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COURT OF APPEALS
STATE OF NEW YORK

MATTER OF CITY OF LONG BEACH,

Respondent,

-against-

NO. 70

PERB,

Appellant.

20 Eagle Street
Albany, New York
September 7, 2022

Before:

ACTING CHIEF JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE SHIRLEY TROUTMAN

Appearances:

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Official Court Transcriber



1 ACTING CHIEF JUDGE CANNATARO: Good afternoon,
2 everyone. Welcome to our reconstituted courtroom at Court of
3 Appeals of Hall.

4 I'd just like to note before we begin today's
5 proceedings that today, September 7th, is the 175th anniversary
6 of the establishment of the New York Court of Appeals. And we
7 will be observing the occasion for the next several weeks
8 through displays throughout the courthouse including the banner
9 which you say hanging in the rotunda as you came in the
10 building, as well as literature which is available, and I think
11 maybe even handed out as you came in. So happy anniversary to
12 all.

13 And we will begin with the first case on today's
14 calendar, No. 70, Matter of City of Long Beach versus the Public
15 Employment Relations Board.

16 Counsel?

17 MR. FOIS: Thank you, Your Honor. May I reserve
18 two minutes for rebuttal?

19 ACTING CHIEF JUDGE CANNATARO: Two minutes? Yes.

20 MR. FOIS: Please.

21 Michael Fois, I'm the general counsel of the New
22 York State Public Employment Relations Board.

23 To start off, let's - - - I want to point out
24 what is not in dispute here, which is that the Appellate
25 Division's ruling cannot be affirmed on Appellate



1 Division's decision. There's absolutely nothing in the
2 decision this court can hang onto in order to affirm that
3 decision. All - - -

4 JUDGE WILSON: So should we - - - should we just
5 sent it back for redo?

6 MR. FOIS: That is one of your - - - your
7 possibilities. I think in the interest of judicial economy
8 since it's fully briefed and it is before this court, it
9 would be appropriate for the court to decide the issue.

10 But as I was saying, we agree that the
11 regulations the lower court relied upon do not apply to
12 employees of the City of Long Beach. And it's also
13 undisputed that in the decision, no specific language in
14 CSL § 71, itself, was identified by the Court.

15 Our position is clear, that the numerous
16 precedents of this court, Watertown, Auburn, Schenectady
17 Board of Education, set forth very directly that the strong
18 sweeping policy in favor of collective bargaining means
19 procedures to implement the statute are bargainable unless
20 there's something explicit in the statute preventing it or
21 clearly inescapably implicit.

22 JUDGE RIVERA: So what would the legislature - -
23 - from your view, what would the legislature have had to
24 have done - - -

25 MR. FOIS: Well, I think - - -



1 JUDGE RIVERA: - - - to say that this - - - what
2 - - - what you're arguing for is not negotiable?

3 MR. FOIS: I think I'll use Schenectady as an
4 example. In Schenectady, one of the issues - - - the key
5 issue was whether in order to be eligible for light duty
6 the municipality can require ongoing medical treatment.
7 There were other issues in there, as well, such as notice
8 and what have you.

9 This court looking at it said since the statute
10 itself refers to surgery and continuing medical treatment,
11 it was clear that the legislature did not intend a
12 municipality have to bargain over regular, over procedures
13 regarding surgery or continuing medical care.

14 That same opinion, however, took pains to point
15 out that even though not in front of the court at that
16 matter, there were other procedures pursuant to the statute
17 that may be negotiable, such as the review of medical
18 records, whether that - - - the medical records relied upon
19 by the municipality making the determination.

20 JUDGE WILSON: So for example, if you look at
21 Civil Service Law 71 itself, it has some, we can call them
22 post termination or, perhaps, call them reinstatement type
23 of provisions. One little piece of that is that the
24 department or commission selects the medical examiner. Is
25 that bargainable or not bargainable?



1 MR. FOIS: I don't think - - - because a specific
2 issue hasn't - - - wasn't put before PERB, I can't say - -
3 - can't pre-guess a case.

4 But based on the precedent, I would say not
5 bargainable because not disputed in this case that the
6 decision whether or not to terminate is discretionary and
7 resides with the employer. And not only - - -

8 JUDGE WILSON: Let me - - - let me ask - - -
9 sorry, let me ask you then a follow up to that.

10 The provisions about post-termination
11 reinstatement have a one-year period of time after the
12 disability, right, during which these various protections
13 exist.

14 MR. FOIS: Um-hum.

15 JUDGE WILSON: Is it - - - would it be
16 bargainable or not bargainable if the union wanted to
17 bargain about reinstatement after three years, let's say,
18 from the - - - from the termination of the disability?

19 MR. FOIS: I believe so because - - -

20 JUDGE WILSON: It would mean - - -

21 MR. FOIS: - - - we want to maximize the
22 flexibility - - -

23 JUDGE WILSON: - - - is - - - is bargainable - -
24 - is bargainable or not bargainable?

25 MR. FOIS: I would say it is - - -



1 JUDGE WILSON: Okay.

2 MR. FOIS: - - - because we want to maximize the
3 flexibility of the parties including employers.

4 One example I would use is, this case does not
5 concern hearing. We're not saying hearings were required.
6 Your case law says hearings are not required as a matter of
7 minimum due process. But it is very common for the parties
8 to choose to negotiate and agree to hearings in certain
9 circumstances. In other words, if an employer wants to,
10 for good labor relations, or for whatever reason, agree to
11 say, even more than a year later, we'll continue
12 reinstatement - - -

13 JUDGE GARCIA: Counsel, going to this point here,
14 I think it's your brief, you say, the employer's right to
15 terminate under section 71, and its right to choose who
16 makes that determination, are not at issue. The sole issue
17 is whether under the Taylor Law, an employer is required to
18 bargain over pretermination procedures, right?

19 MR. FOIS: Correct.

20 JUDGE GARCIA: But in your decision below, in the
21 PERB decision below, and in the - - - particularly citing
22 Cortland, it seems like you are saying that who makes the
23 decision is bargainable?

24 MR. FOIS: Well, with all due respect, I believe
25 that's a misreading of Cortland. We are most certainly not



1 in Cortland, or any of the similar cases under the various
2 other civil law sections, did PERB ever say that the
3 decisionmaker can be controlled - - - is a required act
4 with the bargaining.

5 What we did recognize is that procedures related
6 to it, which may impact on who the employer chooses to be
7 the decisionmaker, or the employer may agree as to who the
8 decisionmaker is. But we most definitely have never said
9 that who the decisionmaker, as to whether or not to
10 terminate someone, is subject to mandatory bargaining.
11 That resides with the municipality.

12 ACTING CHIEF JUDGE CANNATARO: Can I go back to
13 Judge Wilson's question about the three-year termination
14 negotiation. Is there any problem here in that this
15 statute specifically refers to a one-year timeline?
16 Granted, it's permissive, it's may, not must. But it would
17 seem to contradict in at least the spirit that the
18 legislation seems to be written in.

19 MR. FOIS: With all due respect, Your Honor, I
20 couldn't disagree more. If they didn't want to give the
21 employer the freedom to keep someone out for more than a
22 year, or to consider reinstating them after three years,
23 they wouldn't have made it discretionary. They did not
24 say, because of labor problems in the State of New York,
25 if you're out for a year, the municipality has to let the



1 person go and then go through the civil service process to
2 replace.

3 JUDGE TROUTMAN: What about the fact that there's
4 a presumption in favor of collective bargaining unless
5 there's legislative intent to remove that issue from
6 mandatory bargaining that is plain and clear.

7 MR. FOIS: I couldn't agree - - -

8 JUDGE TROUTMAN: How - - - what's - - - where is
9 that here?

10 MR. FOIS: There's nothing that's plain and
11 clear. The parties agree that the legislation is silent as
12 to it. And I believe it was Auburn, but it's cases cited
13 in our briefs, where this Court held that where the statute
14 is silent, you cannot presume or imply a legislative intent
15 to prohibit collective bargaining. There is no pertinent
16 legislative history. Section 71's legislative history
17 doesn't go anywhere near this, and a similar statute they
18 relied on predates the Taylor Law.

19 And once again, this court has basically said
20 it's a matter of statutory construction, you can't look to
21 case - - - legislative history older than the Taylor Law to
22 try to get an idea of what the legislature was thinking
23 about collective bargaining. Obviously, if there was a
24 more recent amendment, that legislative history would
25 clearly be considerable. But actually - - -



1 JUDGE RIVERA: But - - -

2 MR. FOIS: - - - there is nothing.

3 JUDGE RIVERA: - - - but your interpretation does
4 appear - - - maybe there's a response to it - - - does
5 appear to undermine the legislative goal of expeditious
6 termination.

7 MR. FOIS: Absolutely not. This is a - - -
8 parties have to negotiate one time. And critically, they
9 do not have to wait until they want to terminate an
10 individual.

11 In 1997, court - - - it was confirmed by the
12 courts. Since 1997, it's not only been per precedent, but
13 court-confirmed precedent that section 71 procedures are
14 bargainable. They had twenty-five years. They waited
15 until after a year after they wanted to terminate someone
16 to give the first notice to anyone that they considered
17 doing those.

18 JUDGE RIVERA: Well, you say they only have to do
19 it once. Perhaps I've misunderstood - - -

20 MR. FOIS: Yeah.

21 JUDGE RIVERA: Every time - - - every time the
22 collective bargaining agreement expires, don't they have to
23 renegotiate?

24 MR. FOIS: Yes, but the prior existing procedures
25 stay in effect until you negotiate new ones.



1 JUDGE RIVERA: Yes, but I - - - all I'm saying is
2 it would be open to negotiation again? It's not that you
3 negotiate it once forever and now both sides, because it
4 may very well be employees are seeking a reconsideration of
5 whatever they've negotiated, right?

6 MR. FOIS: Absolute - - -

7 JUDGE RIVERA: You're not necessarily bound to it
8 for a future agreement. The parties might renegotiate.

9 MR. FOIS: Absolutely. But the harms the city
10 keeps going at about we can't replace the employee, or the
11 time it will take, these are myths.

12 JUDGE RIVERA: Um-hum.

13 MR. FOIS: This is a one-time thing. So the
14 goals of the statute are not frustrated by having to
15 negotiate the first time procedures to be put in place.

16 JUDGE RIVERA: Um-hum.

17 ACTING CHIEF JUDGE CANNATARO: Thank you,
18 Counsel.

19 MR. FOIS: Thank you, very much.

20 MR. STOBER: Your Honors, if I may reserve three
21 minutes for rebuttal?

22 ACTING CHIEF JUDGE CANNATARO: You may.

23 MR. STOBER: Thank you.

24 If it may please the court, my name is Louis D.
25 Stober, Jr. I'm attorney for the City of Long Beach



1 Professional Firefighters. Had to make sure I put that
2 junior in there so that my son, Louis D. Stober, III, who
3 this is his second day as an ADA in the Nassau DA's office,
4 so we have that distinction between father and son. But
5 very proud of him.

6 I'm going to be - - - try to be concise, quick,
7 and to the point here since you've asked questions of Mr.
8 Fois on behalf of PERB.

9 If you look at the Appellate Division decision,
10 it can be broken down as follows. They did not mention
11 legislative history as a rationale. They did not mention
12 public policy as their rationale. They did not mention
13 that there's a clear and present indication either
14 expressly or implicitly prohibiting negotiations. Instead,
15 what they said was section 71 has not pretermination
16 procedures. Section 6, bracket 1, of the Civil Service Law
17 allows civil service to promulgate rules to implement this
18 chapter, meaning the entire Civil Service Law. They then
19 jump to say, and the New York State Department of Civil
20 Service enacted section 5.9, setting forth rights under
21 section 71. Therefore, number four, there's no need for
22 negotiations.

23 There's two critical flaws with that analysis.

24 JUDGE RIVERA: Let me interrupt you. I mean, it
25 does seem - - - since I'm following up with some of the



1 questioning of - - - of - - -

2 MR. STOBBER: Sure.

3 JUDGE RIVERA: - - - of Mr. Fois. It does seem
4 that what the legislature is trying to do is balance the
5 employee's interests and needs and the employer's interests
6 and needs. And it looks like when they did that, they
7 decided, okay, they'll be this one-year period, but after
8 that, if the employer wishes to terminate - - -

9 MR. STOBBER: They can do so - - -

10 JUDGE RIVERA: - - - terminate and - - - and you
11 want to expedite that because you've already waited a
12 certain period of time to get to that point.

13 MR. STOBBER: And all we are saying is, fine, but
14 the procedure for getting there is mandatorily negotiable.
15 Is an email to the employee - - -

16 JUDGE RIVERA: But - - -

17 MR. STOBBER: - - - sufficient?

18 JUDGE RIVERA: - - - but doesn't the procedure
19 extend that period of time that the legislature has
20 already, in their balance - - -

21 MR. STOBBER: I would disagree - - -

22 JUDGE RIVERA: - - - weighed in a particular way
23 and come out with a particular timeframe.

24 MR. STOBBER: I would disagree, Your Honor. There
25 - - -



1 JUDGE RIVERA: I mean - - -

2 MR. STOBBER: - - - there can be - - - there can
3 be procedure that says thirty days prior to the one year,
4 you have to notify the employee. The employee must within
5 ten days object. An opportunity to be heard must be - - -

6 JUDGE RIVERA: But you could have a different
7 procedure that's quite - - -

8 MR. STOBBER: - - - heard within that - - -

9 JUDGE RIVERA: - - - lengthy - - -

10 MR. STOBBER: - - - so that you could - - -

11 JUDGE RIVERA: - - - that involves appellate
12 practice. There might - - - very well expand this way
13 beyond what the legislature ever intended.

14 MR. STOBBER: But you know the legislature is
15 astute. I've been practicing for thirty-eight years. I
16 know collective bargaining takes time. The legislature
17 knows that too.

18 JUDGE RIVERA: Um-hum.

19 MR. STOBBER: And yet, there is not a single
20 statute that says, you know what, we are going to prohibit
21 negotiations if it's going to take an extended time to get
22 there. If there's six months or longer to get to the - - -
23 a collective agreement on this, then you don't have to do
24 it. They didn't do that. They know. We know. And the
25 City of Long Beach nor any other municipal employer has



1 ever prevailed upon the legislature and the Governor to
2 enact legislation that would prohibit collective bargaining
3 if it takes a long time - - -

4 JUDGE RIVERA: Well, the collective - - -

5 MR. STOBBER: - - - to get there.

6 JUDGE RIVERA: - - - bargaining may take a period
7 of time.

8 MR. STOBBER: Right.

9 JUDGE RIVERA: The question is whether or not
10 what you end up bargaining for undermines the original
11 intent of allowing the employer, after a set period of
12 time, to be able to terminate, get an employee in, and move
13 on with business.

14 MR. STOBBER: You know, but even if in the city's
15 best case - - -

16 JUDGE RIVERA: Um-hum.

17 MR. STOBBER: - - - they were to notify the
18 employee and then give them their opportunity to be heard,
19 it's going to be more than a year anyway.

20 JUDGE RIVERA: Um-huh.

21 MR. STOBBER: And frankly, if somebody's on
22 section 71 - - -

23 JUDGE RIVERA: Um-hum.

24 MR. STOBBER: - - - that means they're on workers'
25 comp. They're not on salary. They're receiving workers'



1 comp benefits. So the benefit to the employer is not there
2 that, oh, we're keeping him on salary, he - - - we're
3 keeping him on workers' comp.

4 JUDGE GARCIA: Counsel, but you agree with your
5 colleague that the issues here are circumscribed to
6 pretermination procedures?

7 MR. STOBBER: Yes. And the problem, as I was
8 about to say, the two flaws that I see with the Appellate
9 Division decision is, one, they relied on a rule that
10 doesn't apply to Long Beach Firefighters. The City, in
11 their brief, spent many pages on that exact point. And
12 there is no rule or regulation in Long Beach Civil Service
13 Commission on section 71.

14 And secondly, the Appellate Division decision - -
15 - and I'm sorry, the red light just came on - - - the
16 Appellate Division's decision does not take account of the
17 numerous cases, including Newburgh, that says that a rule
18 or regulation cannot supersede a legislative enactment,
19 such as here, that says, that this is collective
20 bargaining. And the policy in the State of New York is a
21 sweeping policy of collective negotiations.

22 And I thank Your Honor - - - Honors for giving me
23 this opportunity to speak to you, and I look forward to
24 seeing you on rebuttal.

25 JUDGE RIVERA: Good luck to your son.



1 MR. STOBBER: Oh, thank you, thank you.

2 JUDGE RIVERA: Um-hum.

3 ACTING CHIEF JUDGE CANNATARO: Thank you.

4 MR. O'NEIL: Good afternoon, Your Honors. Three
5 things first, so I don't forget to do them later.

6 Cortland was not affirmed by the courts. It went
7 to the supreme court, Westchester County. That's it. No
8 appellate review of that.

9 Number two, the rules that we're dealing with
10 here, ironically, we have Mr. Stober to thank for that.
11 They were submitted post-oral argument in the Appellate
12 Division; that issue was raised. Cook was raised by him
13 post - - - and we had no right to submit any more papers.
14 So that's why the Appellate Division definitely was
15 confused on that issue because they do not apply. No
16 question about it.

17 The third thing is, and I don't ever do this, but
18 I've been practicing fifty-two years. He said thirty-six,
19 so I don't usually tell people, but I will tell you today.
20 So this statute, in all those years, with all the cities,
21 villages, towns I've represented, this is one of the most
22 damaging statutes and so contrary to the legislative
23 history.

24 The legislative history of this statute could not
25 be any clearer. Pre-Taylor Law, back in the sixties, and



1 they said we have to do something because when people get
2 sick for extended periods of time, we can't go without
3 them, because it puts too much of a burden on the people
4 who - - - who are still left, or we have to get
5 replacements. And God forbid, you try to get replacements
6 nowadays for workers.

7 JUDGE RIVERA: Do you have a sense of how
8 widespread this issue is, of employees being in this
9 particular situation and the employer really needing to
10 replace them, wanting to bring someone in, potentially
11 losing someone because they have to wait?

12 MR. O'NEIL: Well, with the fiscal problems they
13 have, every time someone goes out on workers' comp, we're
14 down one person. I'll take a police department because
15 that's the easiest. They don't go without that person.
16 They have to have people work overtime - - -

17 JUDGE RIVERA: Um-hum.

18 MR. O'NEIL: - - - and you're talking about a
19 year. And it's a strain on them and - - - and I must say,
20 the younger generation, in the early days, you couldn't get
21 enough overtime for the cops. Now it's hard to get cops
22 who want to work overtime.

23 JUDGE WILSON: Let me direct - - -

24 ACTING CHIEF JUDGE CANNATARO: Counsel, I assume
25 - - -



1 JUDGE WILSON: - - - legislative history for a
2 second.

3 MR. O'NEIL: Yeah.

4 JUDGE WILSON: Because it seems to me that the
5 legislative history expresses two different concerns. One
6 is the one you stated, right, we need to have people in the
7 jobs. But the special concern that's stated in the
8 legislative history is that people who are mentally ill and
9 unable to perform on the job because of a either temporary
10 or longer running mental illness would be stigmatized by
11 the process under section 75 that would designate them
12 either incompetent or I forgot what the other word is - - -
13 or guilty of misconduct.

14 And it troubled me, I have to say, that in the
15 long block quote of the legislative history you have on
16 page 15 of your brief, you twice elided the references to
17 mental illness which seemed to be the legislature special
18 concern.

19 So at least as I read the whole legislative
20 history, it seems to me there were dual concerns, right?
21 One concern was, we need to have people in the job so the
22 work can continue. But the other concern that the
23 legislature says especially about is the stigma attached to
24 using 75 for people who are mentally ill.

25 How - - - what do you say about that?



1 MR. O'NEIL: It was not just for mentally ill,
2 Your Honor. It was in there - - - mentally ill was
3 mentioned very much at the end. But the overall problem,
4 how many mentally ill people do you have on workers' comp?
5 It has to be caused by working on the job. It doesn't
6 happen very often. I haven't had many cases in my
7 lifetime. But there's a lot of physical injuries, injuries
8 that people - - -

9 JUDGE WILSON: Why did you - - - why did you
10 elide the two references to mental illness from the
11 legislative history - - -

12 MR. O'NEIL: I'm sorry, I didn't - - -

13 JUDGE WILSON: Why did you remove those when you
14 quoted the legislative history?

15 MR. O'NEIL: About the mentally ill?

16 JUDGE WILSON: Yeah.

17 MR. O'NEIL: I actually thought it was something
18 that I never dealt with, I'd never heard of, I hadn't ever
19 had a case where we had somebody out because they're on
20 workers' comp, the mental illness was caused by the
21 employer? I - - - I'd never heard of even a case like
22 that. And then - - - and most of them are all physical
23 injuries, and they're out for year, and the problems - - -
24 in fact, the legislative history says at the end, it's the
25 public policy of the state to make sure we fix this problem

1 by putting this in. This is a - - - it was a serious
2 problem. And it's one of the last paragraphs that they
3 mention before the mental illness part, that this is a very
4 serious problem. And the stigma about 75 is true.

5 And now, again, I'm jumping ahead a bit, but now
6 we're back at there because of what happened in Southold.
7 They didn't want to go - - -

8 JUDGE TROUTMAN: So is it clear here in the
9 legislation that there was an intent to remove this from
10 collective bargaining?

11 MR. O'NEIL: Well, it couldn't have been the
12 intent then because it wasn't collective bargaining. There
13 was - - - and - - - but I have a list of cases somewhere in
14 this pile of all of the - - - the cases this court has
15 overturned of PERB. When they keep saying the Court of
16 Appeals can't overturn PERB's decisions, there's a list of
17 about a dozen of them, and about a half a dozen of them
18 involve statutes that existed before the Taylor Law was
19 drafted.

20 So you have to - - - and - - - and in this case,
21 when they talk about the importance of this, I - - - I've
22 seen it and now we don't have to - - - we don't have to
23 guess anymore.

24 ACTING CHIEF JUDGE CANNATARO: But if I'm - - -

25 MR. O'NEIL: We've seen what bargaining leads to



1 - - -

2 ACTING CHIEF JUDGE CANNATARO: - - - this is a -
3 - - Counsel - - -

4 MR. O'NEIL: - - - three years without a worker.

5 ACTING CHIEF JUDGE CANNATARO: It's a statute
6 that provides for termination. And it would seem that
7 there has to be some process, some procedure around how you
8 effectuate that termination right. Your argument surely
9 isn't that they could just send a pink slip to an employee
10 after one year and tell them it's time to go; is that your
11 argument?

12 MR. O'NEIL: It happens to be a no-fault statute.
13 If they did something wrong, we have section 75. And that
14 has all the prehearing protection you need, charges,
15 attorneys, people present at the meeting, hearings - - -

16 ACTING CHIEF JUDGE CANNATARO: But this
17 theoretically covers a different class of employees than
18 75? I mean - - -

19 MR. O'NEIL: No. Same people. They're all civil
20 servants.

21 JUDGE WILSON: But - - - but - - - but - - -

22 JUDGE SINGAS: But Counselor - - -

23 ACTING CHIEF JUDGE CANNATARO: It's - - - it's a
24 different type of - - - this is - - - these are workers who
25 are out due to injury, not workers who are being terminated



1 for any of the causes that are specified under 75.

2 MR. O'NEIL: But well the people who were taken
3 out in Southold were taken out on 75 charges because they
4 weren't able to work. They hadn't worked, one of them for
5 four-and-a-half years.

6 ACTING CHIEF JUDGE CANNATARO: 75 is available.
7 But 71 is there now, as well?

8 MR. O'NEIL: And I - - -

9 ACTING CHIEF JUDGE CANNATARO: It provides
10 another avenue to terminate this particular type of
11 employee after a year's absence from the job.

12 MR. O'NEIL: You're right.

13 ACTING CHIEF JUDGE CANNATARO: And my only
14 question is, there has to be some process around how you do
15 that, doesn't there not?

16 MR. O'NEIL: Your Honor, I've done a lot of these
17 in my history, and they're seamless. I don't have one
18 where we've negotiated the procedure. And the only thing
19 that's in the record is that Mr. Stober told somebody that
20 Nassau County has negotiated 71 procedures. We don't have
21 anything in the record other than his statement. I can
22 tell you on the record, I've never negotiated one in fifty-
23 two years.

24 JUDGE RIVERA: But the reality is there was a
25 procedure here, they're just arguing that it's not the one



1 that anybody negotiated. It was one - - -

2 MR. O'NEIL: He got the letter - - -

3 JUDGE RIVERA: - - - the employer imposed. So
4 this is actually not a case about no procedure being used
5 to terminate the individual. This is - - -

6 MR. O'NEIL: It - - - well - - -

7 JUDGE RIVERA

8 : - - - only whether or not the procedure that
9 the employer is going to adopt and impose should be one
10 that is collectively bargained; that's the question on the
11 table.

12 MR. O'NEIL: Well, let's talk about what you say
13 is a procedure. The person who is the commissioner sent
14 the letter - - -

15 JUDGE RIVERA: Right. That's called notice.

16 MR. O'NEIL: Notice. And gave an opportunity - -
17 -

18 JUDGE RIVERA: It said if you have anything -

19 MR. O'NEIL: - - - to be heard.

20 JUDGE RIVERA: That's what it - - -

21 MR. O'NEIL: There's no hearing in this case.
22 Your own summary of this case mentions the hearing.

23 JUDGE RIVERA: But that's an attempt at minimal
24 due process, is it not?

25 MR. O'NEIL: Exactly what it was.



1 JUDGE RIVERA: Okay.

2 MR. O'NEIL: Under Loudermill and under - - -

3 JUDGE RIVERA: All right.

4 MR. O'NEIL: - - - many subsequent cases that - -

5 -

6 JUDGE RIVERA: And that's a procedure.

7 MR. O'NEIL: It's - - -

8 JUDGE RIVERA: It's a procedure.

9 MR. O'NEIL: - - - procedural.

10 JUDGE RIVERA: That - - - it may not be the one
11 they want - - -

12 MR. O'NEIL: Correct.

13 JUDGE RIVERA: - - - but it's a procedure.

14 MR. O'NEIL: It - - - there's a procedure. They
15 get notice, opportunity to be heard. And then - - -

16 JUDGE RIVERA: Yeah.

17 MR. O'NEIL: - - - it - - - and it's - - - again,
18 it's a no fault. After they year, they can remove so that
19 we can address all the things we talked about before,
20 getting someone else in there - - -

21 JUDGE RIVERA: Well, true no fault - - -

22 MR. O'NEIL: - - - the overtime - - -

23 JUDGE RIVERA: - - - is your - - -

24 MR. O'NEIL: - - - the morale.

25 JUDGE RIVERA: True no fault is, here's the



1 letter, you're - - - you're terminated, period. Not I want
2 to hear anything, not you have an opportunity to respond,
3 right?

4 MR. O'NEIL: Well, here you'd be taking away
5 someone's job. And I think constitutes - - -

6 JUDGE RIVERA: Well, I think and then your
7 response to - - - to the judge, of course, is that, yes, it
8 is a procedure, it's just not negotiable, right?

9 MR. O'NEIL: Well - - -

10 JUDGE RIVERA: I think he was asking you - - -

11 MR. O'NEIL: I - - -

12 JUDGE RIVERA: I thought - - - I thought - - - I
13 may have misunderstood but, Judge, you will correct me if
14 I'm wrong.

15 ACTING CHIEF JUDGE CANNATARO: You did not
16 misunderstand.

17 JUDGE RIVERA: I thought - - - I thought his
18 point was there has to be some procedure. And that - - -
19 he wanted to confirm with you that you were agreeing that
20 there should be a procedure - - - well, not that it - - -
21 that this is - - - section 71 doesn't allow for any
22 procedure.

23 MR. O'NEIL: If you want to call it a procedure,
24 what happened in this case is what - - - that letter looked
25 very familiar to me, I represent the City of Long Beach.



1 So it put the person on notice of what we intended to do,
2 and gave them an opportunity to be heard because he has a
3 constitutional right to his job. And that's all that
4 statute calls for. It's a no fault statute, for better or
5 worse. We didn't write the statute, but it - - - there was
6 a terrible problem that the legislature addressed by people
7 being - - - not coming to work.

8 ACTING CHIEF JUDGE CANNATARO: This reference to
9 no fault statute seems to imply that the - - - the process
10 automatic. But the statute itself says may terminate, not
11 must terminate. And I think the - - - you know, what Judge
12 Rivera characterized as a minimal amount of due process,
13 sending a letter and giving an opportunity to be heard, is
14 at least implicitly a recognition of the fact that it's not
15 no fault in the sense that it happens automatically.

16 Certainly, not the case that every employee who's
17 been out on disability for a year gets terminated. And
18 you've never alleged that and I don't think the reality
19 bears that out, correct?

20 MR. O'NEIL: Correct.

21 ACTING CHIEF JUDGE CANNATARO: So this goes back
22 to the question I was asking which is - - - and I think
23 Judge Rivera actually hit on the point - - - you did set up
24 a procedure, it just may not be the procedure that the
25 other side wants. And now we have to figure out a way to



1 get to a procedure that applies equally to both. And why
2 isn't that the Taylor Law, why isn't that negotiation?

3 MR. O'NEIL: Your Honor, to me, maybe we
4 disagree, a letter and a meeting is not a procedure to me.
5 It's notice under the Constitution that you're - - -

6 JUDGE TROUTMAN: But it's something - - -

7 MR. O'NEIL: - - - required to give an
8 opportunity to be heard.

9 JUDGE TROUTMAN: Counselor? It's something that
10 triggered a process wherein this employee was going to be
11 removed from their position. That's what that letter did.

12 MR. O'NEIL: No. The letter did not. It set up
13 the meeting.

14 JUDGE TROUTMAN: It - - - it started a process.
15 It started something. If the letter didn't go out, would
16 the employee remain employed?

17 MR. O'NEIL: If the letter - - - well, the - - -
18 if my client were asking for my advice, I would send the
19 letter to put them on notice that we're going to take your
20 job away under a no-fault statute.

21 JUDGE TROUTMAN: So your - - - your position is
22 that it is - - - that the statute is such that you just get
23 to exercise, not may, that at the end of the year, they are
24 gone, period, the end? There's no process or procedure
25 required?



1 MR. O'NEIL: There is a process. None of my
2 clients have ever done that because we have a constitution
3 and they have a liberty interest in their job. So we put
4 them on notice, and we give an opportunity to respond. No
5 hearing, like in - - - you know, people say we have - - -
6 there was a hearing; there was no hearing. It was a - - -

7 JUDGE TROUTMAN: Because the year - - -

8 MR. O'NEIL: - - - meeting. Not a person - - -

9 JUDGE TROUTMAN: - - - has passed.

10 MR. O'NEIL: I'm sorry?

11 JUDGE TROUTMAN: Because the year - - - your
12 argument is because - - -

13 MR. O'NEIL: Right.

14 JUDGE TROUTMAN: - - - a year has passed, that's
15 it. It's not showing that they were guilty of misconduct
16 or anything else like the Article 75 - - -

17 MR. O'NEIL: Right.

18 JUDGE TROUTMAN: - - - would.

19 JUDGE WILSON: Could they - - -

20 JUDGE SINGAS: Yeah, but Counsel, would a - - -
21 would a negotiated 71 procedure really impact the
22 efficiency of termination of employees? Like, what - - -
23 what's the practical - - -

24 MR. O'NEIL: You know - - -

25 JUDGE SINGAS: - - - impact of that?



1 MR. O'NEIL: - - - Your Honor, I was thinking of
2 all these hypotheticals as I'm going through this process
3 about how awful it was for my employers. Well, I don't
4 have to do any hypotheticals anymore, we've got it.

5 City of Yonkers, I've represented them at one
6 time in my life also. Five years they've been going. The
7 process of the negotiations has been three-something years.
8 Before that, they had two more years at it. Now all that
9 time, that firefighter's being paid a hundred something
10 thousands of dollars. And they replace firefighters like
11 they replace cops, you're out, someone gets overtime. It's
12 cost them millions of dollars already.

13 That to me - - - that's why they don't have these
14 procedures. That's why they weren't in the statute.
15 There's - - -

16 JUDGE RIVERA: But isn't that really - - -

17 MR. O'NEIL: - - - nothing to be - - -

18 JUDGE RIVERA: Counsel, isn't that really an
19 argument to the legislature? To say, look, you've got to
20 carve this out because this is just too financially
21 burdensome for us.

22 MR. O'NEIL: No. I have the legislation. It's
23 in existence right now. PERB is trying to stop it by
24 allowing unions to slow it down.

25 JUDGE WILSON: So can I - - -



1 MR. O'NEIL: And that's what they've done.

2 JUDGE WILSON: - - - can I turn you back to
3 article - - - to section 75 for - - - for a minute, which
4 has hearing requirements and other procedural protections,
5 right?

6 MR. O'NEIL: I'm sorry, I can't - - -

7 JUDGE WILSON: Section 75 - - -

8 MR. O'NEIL: 75, I understand that part.

9 JUDGE WILSON: - - - it has a bunch of procedural
10 protections in it - - -

11 MR. O'NEIL: Yeah.

12 JUDGE WILSON: - - - including hearing
13 requirements. Are those, in your view, not bargainable?

14 MR. O'NEIL: The - - - that's a for cause
15 statute. And they have all the pretermination - - -

16 JUDGE WILSON: I'm just - - -

17 MR. O'NEIL: - - - yeah - - -

18 JUDGE WILSON: - - - simple question.

19 MR. O'NEIL: 75, yes, they could negotiate an
20 alternative - - -

21 JUDGE WILSON: They can - - -

22 MR. O'NEIL: - - - to 75.

23 JUDGE WILSON: - - - they can bargain those - - -
24 that's a bargainable subject?

25 MR. O'NEIL: 75?



1 JUDGE WILSON: Yeah.

2 MR. O'NEIL: Yeah. Yes.

3 ACTING CHIEF JUDGE CANNATARO: I think the
4 question is the procedures that are - - -

5 MR. O'NEIL: But excuse me - - -

6 ACTING CHIEF JUDGE CANNATARO: - - - laid out in
7 75 - - -

8 MR. O'NEIL: - - - that - - - statute would be in
9 place while your bargaining was going on. Here, the people
10 are working.

11 JUDGE WILSON: No. My question is could - - -
12 could the - - - is it a mandatory subject of bargaining
13 such that the employer and union could bargain away the
14 provisions that are in section 75, the procedure - - -

15 MR. O'NEIL: I believe it is - - -

16 JUDGE WILSON: - - - do you think - - -

17 MR. O'NEIL: - - - they can negotiate - - -

18 JUDGE WILSON: - - - you think they are
19 bargainable?

20 MR. O'NEIL: - - - a substitute for it. I - - -
21 I - - -

22 JUDGE RIVERA: Could they negotiate something
23 that's less protective of the employee?

24 MR. O'NEIL: Of the employees? If the union
25 would agree to it.



1 JUDGE WILSON: So I'm - - - now I'm having a lot
2 of trouble. Because it seems to me you're saying when the
3 legislature set out a specific set of procedural
4 protections, that's a mandatory subject of bargaining. But
5 when they've said nothing, as they did in Section 71,
6 concerning pre - - - anything pretermination, that can't be
7 bargained?

8 MR. O'NEIL: Well, think of the issues in a 75.
9 Cause, there's no - - - there's no definition of cause, you
10 got to prove it. Here, what - - - you know what you need
11 for one of these hearings? A workers' comp decision, which
12 every employer I've ever dealt with has one because now it
13 shows it's on-the-job injury. And then secondly, they have
14 a calendar. That's all they need. Have they been out for
15 a year under that, that's the end of the case. That's why
16 there's so minimal due process.

17 The issues here, it's a very pro-employer good
18 statute that saves people from having workers - - - you
19 know, I brought it up in the Appellate Division too when I
20 was arguing with the judges. I said, let's say you had a
21 clerk who all the sudden now is sick and they're out for
22 six months, seven months, eight months, nine months, a
23 year. Your life gets pretty difficult. So the legislature
24 decided, before the Taylor Law, that yeah, not only that,
25 the burden that falls on the others is not good, and you

1 got to get workers, and they're hard to get, and if you
2 have a full-time job to replace them you can get good
3 workers. So they put this legislation in.

4 And again, these are people who that - - -
5 usually we don't have issues with, people who are
6 malingerers at that stage, they either get back to work
7 before a year or we let them loose. And they have a - - -
8 they have a very, very long post-termination procedure
9 about steps you can take to get your job back. So it's not
10 like its lost forever. So it's not unfair. It gives an
11 opportunity to get it back if the person gets healthy
12 again.

13 Almost every one of my cases in my career, people
14 have retired after they were removed under 71. I do - - -
15 the most recent one I have, which is a long career, I had
16 one recently where a guy came back after being released
17 under 71, didn't retire, and is back working. First one
18 I've had in fifty-something years - - -

19 ACTING CHIEF JUDGE CANNATARO: Thank you,
20 Counsel.

21 MR. O'NEIL: - - - so it's not as it appears.
22 Thank you. I'll save all this now.

23 MR. FOIS: Thank you, Your Honor.

24 In the seventy-some-odd years of the Taylor Law,
25 no court has held that the time it takes to bargain or the



1 difficulties in bargaining are grounds to remove something
2 from collective bargaining. And relying primarily on his
3 own experience as an attorney, as opposed to giving you
4 specific case cites, he's saying this is an impossibility.

5 An employer cannot refuse to bargain and then
6 complain to the courts it takes so long to bargain.

7 JUDGE GARCIA: Counsel, that's not really his
8 argument. His argument is because of that, that goes
9 against the statute here; this particular statute, not in
10 general, not a general proposition. But he's making that
11 argument in support of an argument that the legislature
12 decided this, and it's not bargainable because the purpose
13 of the statute is to prevent exactly that delay.

14 So to get to that point, what happens - - - and I
15 just don't know this - - - what happens if in this case
16 negotiations just break down, and they can't come to an
17 agreement over process? Your point, that this concerns the
18 procedure; what's the remedy? Like, how does that get
19 moving?

20 MR. FOIS: They have what's known as impasse
21 arbitration procedures for the uniform in this
22 circumstance, which means the party who believes the other
23 side is not properly responding goes and say we're impasse.
24 Then an arbitrator chosen by the parties from a panel
25 reviews the material and reaches a decision, and this is an

1 arbitration award. If one side doesn't like the
2 arbitration award, they can go to court.

3 And that's what happened in Yonkers, the case
4 that just last week was brought to the court's attention,
5 although decided in December of last year. In that case,
6 the employer, like here, argued public policy should not
7 allow bargaining over pretermination section 71 procedures,
8 and the court found no public policy grounds not to
9 prohibit - - - to prohibit bargaining.

10 And while Mr. O'Neil doesn't like supreme courts
11 as lower courts, they are courts. They did confirm PERB.
12 It wasn't some internal rubber stamp. It was a court that
13 could have been appealed to the PERB division and stayed
14 good precedent and well followed since 1997.

15 This is only an issue for the City of Long Beach
16 because despite being on clear notice since at least 1997,
17 they decided to wait until they wanted to fire someone
18 under section 71 to decide how to do it. That's the only
19 reason why there's any conflict with what seems to be the
20 clear goals. Nothing prevented this from being fully
21 addressed - - -

22 JUDGE GARCIA: So there is this mechanism for
23 resolving - - -

24 MR. FOIS: Yes.

25 JUDGE GARCIA: - - - use an arbitrator.



1 Just a different question. Would our ruling
2 here, if we were to go your way on these types of
3 procedures, would it be limited to municipal employees, and
4 not state because the impact of the regulation potentially?

5 MR. FOIS: I don't believe it'd be unless you
6 drafted it to so be so. I don't think it'd be
7 automatically unchallengeable. But I think the better view
8 of any ruling on section 71 here would apply to both state
9 and local municipalities because although there are clear
10 distinctions for the Civil Service Law, they are not
11 pertinent to the legal principle before this court which is
12 that the legislature needs to be explicit or inescapably
13 implicit.

14 So I would argue the better way to draft your
15 opinion would be, but you do have the power to limit it to
16 this case.

17 ACTING CHIEF JUDGE CANNATARO: Thank you, Mr.
18 Fois.

19 MR. FOIS: Thank you.

20 ACTING CHIEF JUDGE CANNATARO: Mr. Stober?

21 MR. STOBER: Your Honors, I - - - I would just
22 like to use one word: Watertown.

23 The Appellate Division Second Department decision
24 for all intents and purposes reversed Watertown.
25 Watertown,, which dealt with Section 207, also said, you



1 know what, legislative history is empty, there's no
2 pretermination procedures. Therefore, under the state's
3 sweeping proposal of promoting negotiations, pre-207
4 procedures must be mandatorily negotiated. That has been
5 the law ever since you promulgated this back - - - back in
6 the day.

7 What the Appellate Division is doing is saying,
8 no, no, despite Watertown, we're saying that this is not
9 clearly negotiable even though it's the exact same scenario
10 as Watertown.

11 JUDGE WILSON: Well, the only way around
12 Watertown is by citing the regulations that everybody seems
13 to think don't - - - don't apply.

14 MR. STOBBER: You know, the - - - the thing with
15 those regulations are, they're guideposts. But under
16 Newburgh, and the other caselaw that - - - that this court
17 has determined, you can't use a regulation to overturn a
18 specific statutory obligation. And - - - and - - -

19 JUDGE WILSON: But I thought that - - -

20 MR. STOBBER: - - - if this court - - -

21 JUDGE WILSON: - - - the parties also agreed the
22 regulations applied, if at all, only to state employees not
23 municipal employees and so - - -

24 MR. STOBBER: Well, that - - -

25 JUDGE WILSON: - - - it's irrelevant here.



1 MR. STOBBER: That is true that this regulation
2 only applies to state employees. And they're not before us
3 here. So like Mr. Foiss said, if you specifically carved it
4 out in your decision, well then you carved it out. But if
5 you leave it, I guess it's a fight for another day and the
6 next time I'm representing state employees and - - -

7 JUDGE RIVERA: So if I must - - -

8 MR. STOBBER: - - - we might - - -

9 JUDGE RIVERA: - - - if I'm understanding your
10 response, you're saying, okay, well, maybe the plain text
11 makes it obvious that it - - - that it - - - the regs only
12 apply to state employers, but whether or not that could
13 withstand the challenge is not something we have to decide
14 now?

15 MR. STOBBER: Not today. No, Your Honor.

16 Unless the court has any other questions, I rely
17 on our briefs and the oral argument and the Watertown case.
18 And I thank you all, and congratulations on 175 years.
19 Let's go for another 175.

20 ACTING CHIEF JUDGE CANNATARO: Thank you, Mr.
21 Stober.

22 MR. FOISS: Thank you, Your Honors.

23 (Court is adjourned)

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C E R T I F I C A T I O N

I, Amanda M. Oliver, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of City of Long Beach v. PERB, No. 70 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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