

Client Alert
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PERB FINDS THAT PROPOSED PROCEDURE FOR A GENERAL MUNICIPAL LAW 207-C ADJUDICATIONS WHICH DID NOT PROVIDE A STANDARD OF REVIEW BUT RESULTED IN A FINAL DECISION WAS MANDATORY: COUNTY OF CHEMUNG, 44 PERB 3026 (2011)

In a recent opinion, PERB reviewed the County of Chemung and the Chemung County Sheriff's ("Joint Employer") arguments that the Chemung County Sheriff's Association's ("Association") proposed General Municipal Law Section 207-c procedure was non-mandatory, and therefore not subject to compulsory interest arbitration. PERB concluded that the proposal was a mandatory subject of bargaining because it did not require *de novo* review of the Joint Employer's initial determination, but only provided that the hearing officer's decision would be binding. This case has state-wide importance to police and firefighter unions that have or are seeking to negotiate General Municipal Law Section 207-a or 207-c procedures.

Facts and Procedural Background

Following an impasse in negotiations that was limited to the parties' 207-c procedure, the Association filed a petition for compulsory interest arbitration. The Association's proposed procedure included subjects concerning the application for benefits, the employer's right to determine initial eligibility, directing medical examinations and treatment, light duty assessments, and termination of benefits. The proposal also included "Hearing Procedures" which outline the Hearing Officer selection process and fee splitting. Additionally, the procedure provides that "After the hearing, the Hearing Officer shall render a determination which shall be final and binding upon all parties. Any such decision of the Hearing Officer shall be reviewable only pursuant to the provisions of Article 78 of the Civil Practice Law and Rules."

The Joint Employer filed an improper practice charge, and a later amendment, claiming the Association committed an improper practice by submitting a non-mandatory subject to interest arbitration. The substance of the allegation was that the hearing procedure was non-mandatory because it did not concern compensation, and removed the Joint Employer's statutory rights and authority afforded to the initial determination.¹ Following procedural

¹ Civil Service Law Section 209(4)(c)(vii)(g) requires that only matters directly related to compensation are appropriate subjects for interest arbitration. The section applies to deputy sheriffs specifically.

disputes concerning the timeliness and sufficiency of the Joint Employer's charges, PERB considered the merits of the Association's proposal.

PERB Decision

The Joint Employer claimed that the procedure was non-mandatory under the Act, relying on the Court of Appeals holding in *Poughkeepsie Professional Firefighters' Association, Local 596, IAFF v. New York State Board ("Poughkeepsie")*². However, PERB noted that the Court of Appeals had previously held in *City of Watertown v. New York State Public Employment Relations Board ("Watertown")*³ that a 207-c policy that does not divest the employer's authority to make the initial decision as to whether the officer was either injured in line of duty or taken sick as result of the performance of duty is mandatory. *Watertown* held that a procedure providing for a forum where disputes related to initial determinations are processed is mandatory. In contrast, *Poughkeepsie* held that a proposal which gave an arbitrator the ultimate authority for determining a statutory claim (*de novo* review), rather than limiting the arbitrator's power to reviewing the employer's initial determination, was non-mandatory.

In this case, PERB considered whether the proposal provided ultimate authority to the hearing officer to determine entitlement to 207-c statutory benefits, rather than limiting the hearing officer's power to review the Joint Employer's initial determination. PERB held that the Association's proposal was mandatory under *Watertown*, and unlike *Poughkeepsie*, the proposed hearing procedure does not "expressly or implicitly call for a *de novo* review of the Joint Employer's determination of a claim for statutory benefits subject to limited review under CPLR Article 75. Instead, it proposes a hearing before a hearing officer resulting in a binding decision with the ultimate authority for resolving the dispute resting with the courts under CLPR Article 78." PERB noted that the Association's proposal recognizes and includes other provisions protecting the Joint Employer's authority to render an initial determination.

Practical Impact

The *Chemung* decision emphasizes that any negotiated procedure under Section 207-a or 207-c must ensure that the initial determination of benefits is made by the employer. Clearly, the level of deference given to an initial determination has a tremendous impact on all individuals seeking these benefits. The deference level is what gives the public employer influence over the potential award of benefits. For example, where plausible evidence exists for denying benefits, the employer's initial determination will be very difficult to overturn when the substantial evidence standard is applied, as opposed to *de novo* review. In other words,

² 6 N.Y.3d 514 (2006).

³ 95 N.Y.2d 73 (2000).

the more deference that is provided, the less likely it is that an arbitrator or hearing officer would reach a result that is different than the one initially made by the employer.

This PERB decision provides guidance to fire and police unions seeking a fairer procedure for obtaining Section 207-a and Section 207-c benefits. The proposed procedures which are found to be mandatory in *Chemung* would allow an arbitrator or hearing officer to resolve any disputes concerning the initial determination without necessarily utilizing a substantial evidence review standard. While a or hearing officer would not necessarily have to review the initial determination *de novo*, it would also not have to utilize a “substantial evidence” standard of review. By providing the hearing officer an opportunity to hear all of the evidence and not necessarily just the evidence that was before the employer when the initial decision was made, the firefighter or police officer would have a better chance at overturning the employer’s initial determination denying benefits.

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This client alert is not intended to provide legal advice with respect to any particular situation and no decision should be based solely on its content. Please feel free to contact Nathaniel G. Lambright at (315) 422-7111 or nglambright@bklawyers.com, or any Blitman & King attorney, with any questions or concerns regarding the issues raised in this client alert.