

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ORANGETOWN POLICEMEN'S BENEVOLENT
ASSOCIATION,

Charging Party,

-and-

CASE NO. U-25717

TOWN OF ORANGETOWN,

Respondent.

BUNYAN & BAUMGARTNER, LLP (JOSEPH P. BAUMGARTNER of counsel),
for Charging Party

KEANE & BEANE, P.C. (LANCE H. KLEIN of counsel), for Respondent

DECISION OF ADMINISTRATIVE LAW JUDGE

On February 18, 2005, the Orangetown Policemen's Benevolent Association (PBA) filed an improper practice charge alleging that the Town of Orangetown (Town) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it denied General Municipal Law (GML) §207-c applicants the right to video or audiotape medical examinations. The Town denied that its actions violated the Act, and raised several affirmative defenses.

A hearing was held on November 30, 2005, at which both parties were present. Both parties filed briefs.

FACTS

Police Officer John Fitzgibbons filed a claim for GML §207-c benefits as a result of an injury suffered on November 15, 2004. By letter dated December 6, 2004,¹ the Chief of Police, Kevin A. Nulty, directed Fitzgibbons to undergo a medical examination with regard to his GML §207-c claim. Fitzgibbons appeared before the Town's designated physician on the date specified accompanied by a PBA representative. Fitzgibbons informed the physician that it was his intent to have the representative videotape the medical examination. The physician informed Fitzgibbons that he would not conduct the examination if it was to be videotaped. The medical examination was not conducted and Fitzgibbons left the physician's office with a note stating: "the examination was not performed because the officer with the accompanying PBA representative placed requirements on the examination which were deemed unacceptable."²

By letter dated December 20, 2004, Nulty informed Fitzgibbons that "under existing New York State Law, an examinee has no right to videotape the Town's examination."³

Police Officer Susan Lanoce filed a claim for GML §207-c benefits as a result of an injury suffered on January 22, 2005. By letter dated January 26, 2005,⁴ Nulty

¹Charging Party Exhibit 3.

²Charging Party Exhibit 7.

³In the same letter Nulty also informed Fitzgibbons that his GML §207-c claim was denied due to his failure to participate in a medical examination. The denial of benefits was challenged in court. By order of the Supreme Court, County of Rockland, the denial of GML §207-c benefits to Fitzgibbons was vacated. See Charging Party Exhibit 7. The denial of GML §207-c benefits to Fitzgibbons is not, however, at issue here.

⁴Charging Party Exhibit 5.

directed Lanoce to undergo a medical examination and provided further that "under existing New York State law, an examinee has no right to video tape the Town's examination."

Lanoce appeared at the physician's office and indicated that she intended to audiotape the medical examination. The physician refused to examine Lanoce and she left. By letter of January 26, 2005,⁵ Captain Terrence Sullivan informed Lanoce that her medical examination had been rescheduled and that "there is to be no video or audiotaping of the Town's examination."

By letter dated February 7, 2005,⁶ Nulty clarified for PBA President Dennis Buckley the Town's practice regarding medical examinations in connection with claims for GML §207-c benefits, stating that "[t]here will be no video or audio taping of the Town's GML §207-c examination."

The parties stipulated that prior to Nulty's February 7, 2005 letter to Buckley the Town had no written policy with respect to audiotaping or videotaping physical examinations ordered by the Orangetown Police Department for purposes of evaluating a claim for GML §207-c benefits. The parties further stipulated that prior to the two letters to Lanoce, both dated January 26, 2005, no notification letters for physical examination pursuant to GML §207-c claims contained any prohibition regarding videotaping or audiotaping of the physician's examination. In addition, prior to the events complained of, no officer ever requested to be allowed to videotape or audiotape examinations nor had the PBA ever made a proposal during collective bargaining addressing the right of employees to videotape or audiotape physical examinations

⁵Charging Party Exhibit 6.

⁶Charging Party Exhibit 12.

pursuant to evaluations of GML §207-c claims.

DISCUSSION

A municipality is authorized, by statute, to make initial eligibility determinations as to receipt of GML §207-c benefits. Procedures incident thereto, however, which extend beyond the statutory language and could result in the loss of benefits are terms and conditions of employment subject to mandatory negotiation.⁷

The at-issue policy, as set forth in Nulty's letter of February 7, 2005 to Buckley, i.e. that "there will be no video or audio taping of the Town's GML 207-c examination",⁸ is a unilateral change, is procedural in nature, and is therefore mandatorily negotiable.

The Town's reliance on *DePoalo v. County of Schenectady*, 85 NY2d 527 (1995), for the proposition that the internal procedures of an examination are nonmandatory is misplaced. The Court in *DePoalo* did not find as the Town describes but rather held that the provisions of GML §207-c require an applicant for benefits to submit to a medical examination.

The Town next relies upon an assertion in the Administrative Law Judge's (ALJ)

⁷*City of Schenectady v. New York State Pub. Employment Relations Bd*, 135 Misc. 2d 1088, 19 PERB ¶7023 (Alb Co Sup Ct 1986), *aff'd*, 132 AD2d 242, 20 PERB ¶7022 (3d Dept 1987), *lv. to appeal denied*, 71 NY2d 803, 21 PERB ¶7007 (1988). *See also Town of Cortlandt*, 30 PERB ¶3031 (1997), *conf'd sub nom Town of Cortlandt v. Pub. Employment Relations Bd*, 30 PERB ¶7012 (Sup Ct Westchester Co 1997); *County of Greene and Greene County Sheriff*, 25 PERB ¶4502, *aff'd*, 25 PERB ¶3045 (1992); *Police Ass'n of New Rochelle, New York, Inc.*, 13 PERB ¶3082, at 3132 (1980) (the statutory scheme "does not preclude the establishment of a procedure for the medical determination, either initially or on review, as to whether an illness or injury is job-related"). *See also Local 589, Int'l Ass'n of Firefighters, AFL-CIO v. City of Newburgh*, (Sup Ct Orange Co 1984), 17 PERB ¶7506, at 7516, where the Court found that the establishment of a medical review board consisting of a mutually agreed upon physician was mandatory and that the demand "simply provides the procedure to ... effect the intent and general purpose of General Municipal Law §207-a," citing to *Police Ass'n of New Rochelle, New York, Inc.*, *supra*.

⁸Charging Party Exhibit 12.

decision in *City of Watervliet*⁹ that the adoption of the GML §207-c procedure in a “first-time situation”¹⁰ privileges an employer to act in the absence of a union demand to negotiate. Board decisions, however, hold that a demand is not a prerequisite to the right to negotiate a mandatory subject of bargaining, and that the onus to negotiate in such circumstances falls upon the party making the change¹¹ including the introduction of a policy which is mandatory in nature.¹² To the extent that *City of Watervliet* holds to the contrary, I am not obliged to, and do not, follow it.

The Town argues further that a GML §207-c medical examiner must be free to conduct an examination without restriction and that to allow applicants to record the process would open the floodgates to countless more limitations, exposing it to fraudulent or unworthy claims. This assertion is rejected. The presumption in favor of collective bargaining cannot be overcome by an employer’s speculative concerns.

The Town argues, by way of affirmative defense, that the management rights clause in the parties’ collective bargaining agreement allows the employer to establish the policy prohibiting videotaping or audiotaping of GML §207-c medical examinations. The management rights clause, however, provides that

[n]othing contained herein shall deprive the Employer and the Union of any protection and/or rights they have under this contract, the New York State Civil Service Law and any other applicable law and/or rule or regulation.¹³

⁹32 PERB ¶14595 (1999).

¹⁰*Id.* at 4848.

¹¹*Wappingers Cent. Sch. Dist.*, 19 PERB ¶13037 (1986).

¹²*County of Orange*, 12 PERB ¶13114 (1979), *conf’d sub nom.*, *County of Orange v. County Employees Unit, Orange County Chapter 836, Civil Service Employees Ass’n, Inc., and New York State Pub. Employment Relations Bd*, 76 AD2d 878, 13 PERB ¶17009 (2d Dep’t 1980), *lv. to appeal denied*, 51 NY2d 703, 776, 13 PERB ¶17013 (1980)

¹³Charging Party Exhibit 1, p. 3.

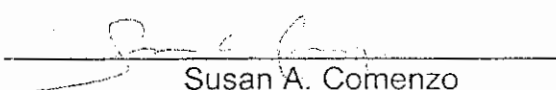
Rather than establishing the Town's reserved right to unilaterally establish procedures incident to GML §207-c eligibility determinations, the management rights clause preserves the PBA's right and the Town's concomitant obligation to negotiate such policies.¹⁴

In light of the foregoing, I find that the Town violated §209-a.1(d) of the Act when it unilaterally adopted a policy prohibiting the videotaping or audiotaping of GML §207-c medical examinations.

IT IS THEREFORE ORDERED that the Town of Orangetown:

1. immediately rescind and cease enforcement or implementation of its prohibition against videotaping or audiotaping of GML §207-c medical examinations;
2. remove from unit members' personnel files any documents placed in those files as a result of the implementation of the prohibition; and
3. sign and post the attached notice at all locations normally used to communicate information to unit employees.

Dated at Albany, New York
this 17th day of October, 2006


Susan A. Comenzo
Administrative Law Judge

¹⁴The Town's remaining affirmative defenses, i.e. that neither the collective bargaining agreement nor GML §207-c allows applicants to record medical examinations and thus the subject is nonmandatory; that the PBA never negotiated the right to record medical examinations and that PERB is, therefore, without jurisdiction; that no determination has been made regarding Fitzgibbons' eligibility for benefits and that PERB cannot determine GML §207-c eligibility; and that it has been the past practice of the Town not to allow applicants to record GML §207-c examinations, are rejected. The last is without record support; the rest are not defenses to a unilateral change claim. Finally, the Town includes in its brief a response to a Workers' Compensation Law argument it assumed the PBA would raise. As the PBA did not rely on the Workers' Compensation Law, the Town's response thereto need not be addressed.

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the Town of Orangetown represented by the Orangetown Policemen's Benevolent Association that the Town of Orangetown will

1. immediately rescind its prohibition against videotaping or audiotaping of GML §207-c medical examinations; and
2. remove from unit members' personnel files any documents placed in those files as a result of the implementation of the prohibition.

Dated

By

(Representative)

(Title)

Town of Orangetown
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This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.