESSION

CSL Section 209.4(c)(v)(c) requires the Panel to compare the attributes of the fire profession with other trades or professions. The Panel has carefully considered the statutory criteria regarding the comparison of the firefighting profession with other trades or professions, including specifically: (1) hazards of employment; (2) physical qualifications; (3) educational qualifications; (4) mental qualifications; and (5) job training and skills.

The Union argues that the profession is unique, no real comparison can be made with other trades or professions. Instead, this criterion looks inward and examines the peculiarities of the firefighting profession itself. In that regard, appropriate weight must be given to the especially hazardous nature of a Fire Fighters' work and to the special qualifications, training, and skills required of a fire fighter.

The parties do not dispute that appropriate weight must be given to the especially hazardous nature of firefighting work and the unique training, skills, pressures, and dangers

that Fire Fighters face each day. The Panel Chair finds that the peculiarities of the profession mandate a direct comparison with Fire Fighters.

TERMS OF THE PARTIES' COLLECTIVE BARGAINING AGREEMENTS

The Panel must consider the parties' bargaining history under CSL § 209.4(c)(v)(d). The record includes all collective bargaining agreements between the parties since 2002. The parties have entered into memoranda and stipulations. None of the agreements, memoranda, or stipulations contain a procedure addressing New CSL § 71.

The Union maintains that as collective negotiations under the Taylor Law extend to the negotiations and administration of a collective bargaining agreement, including the resolution of questions arising, CSL Sections 203; 204, the Panel should and must consider under this criterion the full range of transactions affecting the parties' labor relationships. The Union stresses that certain of the City's proposals seek to alter the parties' Agreement dramatically.

The Panel has diligently reviewed the terms of collective bargaining agreements negotiated in the past. This recent history provides significant context for the Panel to develop and create a just and reasonable award.

There is only one issue for impasse resolution. A procedure to address the separation of any employee's employment under CSL § 71. The City petitioned for interest arbitration. The City and the Union have authorized this panel to make a just and reasonable determination for the procedure for terminating City firefighters disabled in the line of duty, under Civil Service Law ("CSL") § 71. The parties submitted to this panel, what the CSL § 71 procedure should be.

OTHER RELEVANT FACTORS

The panel considered "other relevant factors" in making its determination. CSL § 209 (4) (v).

Union witnesses fire fighters President Barry McGoey and retired firefighter Hung Sup ("John") Chun provided testimony supporting the Union's proposals and describing the City's use of CSL § 71.

Kittelstad

Fire Fighter Lawrence Kittelstad was injured in the line of duty while performing a smoke inspection and approved by the City to receive GML § 207-a benefits. (Union Ex. 14). Under the negotiated GML § 207-a procedure, Kittelstad was subject to an independent medical examination ("IME"), at the City'srequest, conducted by a physician selected by the City. (Union Ex. 16). The City'sphysician, Dr. Charles M. Totero, examined Kittelstad and prepared an IME report.*Id.* In his April 2017 IME report, Dr. Totero stated that Kittelstad "is a surgical candidate" and recommended that Kittelstad "have a follow up MRI and electrodiagnostic studies at this time in anticipation of decompression fusion surgery." *Id.* While casting "doubt" on Kittelstad's ability to return to full duty as aFire Fighter," he did not count it out. *Id.* Concurrently, Kittelstad made numerous requests for the City to authorize an MRI prescribed by his physician with his approved GML § 207-a injury. *Id.* Just weeks after the City requested Kittestad submit to an IME and received the IME report recommending further evaluation and treatment, the City sent Kittelstad a letter dated May 24, 2017 advising him that his employment was being terminated under CSL § 71 on July 7, 2017. (Union Ex. 14, 16). As described by President McGoey: "This wasn't Larry Kittelstad's doctor. This was the City's doctor in April of 2017 says that he's a surgical candidate and he recommends a follow-up MRI which might lead to further treatment or surgery and he never got that MRI. Q. Why not? A. Because he was terminated shortly thereafter." (Tr. 191).

The Union grieved Kittelstad's termination notice and also filed improper practice charges

at PERB, because Kittelstad's termination under CSL § 71 was an attempt to do an end run around various provisions of the CBA and the negotiated GML § 207-a procedure, which culminates in *de novo* arbitrationbefore a neutral arbitrator. (Union Ex. 10) (Tr. 187) ("we never believed that Section 71 even applies to firefighters with special protections under the [GML]...There is a very specific procedure under [GML §] 207-a to deal with injured firefighters and what happens when they get injured, and they can't work, how they get paid, it's in [§] 207-a of the [GML] which allows us to negotiate specific procedures. We did negotiate very specific procedures in 2015, and here we are less than two years later, now they just want to bring out Section 71.")

Although the City remained obligated to pay Kittelstad's "regular salary or wages" pursuant to GML § 207-a, shortly after the City terminated Kittelstad, it ceased paying Kittelstad's health insurance premiums and notified Kittelstad that he was now required to pay the full share premium to remain on the City's coverage. (Union Ex. 36). For Kittelstad to continue his coverage under the Consolidated Omnibus Budget Reconciliation Act ("COBRA") would cost $1,014.98 monthly forhis individual plan. (Union Ex. 37).

Chun

Fire Fighter John Chun testified that he injured both shoulders in the line of duty in 2014, applied for GML § 207-a benefits, and was approved by the City for GML § 207-a benefits. (Tr. 281). In 2014, Chun expected that he would make a full recovery. (Tr. 281-282). He desired to return to work soon as possible because he loved his job. *Id.* However, "in the middle of [Chun's] rehab," the City changed third party claims administrators to POMCO. (Tr. 282). POMCO generally was not responsive to Chun's medical providers' requests for POMCO to approve medical evaluation and treatment, to where Chun's physical therapy would lapse and he would

have to start his course of treatment over again. (Tr. 283-284). Indeed, Chun testified that even up to his testimony, the City's third-party claims administrator (now with a different name) is still engaged in "the tactics of delay andjust ignoring and the only times that -- that they won't lapse -- I mean after the lapse,they said I have to contact the union and then that very day I would get the approval."(Tr. 285).

Chun applied for a disability retirement with the New York State RetirementSystem. (Tr. 301). The application process took over a year to complete. (*Id.*) Chun called the Retirement System to inquire what was taking his application so long to process, and he was advised that the Retirement System was still waiting on the Cityto reply to its requests for information. *Id.* ("so the City was holding up my retirement basically"). Shockingly, President McGoey testified that he reviewed Chun's personnel file and discovered:

> [W]hen I received his personnel file, I found documents, requests from the Retirement System to the City of Yonkers requesting that they provide the Retirement System with documentation that they needed in order to process his application for disability retirement. As a matter of fact, one of them either said final request or thirdrequest for documentation that they needed in order to process his application. (Tr. 199-200).

Despite the City's own failure to provide the Retirement System with necessary information to complete Chun's application for a disability retirement, the City sent an attorney to Chun's house—unannounced—to hand-deliver a letter dated February 7, 2018 notifying Chun of his termination pursuant to CSL § 71, while his application for retirement was still pending. (Union Ex. 47) (Tr. 287). Chun understood this to mean that his family health insurance coverage would be terminated by the City. (Tr. 287-288).

After the Union became involved and the initial CSL § 71 notice waswithdrawn, the City

later issued a second CSL § 71 notice dated July 5, 2018. (Union Ex. 48). Thankfully, Chun received notification that he was approved by the Retirement System for a disability retirement approximately one week later. (Union Ex. 43) (NYS Retirement System Determination – Awarding Performance of Duty Disability Retirement to Firefighter Chun dated July 3, 2018). The City therefore rescinded its second CSL § 71 notice and Chun retired.

After years of faithful service, in a busy and dangerous firehouse, the City's conduct regarding Chun's injuries—and its use of CSL § 71 to terminate him—devastated Chun, who testified: "All I – all I wanted to do was return to work. I didn't even get to say any goodbyes to anybody. It's just not right the way – so anyway, I feel like my life has been put on hold ever since this started, so." (Tr. 304).

POMCO

As referenced above, the City contracted with POMCO to administer requests for medical evaluation and treatment made by injured Fire Fighters approved to receive GML § 207-a benefits for line of duty injuries. (Tr. 215) (Union Ex. 55). President McGoey cogently explained the relevance of the City's use of POMCO to the dispute:

> A. They're actually it's a service contract and they were provided an annual amount, which was billed on a monthly basis, but there was actually goals that if theyreached their goals in reducing the claims, that there was a financial bonus payable to them based upon the reduction of claims from prior periods in the past.
>
> Q. What claims are you referring to?
>
> A. Often times our members would require, as I said before, depending on the injury, there might be the need for an MRI and we initiated grievances with POMCO andeverything because they were not approving the doctor's request to do an MRI. *If you*

> *don't do an MRI, it delays the treatment. If you delay the treatment, it delays recovery orthe surgery, which further delays it, and in the same time then, they want to say you've been out of work for a year, you're fired. That's the relevance here is here we are, they're not providing timely treatment to our members.* (Tr. 215-216) (emphasis added).

After grieving the City's delays caused by its third-party administrator, POMCO, and litigating the City's attempt to stay arbitration of the same, including in the Appellate Division, Second Department, (Union Ex. 46), the parties ultimately agreed to be bound by the Consent Award of Arbitrator Al Viani (Union Exhibit 44), which provides a mechanism and hotline for Union members receiving GML § 207-a benefits to escalate the requests of their medical providers for evaluation and treatment to expedite approval of the request.(Tr. 221) (Union Ex. 44). Even with this procedure in place, the lack of cooperationand responsiveness from the City's third party administrators continues to cause delays to necessary medical evaluation and treatment. (Tr. 285).

AWARD

The City and the Union have authorized this Panel to make a just and reasonable determination for the procedure for terminating City Firefighters disabled in the line of duty, under CSL § 71 and 4 NYCRR 5.9.

Case law on the issue of negotiability also guides this Panel's decision. In Village of Old Brookville, 16 PERB ¶ 4571 (1983)PERB in considering CSL §209-a.2(b) stated,

> 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.

The Board went on to state,

> A demand relating to a subject treated by a statue is negotiable so

> long as the statue does not clearly preempt the entire subject matter and the demand does not diminish or merely restate the statutory benefits. 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.

In *Greenburgh No. 11 UFSD, 25 PERB ¶ 518 (1991)* the Board held CSL § 71 does not mandate the discharge of an employee nor does it specify the procedural step to be taken to effectuate discharge. In *Allen v. Howe, 84 NY2d 665 (1994)*, the Court of Appeals held CSL § 71 strikes a balance between the recognized substantial state interest in an efficient civil service and the interest of the civil servant in continued employment if a disability occurs. There the Court provided,

> Although termination 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.

In *Town of Cortlandt, 30 PERB ¶ 3031 (1997), aff'd 30 PERB ¶ 7012 (1997)*, PERB in addressing the question 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, held 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.

While an employer may terminate an employee disabled by an occupational injury for more than one year, there is no requirement it do so and no express prohibition against negotiation of an employer's exercise of it prerogative. See *City of Long Beach, 50 PERB ¶ 4503 (2017)* where the city provided notice to employee of intent to terminate and opportunity for a hearing; it alleged that unilateral implementation of procedure for terminating employee under CSL § 71 was proper since it provided due process. There the ALJ relied on *Town of Cortlandt* and *Town of Wallkill* holding the requirements of due process operate independently of the requirements of the Act; and parties are obligated to meet the demands of each. The ALJ held the city unilaterally established a due process procedure (notice, an opportunity to be heard) without bargaining. The city's conduct demonstrated an intent to terminate the employee as well as create a process to pursue that aim. In *City of Long Beach, 50 PERB ¶ 3036 (2017), aff'd 51 PERB ¶ 7002 (2018)* PERB held the city's statutory duties are independent of an exceed its constitutional obligation to provide due process, stating, "The absence of pre-termination procedures in the statute cannot be read as preempting an employer's duty to bargain."

The Panel is mindful of the Appellate Division, Second Department, decision overturning PERB's decision in *Long Beach,* 50 PERB 3036 (2017) See, *In the Matter of City of Long Beach v. New York State Pub. Employment Relations Bd., et al.,* holding that a municipality cannot be forced to negotiate away its statutory pre-termination rights pursuant to CSL § 71. The Court stated,

> Here, the specific directives of Civil Service Law § 71 and 4 NYCRR 5.9 leave no room for negotiation of the procedures to be followed prior to the termination of an employee's employment upon the exhaustion of the one-year period of leave. Therefore the presumption in favor of collective bargaining is overcome.

The Court of Appeals has granted PERB's motion for leave to appeal the Second Department's decision in *City of Long Beach*. Regardless of the Court of Appeal's ultimate decision, the Panel has fashioned a viable award that does violate the Court's decision in *Long Beach* and balances CSL § 71, 4 NYCRR 5.9 and our obligations under CSL §209. The following is the Panel's Award:

CIVIL SERVICE LAW § 71 PROCEDURE[1]

1. Unless fourteen (14) months has elapsed since the Firefighter could not work by reason of a disability resulting from occupational injury or disease as defined in the workmen's compensation law, the City shall not issue a CSL § 71 notice to any employee/member undergoing medical treatment, including physical therapy, for a temporary injury or illness with the expectation of returning to full duty based upon a medical opinion from the employee/member's treating physician.

2. The City shall continue to pay the full regular salary and benefits, including longevity, contractual increases, check-in pay, night differential, holiday pay and individual and family health insurance benefits, for fourteen (14) months after the Firefighter could not work by reason of a disability resulting from occupational injury or disease as defined in the workmen's compensation law.

3. Unless twenty-four (24) months has elapsed since the Firefighter could not work, the City shall not seek to terminate the employment of an employee/member under CSL § 71 if the employee/member has filed for accidental and/or performance of duty disability retirement with the Retirement System.

4. Local 628 and the City have agreed to the following form of the CSL§ 71 notice and a copy of any CSL§71 notice must be furnished to Local 628 promptly after it is personally served upon an employee/member.

NOTICE

Under New York State Civil Service Law Section 71, the City of Yonkers may terminate your employment when you have been cumulatively absent

[1] Nothing in this procedure shall be construed to reduce or limit any obligation the City may otherwise have to continue certain payments to the employee/member pursuant to General Municipal Law§ 207-a or other provisions of the collective bargaining agreement, including, but not limited to, those addressed in pending grievances, arbitrations, improper practice charges, litigation, or proceedings.

from work for more than one work year due to your "illness" or "injury" or you have been determined to be permanently incapacitated from the performance of duty. You are hereby notified that your employment may be terminated as of (INSERT DATE) (Letter to be sent no later than 30 calendar days before leave expires.)

The bases for the decision are (insert bases for determining that employee has been absent for work related illness or injury; i.e., doctors' reports, notes; etc.)

If you dispute the fact that you have been absent from work due to an "illness" or "injury" as defined by the Workers' Compensation Law, or the dates on which you have been absent from work due to that "illness" or "injury", or the fact that you have been cumulatively absent because of that "illness" or "injury" for more than one (1) cumulative year, you have the right to challenge the City's understanding of those facts.

If you wish to contest the preliminary decision to terminate your employment on these or any other bases appropriate pursuant to Civil Service Law Section 71, you must file a written statement with the City on or before (INSERT DATE; EMPLOYEE MUST FILE STATEMENT WITHIN 20 DAYS OF HIS/HER RECEIPT OF THIS NOTICE). This statement must specifically provide the reasons you are disputing the City's findings and include copies of doctors' reports or any other evidence you believe supports your claim.

Upon the City's receipt of an employee's written statement contesting the City's preliminary determination, an opportunity will be provided for you to have a formal due process hearing with the City to dispute the City's findings and/or preliminary decision to terminate your employment with the City of Yonkers. In the event that you wish appeal, the hearing will be scheduled within 45 days of your appeal. At the hearing, you will be expected to provide a contrary medical opinion from your treating provider. Accordingly, do not delay in obtaining that opinion should you wish to appeal as your delay in obtaining that opinion may not be excused. If the City does not receive a written statement by (INSERT TIME)(INSERT DATE; EMPLOYEE MUST FILE STATEMENT WITHIN 20 DAYS OF HIS/HER PERSONAL RECEIPT OF THIS NOTICE) and the City does not hear from you by that time that you wish to schedule a formal due process hearing, the City will assume that you are not contesting the termination of your employment and will accordingly act.

Also be advised that you may have an opportunity to be reemployed by the City of Yonkers. Civil Service Law Section 71 provides that, within one

year after the termination of your___(INSERT "illness" or "injury"), you may apply to the Westchester County Department of Human Resources for a medical examination by a medical officer selected by the City. If the medical officer certifies that you are physically and mentally fit to perform the duties of a Firefighter, then you will be reinstated if there is a vacancy available as a Firefighter at that time, or to a vacancy in a position in a lower grade in the same occupation. If no vacancy exists at that time, you will be placed on a preferred eligible list for a position as a Firefighter and will remain on the list for a period of four years.

5. The employee/member, within ten (20)days of his/her receipt of the CSL § 71 notice, may request a hearing to contest his/her termination under CSL § 71. The due process hearing procedure is set forth in paragraph 6 below.

6. The employee/member shall be entitled to the following hearing process to challenge a CSL §71 notice:

    1. The Appeal shall be heard by an Independent Hearing Officer appointed from an arbitrator list agreed by Local 628 and the City on an expedited basis. Unless agreed to otherwise, the City shall then select an arbitrator on a rotating basis from a panel of four (4) arbitrators to which the parties shall have agreed. In the event that there are less than four (4) arbitrators, the City shall select on a rotating basis from the remaining members of the panel. In the event that there are no remaining panel members and the parties cannot otherwise agree, the parties shall select from a list provide by the American Arbitration Association ("AAA"). If that arbitrator cannot conduct the hearing within forty-five (45) calendar days from the date of the appeal, the City shall go to the next panel arbitrator unless the parties have agreed otherwise or, in the absence of agreement, are required to use an arbitrator from the AAA list. The arbitrator's decision shall be final and binding on the City, Union and the Employee, subject to Article 75 of the Civil Practice Law and Rules. The cost of the arbitrator shall be borne equally by the parties. The parties shall be responsible for the cost of their own attorneys and witnesses. Absent extenuating circumstances, the hearing shall be held and completed within forty-five (45) calendar days of the filing of the appeal.

    2. Upon receipt of the CSL §71 notice, employee/member who has exercised his/her right to an appeal hearing, shall be expected to obtain a contrary medical report from his/her physician and/or testimony for use at the hearing. An employee/member's unexcused delay in obtaining a medical report or testimony shall not result in a delay in scheduling the hearing.

    3. The employee/member shall ensure that all witnesses for the hearing are prepared to testify on the scheduled hearing date. The arbitrator shall require

telephonic or remote testimony in the event that a witness cannot physically appear at the hearing.

4. The stated issue for the arbitrator at the hearing is limited to the following: "Whether the employee/member may be separated under CSL§71." In resolving said issue, and consistent with CSL 71, the City shall only be required to prove the following:

   A. That the employee/member is disabled from performing the full duties of a firefighter as a result of a disability resulting from an occupational injury or disease as defined in the workmen's compensation law as that term is used in CSL§71. With respect to Paragraph 4.A, the fact that the City does not provide benefits under the workers compensation law is irrelevant and shall not be considered.

   B. Except in the event that the employee/member is permanently incapacitated from the performance of the duties as a firefighter, that the employee/member has been on a leave of absence for one (1) cumulative year or more by reason of said disability. With respect to Paragraph 4.B, the City need not prove the length of the employee/member's leave of absence, if (i) the employee/member is permanently incapacitated from the performance of the duties as a firefighter; or (ii) the employee/member has filed for a disability retirement.

5. The arbitrator shall not consider testimony, documents or other offered proof that are not directly related to the specified issue, including, but not limited to, the financial impact of a CSL§71 separation on the employee/member or other collateral matters which are the subject of other past or pending grievances, improper practice charges, litigation or proceedings.

6. This is an expedited hearing. The arbitrator shall render a written determination within thirty (30) days of the closing of the hearing, regardless of if closing briefs or a stenographic record has been requested. The written determination shall only address the specified issue in Paragraph 4 of this procedure.

7. The arbitrator shall not add to, subtract from or otherwise modify this procedure in any manner.

8. This procedure is effective on January 1, 2021 and shall apply to those current employees/members who are eligible for separation under CSL§71, except as agreed to in writing by the parties. However, this procedure shall not apply to those former employees/members who were previously separated under CSL§ 71.

X			X
Concur	Dissent	Concur	Dissent *
Richard S. Corenthal, Esq.		Paul J. Sweeney, Esq.	

RSS

* SEE ATTACHED DISSENT.

RETENTION OF JURISDICTION

The Panel Chairman hereby retains jurisdiction of any and all disputes arising out of the interpretation of this Award for a period of one year from the date the Panel Chairperson signs the Award.

X			X
Concur	Dissent	Concur	Dissent *
Richard S. Corenthal, Esq.		Paul J. Sweeney, Esq.	

RSS

* I DISSENT ON "CONTINUING JURISDICTION" FOR THE REASONS IN DISSENT.

DURATION OF AWARD

Pursuant to the agreement of the parties and the provisions of Civil Service Law Section 209.4(c)(vi) (Taylor Law), this Award is for the period commencing January 1, 2019, through December 31, 2020. The terms of this Award shall be effective on such dates as set forth herein and applicable to any unit member working during such award term.

Accordingly, the Panel, following consideration of the record evidence, and after due consideration of the statutory criteria, executes this instrument which is the Panel's Award.

Public Panel Member and Panel Chairperson

Timothy S. Taylor, Esq.

STATE OF MASSACHUSETTS
COUNTY OF BERKSHIRE

On this 15th day of May 2021 before me personally came and appeared Timothy S. Taylor, Esq., to me known and known to me to be the individual described in the foregoing instrument, and he acknowledged to me that he executed the same.

Timothy S. Taylor, Esq.

Notary Public

BRIDGET ALBANO
Notary Public
Commonwealth of Massachusetts
My Commission Expires
January 27, 2023

STATE OF NEW YORK
COUNTY OF

On this 17 day of MAY, 2021 before me personally came and appeared Richard Corenthal, Esq., to me known and known to me to be the individual described in the foregoing instrument, and he acknowledged to me that she executed the same.

Richard S. Corenthal, Esq.

Notary Public

AMANDA MACALUSO
NOTARY PUBLIC-STATE OF NEW YORK
No. 01MA6246758
Qualified in Suffolk County
My Commission Expires 8/15/23

STATE OF NEW YORK
COUNTY OF

On this 19th day of May, 2021 before me personally came and appeared Paul J. Sweeney, Esq., to me known and known to me to be the individual described in the foregoing instrument, and he acknowledged to me that he executed the same.

Paul J. Sweeney, Esq.

Notary Public

RONITTA J. MCPHERSON
NOTARY PUBLIC, STATE OF NEW YORK
Registration No. 01MC6141851
Qualified in Tioga County
Commission Expires February 27, 2022

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD
INTEREST ARBITRATION PANEL

In the Matter of the Interest Arbitration between

THE CITY OF YONKERS,

Public Employer,

DISSENTING OPINION

-and-

YONKERS FIRE FIGHTERS, LOCAL 628, IAFF, AFL-CIO,

Employee Organization.

PERB Case No. IA2019-013; M2018-131

I respectfully dissent from the award issued by the majority of the Interest Arbitration Panel ("Panel Majority") executed by the Panel Chairperson on May 15, 2021 in the above captioned matter ("Award"). For reasons set forth below, which were addressed and fully briefed in the City's closing brief and supported by exhibits in the record, I dissent from the Award as I believe it violates the Taylor Law and public policy and is also inconsistent with Civil Service Law ("CSL") § 71 and its implementing regulations.[1]

[1] Consistent with its position, the City proposed a purely statutory CSL § 71 procedure [City Exhibit 2, Exhibit B] and has consistently refused to bargain over Union proposals involving non-mandatory subjects of negotiation or which were contrary to decisional case law on CSL § 71. The Union filed an IP Charge over the City's refusal to bargain [City Exhibit 12]. The City filed its own IP Charge, objecting to certain Union proposals on non-mandatory subjects [City Exhibit 5] and in that proceeding, the City reaffirmed its objections to revised Union proposals [City Exhibit 8]. The City reasserted its objections at the outset of this proceeding [Transcript, September 8, 2020, pp 26-29] and in its closing brief.

Point I: PERB Rule 205.6(d) Precludes An Award On Issues Which Are the Subject of a Pending Scope Charge

It is error for the Panel Majority to issue an award when the subject matter at issue here is being adjudicated under an improper practice ("IP") charge concerning the scope of mandatory bargaining, filed under PERB Case No. U-37312 (the "Scope Charge"). [City Exhibit 5, Volume 1].

The Scope Charge filed by the City of Yonkers (the "City") alleges that the Union's demands concern nonmandatory subjects of negotiation and are beyond the scope of interest arbitration. See *Town of East Hampton v. East Hampton Town Police Benevolent Assoc., Inc.*, 42 PERB ¶ 4534 (2009) ("Only proposals that address mandatorily negotiable subjects may be submitted to compulsory interest arbitration.").

The City expressly asserted that Union proposals 1, 2, and 5, as modified, all relate to the City's statutory rights under Civil Service Law ("CSL") § 71 and are therefore nonmandatory subjects of negotiation. The City also alleged that Union proposal 8.b is a nonmandatory subject as it allows an arbitrator to disregard the City's initial determination and violates public policy. Finally, the City asserted Union proposal 3 is nonmandatory because it is a unitary demand which is unified with proposal 8.b.

In its Award, the Panel Majority, over the City's objections, issued an Award prohibiting the City from separating a firefighter after twelve months if the firefighter is undergoing medical treatment, whereas the statute has no such delay. (Award at p. 33, paragraph 1). The delay in separation is extended to 24 months from the date the firefighter could not work in the event that the firefighter has applied for a disability retirement, whereas the statute has no such delay. (Award at p. 33, paragraph 3). The Award also requires that the

City continue paying certain special pay fringe benefits to firefighters fourteen months after the firefighter incurred the disabling injury, whereas the statute is silent on any such benefit. (Award at p. 33, paragraph 2). Finally, The Award permits binding *de novo* arbitration (albeit on limited issues), whereas 4 NYCRR Rule 5.9 permits a hearing officer report and recommendation to the appointing authority. As such, the final Award includes all or parts of Union proposals, objected to by the City in its Scope Charge.

It is undisputed that all of the City's objections are still pending before PERB ALJ Angela Blassman who has yet to rule on the City's Scope Charge and PERB has yet to issue a "final determination." This is not insignificant as PERB Rule (4 NYCRR) 205.6(d) provides:

> The public arbitration panel *shall not make any award* on issues, the arbitrability of which is the subject of an improper practice charge or a declaratory ruling petition, until final determination thereof by the board or withdrawal of such charge or petition; the panel may make an award on other issues. (emphasis added).

The Panel Majority does not address the application of PERB Rule 205.6(d) in its Award, save a single passing reference to the pending Scope Charge. The subject of the Scope Charge is identical to the sole subject of interest arbitration here – the arbitrability and negotiability of CSL § 71 procedures. There are no other issues on which to grant or deny an award. Therefore it was error for the Panel Majority to "make any award on issues, the arbitrability of which is the subject of an improper practice charge…until final determination thereof by the board or withdrawal of such charge or petition."

Point II: Civil Service Law § 71 Pre-termination Procedures Are Not Mandatorily Negotiable; the Award is Contrary to Case Law and Violates Public Policy

Putting aside the prohibition created by PERB Rule 205.6(d), it was error for the Panel Majority to disregard established case law which held that the subject matter in dispute is non-

arbitrable and a non-mandatory subject of bargaining. Even if the Panel could issue an award, PERB Rule 205.6(d) notwithstanding, granting the Union's proposals violates the Taylor Law, judicial precedent, and established public policy.

Under *Enlarged City Sch. Dist. of Middletown New York v. Civil Serv. Employees Ass'n, Inc.*, 148 A.D.3d 1146, 1148 (2nd Dept. 2017) and *City of Long Beach v. New York State Pub. Employment Relations Bd.*, 187 A.D.3d 745, 747–48 (2nd Dept. 2020), CSL § 71 procedures are not mandatory subjects of bargaining (*Long Beach*), and disputes over the results of those procedures are not arbitrable (*Middletown*). Accordingly, and for reasons set forth below, the City need not bargain over CSL § 71 procedures and need not arbitrate a dispute regarding a separation under CSL § 71.

First, the City has the unqualified statutory authority to terminate the employment of Union members who meet the criteria of CSL § 71 and need not negotiate over such terminations. The Appellate Division, Second Department recognized this statutory grant of authority in *Long Beach*:

> The presumption in favor of bargaining may be overcome only in special circumstances where the legislative intent to remove the issue from mandatory bargaining is plain and clear, or where a specific statutory directive leaves no room for negotiation. Additionally, a subject that would result in [the public employer's] surrender of nondelegable statutory responsibilities cannot be negotiated. Finally, some subjects are excluded from collective bargaining as a matter of policy, even where no statute explicitly says so.

187 A.D.2d at 747 (internal quotations and citations omitted).

The *Long Beach* court found it significant that the legislature authorized the State Civil Service Commission to promulgate rules for "carrying into effect the . . . rules for . . . leaves of absence." *Id.* (quoting CSL § 6(1)). The Civil Service Commission's detailed and comprehensive regulations governing leaves of absence, codified at 4 NYCRR 5.9, combined with CSL § 71, "leave no room for negotiation of the procedures to be followed prior to the

termination of an employee's employment upon the exhaustion of the one-year period of leave. Therefore the presumption in favor of collective bargaining is overcome." *Id.* at 747-48.

Second, the Second Department also found that a municipality need not arbitrate a determination to separate an employee under CSL § 71. "Accordingly, for the same reason that public policy was implicated in *Matter of Economico v Village of Pelham*, i.e., the abrogation of the authority granted to a public employer by the statute to terminate the employee, it is implicated in the instant matter." *Middletown*, 148 A.D.3d 1146 (2d Dept. 2017).

The Panel Majority has inexplicably departed from this well-established doctrine by fashioning an Award that deviates from the statutory requirements of CSL § 71 and the regulations implementing it, namely 4 NYCRR 5.9. The Panel Majority claims it "has fashioned a viable award that does [not] violate the Court's decision in *Long Beach*," but the clear import of the Award says otherwise. Similarly, even if other aspects of the Award could stand (which is denied) or if the Second Department's holding in *Long Beach* was later reversed, that part of the Award which requires that the City arbitrate the CSL § 71 separation would violate the Second Department's holding in *Middletown* which is not reconciled in the Award.

A. The Award Wrongly Requires that the City Wait More than the Period Required by CSL § 71

The relevant part of CSL § 71 provides:

> 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.

Among other things, the Award forbids the City from issuing a CSL § 71 notice to a firefighter who has been absent from employment due to a duty-related disability until fourteen (14) months have elapsed since the start of such disability, and forbids the City from actually terminating the employment of a firefighter under CSL § 71 until the firefighter has been unable to work for twenty-four (24) months.[2] These provisions of the Award go beyond what is required by CSL § 71, and therefore violate the strong public policy granting municipalities the authority to terminate employees who incur long-term disabilities in the performance of their duties in furtherance of an efficient and effective public workforce. Per CSL § 71, the City need not even wait one year if the "disability is of such a nature as to permanently incapacitate him or her for the performance of the duties of his or her position." Put another way, CSL § 71 allows the City to immediately separate an employee who is permanently disabled from the performance of his/her full duties and need not wait one year.

Nowhere in CSL § 71 is the one-year leave of absence period suspended or tolled because the employee is undergoing treatment for their disability. Yet, the Award requires the City to wait fourteen (14) months until issuing a CSL § 71 termination notice to any employee "undergoing medical treatment, including physical therapy, for a temporary injury or illness with the expectation of returning to full duty based upon a medical opinion from the employee/member's treating physician." The Panel Majority does not address how the 14 month waiting period which prevents the City from immediately separating a permanently disabled firefighter or separating a firefighter who has been out of work for more than a year is consistent with the holding in *Long Beach*.

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[2] Under CSL § 71, public employees are only entitled to two (2) years, or twenty-four (24) months, of disability leave if their disability is in connection with "an assault sustained in the course of his or her employment[.]"

B. The Award Wrongly Extends the Employee's Time to Appeal a Determination

The Award further goes beyond what is required by CSL § 71 and 4 NYCRR 5.9 by mandating a detailed notice of termination of employment under CSL § 71. 4 NYCRR 5.9 governs the notice due to employees subject to termination under CSL § 71. Subsection (d) of the regulation, titled "Restoration to duty from workers' compensation leave," provides that the employee "may apply in writing to the appointing authority within 10 working days of the personal service or service by mail of the notice of refusal, for a hearing before a hearing officer[.]" The Award inexplicably doubles this ten (10) day period, giving employees twenty (20) days from their receipt of the initial determination in which to contest the termination. The Award also imposes an arbitrary 45-day deadline in which the City must schedule a hearing. No such deadline exists in either CSL § 71 or 4 NYCRR 5.9.

C. The Award Improperly Denies the City's Right to Appoint the Hearing Officer And Requires Binding Arbitration Under CPLR Article 75

The Panel Majority also erred by imposing its own appeal procedures on the City's decision to separate an employee under CSL § 71. First, 4 NYCRR 5.9(d)(4) specifies that the hearing officer appointed to review the employer's initial determination "shall be appointed and shall conduct the proceedings in accord with article 3 of the State Administrative Procedure Act." This conforms to the City's proposal, which allows it to appoint an independent hearing officer at its discretion, and without input by the Union. The City's proposal also conforms with 4 NYCRR 5.9(d)(4) and (5), which provide that the hearing officer may deliver their "recommendations" to the appointing authority, but that the appointing authority "shall issue a written finding of facts and determination" that "shall be

final, subject only to judicial review pursuant to article 78 of the Civil Practice Law and Rules."

The Award requires the appeal to be heard by an arbitrator list agreed to by the Union and the City, requires the arbitrator's decision to be final and binding upon the parties, and allows for review only by the mechanisms of Article 75 of the Civil Practice Law and Rules. However, the Second Department established in *Middletown* that disputes concerning CSL § 71 determinations are not arbitrable, because allowing arbitration of those determinations abrogates "the authority granted to a public employer by [CSL § 71] to terminate the employee[.]" 148 A.D.3d at 1148. An arbitrator hearing a CSL § 71 dispute "would not be able to fashion a remedy that would not violate public policy[.]" *Id.* at 1149. 4 NYCRR 5.9 specifies that an independent hearing followed by an Article 78 petition is the proper avenue for review of an initial determination of CSL § 71 termination, not arbitration followed by a petition to vacate or confirm the award under Article 75 of the CPLR.

D. The Award Erroneously Imposes a *De Novo* Standard of Review

The Panel Majority's error in imposing an arbitral review mechanism is compounded by its heightening of the standard of review. The City proposed a "substantial evidence" standard of review, while the Union proposed *de novo* review. The Union's proposal is improper because it allows an arbitrator to disregard the City's initial determination through *de novo* review, rather than a hearing officer's review of the City's determination based on the presence or absence of substantial evidence for the City's decision. 4 NYCRR 5.9 unequivocally grants the appointing authority, traditionally the department head, with the right to make the initial and final determinations when addressing CSL § 71 terminations. Union Proposal 8.b seeks to remove the City's authority to make those initial and final

determinations and to give that authority to an outside entity in violation of the City's rights.

In rendering its Award, the Panel Majority has, in effect, adopted the Union's improper *de novo* standard of review, albeit with a defined issue for resolution. Paragraph 6.4 of the Award states that the issue for the arbitrator at the hearing is limited to "whether the employee/member may be separated under CSL 71." The Award requires the City to affirmatively prove:

> A. That the employee/member is disabled from performing the full duties of a firefighter as a result of a disability resulting from an occupational injury or disease as defined in the workmen's compensation law as that term is used in CSL 71. With respect to Paragraph 4.A, the fact that the City does not provide benefits under the workers compensation law is irrelevant and shall not be considered.
>
> B. Except in the event that the employee/member is permanently incapacitated from the performance of the duties as a firefighter, that the employee/member has been on a leave of absence for one (1) cumulative year or more by reason of said disability. With respect to Paragraph 4.B, the City need not prove the length of the employee/member's leave of absence, if (i) the employee/member is permanently incapacitated from the performance of the duties as a firefighter; or (ii) the employee/member has filed for a disability retirement.

This "stated issue" for the arbitrator's determination (albeit limited) is essentially a *de novo* standard of review, and therefore improper. In *Poughkeepsie Prof'l Firefighters' Ass'n, Local 596, IAFF, AFL-CIO-CLC v. New York State Pub. Employment Relations Bd.*, 6 N.Y.3d 514 (2006), the Court of Appeals held that a GML § 207-a proposal which—despite the absence of a reference to de novo review—sought to make a new determination on a municipality's GML § 207-a determination improperly infringed on the employer's rights. The Court of Appeals re-affirmed PERB case law which upheld the statutory right of the municipality to make the initial determination on GML § 207 claims and the prohibition on the ability of an appeal authority (hearing officer or arbitrator) from making a determination *de novo*.

Union Proposal 8.b and the use of a de facto *de novo* review in the awarded CSL § 71 procedure is no different than improper bargaining demands for use of *de novo* review in GML § 207 proceedings. A CSL § 71 procedure which requires use of *de novo* review would constitute an impermissible infringement on the rights of the City to make an initial determination. Conversely, in order to pass muster, the procedure must be limited to one which seeks review of the City's initial determination and cannot apply a *de novo* standard of review. The Award imposes exactly that which the Court of Appeals, the Second Department, and PERB have deemed improper and unacceptable.

Point III: The Award Is Not Supported By the Statutory Criteria

In arriving at its determination, the Panel is constrained to issue an Award which must be based on the following criteria, as detailed in Civil Service Law Section 209.4(c)(v):

> (v) the public arbitration panel shall make a just and reasonable determination of the matters in dispute. In arriving at such determination, the panel shall specify the basis for its findings, taking into consideration, in addition to any other relevant factors, the following:
>
> a. comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services or requiring similar skills under similar working conditions and with other employees generally in public and private employment in comparablecommunities;
>
> b. the interests and welfare of the public and the financial ability ofthe public employer to pay;
>
> c. comparison of peculiarities in regard to other trades or professions, including specifically, (1) hazards of employment; (2) physical qualifications; (3) educational qualifications; (4) mental qualifications ; (5) job training;
>
> d. the terms of collective bargaining agreements negotiated

> between the parties in the past providing for compensation and fringe benefits, including, but not limited to, the provisions for salary, insurance and retirement benefits, medical and hospitalization benefits, paid time off and job security. CSL § 209(4)(c)(v).

In this case, there was no showing that there was any other fire department that had a similar CSL § 71 procedure. While no Westchester County fire department had any such procedure (City Exhibits 11- 41), the City of Long Beach Fire Department had a procedure which did not deviate from the statutory scheme. (City Exhibit 42). The City also produced a procedure from the Village of Sleepy Hollow which did support use of a statutory procedure. (City Exhibit 46). Thus, there was no evidence by way of a "comparison" to other similar fire (or police) departments to support the non-statutory procedure imposed by the Award. To the contrary the only relevant exhibits supported a statutory procedure.

Similarly, there was no showing that the "interests and welfare of the public" benefited from a non-statutory procedure.

Further, there was no showing of the "peculiarities in regard to other trades or professions" to support the procedure imposed by the Award; this is especially true given the very generous wages and benefits provided to those firefighters who are separated under CSL § 71 who continue to collect full pay as part of a General Municipal Law § 207-a benefit. Nothing in CSL § 71 prevents a firefighter from requesting a service retirement for years with retiree health insurance pending a determination on a disability retirement or continuing to accept a "full pay" General Municipal Law § 207-a benefit—on a tax free basis—pending that determination.[3]

Finally, it is undisputed that the Union CBA did not address CSL § 71. (City Exhibit 41). As such, there was nothing in the "terms of collective bargaining agreements negotiated between

[3] Full pay for most City firefighters exceeds $100,000.00 per year plus longevity. See current wages in CBA. (City Exhibit 41).

the parties in the past providing for compensation and fringe benefits" to support the procedure imposed herein.

Conclusion

For the foregoing reasons, I respectfully dissent and request that my dissent be attached and made part of the Award.

Date: May 19, 2021

Paul J. Sweeney, Esq.
Public Employer Panel Member