STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of

THE TOWN OF ORANGETOWN

Petitioner,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

DECISION and ORDER
INDEX NO. 5960-07
RJI NO. 01-07-ST7935

-against-

THE NEW YORK STATE PUBLIC EMPLOYMENT
RELATIONS BOARD,

Respondents,

THE ORANGETOWN POLICEMEN'S BENEVOLENT ASSOCIATION,

Interested party.

Supreme Court, Albany County, Special Term, October 24, 2007
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

Petitioner brings this CPLR Article 78 petition challenging a New York State Public Employment Relations Board ("PERB") Administrative Law Decision. Respondents oppose the petition with an answer and a counterclaim requesting an order for enforcement of PERB's remedial order.

General Municipal Law § 207-c requires employees who apply for disability benefits to undergo a medical examination to prove that their disability is work related. After disability applications were submitted for Orangetown Police Officers John Fitzgibbons and Susan Lanoce, medical examinations were scheduled for December 13, 2004 and January 26, 2005, respectively. Both Officers showed up at their appointment with a third person, whose purpose was to videotape and witness the examination. The physician, who is selected by the Town of Orangetown ("Town"), refused to perform the examinations, and the Town sent letters to both Officers stating that videotaping is not allowed during the examinations. On February 7, 2005, the Chief of Police sent a letter to the PBA President stating that video and audio taping of medical examinations in connection with claims for GML § 207-c benefits is not allowed. Prior to that letter, the Town had no written policy on video or audio taping during these examinations.

The Orangetown Policemen's Benevolent Association ("PBA") filed an Improper Practice Charge against the Town alleging that the Town erroneously told the Officers that they did not have the right to videotape the medical examination. The PBA asserted that videotaping such an examination cannot be a term unilaterally decided by the Town, but rather should be decided through collective bargaining. The Town argued that, under § 207-c, it has the exclusive right to make the determination of whether an injury or illness is work related, and therefore, can

unilaterally establish the conditions under which the examinations will be conducted.

On October 17, 2006, PERB Administrative Law Judge ("ALJ") Susan A. Comenzo ruled in favor of the PBA finding that the Town violated § 209(a)(1)(d) when it unilaterally adopted the video and audio taping prohibition. ALJ Comenzo ordered the Town to rescind and cease enforcement of the policy, remove from any unit members' personnel files any documents resulting from the implementation of the policy, and to sign and post a notice for all unit employees regarding the recision of the policy. The Town filed exceptions to the Decision, and the PBA filed a response. On June 27, 2007, PERB affirmed ALJ Comenzo's October 17, 2006 Decision. The Town filed this petition on July 31, 2007.

It is settled law that a petitioner in a CPLR article 78 proceeding cannot raise new issues that were not raised in the administrative hearing under review. City of Schenectady v. New York State Public Employment Relations Board, 135 Misc.2d 1088, 1091, 517 N.Y.S.2d 845, 847 (Albany Co. 1986). Therefore, Petitioner's claim that the employer and the examining physician have the right to be free of outside influence will not be decided by this Court as it was not raised at the administrative hearing or in the exceptions to the hearing.

Petitioner's preserved claim maintains that PERB's June 27, 2007 Decision erroneously concluded that an employer cannot unilaterally establish the conditions for conducting its own § 207-c medical examination. Petitioner also alleges that GML § 207-c gives employers exclusive authority to determine disability benefits, and is not subject to mandatory collective bargaining. Respondent maintains that PERB has the power under Civil Service Law § 205(5) to prevent and remedy improper public employer practices as defined in Civil Service Law § 209-a(1). Respondent further maintains that PERB's Decision was made under express statutory authority,

has a reasonable basis in the law, and is not arbitrary, capricious, or an abuse of discretion.

The purpose of the Civil Service Law is to promote harmonious and cooperative relationships between the government and its employees, and one of the ways the Law seeks to achieve this purpose is by requiring state and local governments to negotiate with, and enter into written agreements with, employee organizations. Civil Service Law § 200. Collective bargaining is generally mandatory unless the statute "clearly preempt[s] the entire subject matter," or the demand to bargain would diminish or restate the statutory benefits. City of Watertown v. State of New York Public Employment Relations Board, 95 N.Y.2d 73, 79 (NY 2000). Unless the legislature clearly intended otherwise, it is presumed that all terms and conditions of employment are subject to mandatory bargaining. Id.

Here, the legislature did not specifically mention the right of a government to unilaterally determine circumstances under which medical examinations would be conducted under GML § 207-c. Determining what are terms and conditions of public employment subject to mandatory negotiation is within PERB's field of expertise. Schenectady, at 1091, 517 N.Y.S.2d at 847. PERB's decisions regarding such issues are to be affirmed so long as they are not irrational. Id. Therefore, PERB has the authority here to determine whether video or audio taping is a term to be negotiated.

PERB's decision that such a condition is something that cannot be unilaterally decided is not irrational, and is affirmed. The initial determination whether an employee's injury or illness is work related is unquestionably an exclusive right of the employer. Watertown, 95 N.Y.2d at 76. The conditions under which the medical examinations are conducted, however, are not specifically stated as a right, and are therefore subject to bargaining. Furthermore, the conditions

under which the medical examinations are conducted have no bearing on the employer's ability to make the initial determination of whether the injury or illness is work related.

All papers, including this Decision and Order are being returned to the attorneys for the Respondent. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

SO ORDERED!

Dated: November 27, 2007
Albany, New York

Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Petition, dated July 31, 2007, with Attached Exhibits A-G.
2. Respondent's Answer, dated September 27, 2007.
3. Interested Party's Answer, dated October 10, 2007.
4. Interested Party's Affirmation in Support, dated October 10, 2007, with Attached Exhibits 1-8.