Police Reform Issues

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OUTLINE
PLACING A SPOTLIGHT ON POLICE DISCIPLINE IN NYS

2021 CAASNY

September 13, 2021

SESSION 4:25 pm – 5:15 pm:

* Disciplinary Procedures for Police in NYS and their effectiveness along with evolving caselaw.
* Recent Legislative Changes in NYS in Response to Incidents of racial injustice involving law enforcement; How these changes may impact police discipline going forward.

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PRESENTATION:

I. DISCIPLINARY PROCEDURES

A. NYS LAW: Civil Service Law, Section 75
Town Law, Section 155
Village Law, Section 8-804
Second Class Cities Law, Sections 131, 137-138
Unconsolidated Laws, Section 891

B. Negotiated Disciplinary Procedures:
- Command Discipline
- Formal Charges with Binding Arbitration
- Hybrid- State Law and Binding Arbitration
- Negotiability

C. Rockland County, Police Act §4 (L 1936, ch 526 as amended by L 1946, ch 941)
Westchester County, Police Act §7 (L 1936, ch 104)

D. Case Law:

Matter of PBA of City of N.Y.: 6 NY3d 563 (2006)
Matter of Town of Harrison PBA: 69 A.D.3d 639 (2d Dept. 2010)
Matter of Town of Wallkill: 19 NY3d 1066 (2012)
Matter of City of Schenectady: 30 NY 3d 109 (2017)
Matter of Rochester Police Locust Club: 2021 N.Y. App. Div. LEXIS 3812 (6-11-21)

II. RECENT LEGISLATIVE ACTION

A.
- Anti-Chokehold Act (Ch. 94, L. 2020)
- Discharging Weapon — Mandatory Reporting (Ch. 101, L. 2020)
- New Yorker's Right to Monitor Act (Ch. 100, L. 2020)
- Repeal of Civil Rights Law §50-a with amendments to Public Officer's [FOIL] Law (Ch. 96, L. 2020)
- AG Office of Special Investigation (Ch. 95, L. 2020)
- Law Enforcement Misconduct Investigative Office (Ch. 104, L. 2020)

B. Use of Force Reporting: Executive Law Section 837-T effective 7/11/19

C. Discovery Reform CPL Section 245.20

D. NYS Governor Executive Order #203: "NYS Police Reform and Reinvention Collaborative"

E. PENDING NYS LEGISLATION

NO POLICE REFORM LEGISLATION WAS ENACTED IN THE RECENT (2021) SESSION

1. A5470 / S6017 – Amend FOIL to require particularization and specific notice for denial of access to records. If denial of records would interfere with a judicial proceeding then the decision as to whether to grant access to the records would be made by the judge presiding over the judicial proceeding.

2. A4331 / S1991 – End the defense of qualified immunity for law enforcement even for a "good faith but erroneous belief in the lawfulness of their conduct..."

3. A7835/S6615 – Police Accountability Act – Attorney General generated legislation with a goal of "strengthening a Prosecutor's ability to hold Police Officers accountable for unjustified and excessive use of force."

F. Police Reform Laws Upheld by Court:

Other State's police reform laws have passed constitutional muster. In *FOP Metro Police Dept.*, 502 F Supp.3d 45 (2020), the District Court for the District of Columbia held that DC's Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020 did not violate the Equal Protection Clause.

III. OTHER POINTS OF NOTE

A. DCJS Law Enforcement Officer (and Peace Officer) Decertification (10/17/16) 9 NYCRR §6056

B. LOCAL ACTION Examples: City of Hudson Executive Order Number 21-20
City of Buffalo Executive Order Number 2020-001
City of Albany Executive Order Number 1-20

IV. REAL WORLD IMPACT

A. Increased "Blue Wall of Silence" — Confidentiality removed due to repeal of CRA § 50-a

B. Increased FOIL requests for discipline of officers; Development of policy of releasable records (i.e. sustained, not sustained, undercover officers, negotiable release of employer's records; what constitutes term and condition of employment?)

PERB has yet to rule that provisions of FOIL allowing a municipality to release records are a mandatory subject of bargaining. There are approximately 13 improper practice charges pending seeking to require negotiations. But see, *Uniformed Fire Officers Assn v. DeBlasio*, 846 Fed. Appx. 25 (2d Cir. 2021) (holding that terms of CBA cannot usurp NY Freedom of Information Law).

Similarly, *Conn. State Police Union v. Rovella, 494 F Supp.3d 201* (Dist. Ct. CT 2020), the District Court held that the Connecticut Public Act No. 20-1 (similar to NY FOIL) did not violate the Contracts Clause because a state's police power prevailed over the right to contract. Further, specific provisions of the Act requiring the Act's provision to prevail over conflicting CBA provisions was constitutional.

C. Much more difficult to resolve a discipline case because the stakes have become much higher. (DCJS implications – decertification of law enforcement)

D. Role of Public Policy In Arbitration – Developing Case Law

Trio of Illinois Cases – Public Policy Over Lax Discipline

- Chicago Fire – *City of Chicago v. Chicago Fire Fighters Union, Local No. 2, Case No. 2019 CH 12662 (Cir. Ct. 2020)*
- Yorkville Sergeant – *City of Yorkville v. FOP, Case No. 19 MR 219 (III. Cir. Ct. 2020)*

- Country Club Hills Officer – *City of Country Club Hills v. Charles, No. 18 CH 13458 (III. App. Ct. 2020)*

New York – Developing

- In *Matter of NY Off. For People with Dev. Disabilities*, 193 A.D.3d 1305 (3D Dept. 2021), the Appellate Division, Third Department, overturned an arbitrator's award on public policy grounds where an arbitrator found an employee guilty of violating anti-harassment policies but reinstated the employee. The Court held that public policy dictated "zero" tolerance for sexual harassment and to allow an employee to remain employed despite engaging in such conduct violates public policy. Matter remitted to new arbitrator.

E. Replacing an independent Arbitrator with the Police Commissioner or other internal person for example may have unintended consequences as to fairness, due process and exposure to politics.

§ 75. Removal and other disciplinary action

1.Removal and other disciplinary action. A person described in paragraph (a) or paragraph (b), or paragraph (c), or paragraph (d), or paragraph (e) of this subdivision shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section.

(a)A person holding a position by permanent appointment in the competitive class of the classified ***civil service***, or

(b)a person holding a position by permanent appointment or employment in the classified ***service*** of the state or in the several cities, counties, towns, or villages thereof, or in any other political or ***civil*** division of the state or of a municipality, or in the public school ***service***, or in any public or special district, or in the ***service*** of any authority, commission or board, or in any other branch of public ***service***, who was honorably discharged or released under honorable circumstances from the armed forces of the United States including (i) having a qualifying condition as defined in *section three hundred fifty of the executive law*, and receiving a discharge other than bad conduct or dishonorable from such ***service***, or (ii) being a discharged LGBT veteran, as defined in *section three hundred fifty of the executive law*, and receiving a discharge other than bad conduct or dishonorable from such ***service***, having served therein as such member in time of war as defined in *section eighty-five* of this chapter, or who is an exempt volunteer firefighter as defined in the general municipal ***law***, except when a person described in this paragraph holds the position of private secretary, cashier or deputy of any official or department, or

(c)an employee holding a position in the non-competitive or labor class other than a position designated in the rules of the state or municipal ***civil service*** commission as confidential or requiring the performance of functions influencing policy, who since his or her last entry into ***service*** has completed at least five years of continuous ***service*** in the non-competitive or labor class in a position or positions not so designated in the rules as confidential or requiring the performance of functions influencing policy, or

(d)an employee in the ***service*** of the City of New York holding a position as Homemaker or Home Aide in the non-competitive class, who since his last entry into city ***service*** has completed at least three years of continuous ***service*** in such position in the non-competitive class, or

(e)an employee in the ***service*** of a police department within the state of New York holding the position of detective for a period of three continuous years or more; provided, however, that a hearing shall not be required when reduction in rank from said position is based solely on reasons of the economy, consolidation or abolition of functions, curtailment of activities or otherwise.

2.Procedure. An employee who at the time of questioning appears to be a potential subject of disciplinary action shall have a right to representation by his or her certified or recognized employee organization under article fourteen of this chapter and shall be notified in advance, in writing, of such right. A state employee who is designated managerial or confidential under article fourteen of this chapter, shall, at the time of questioning, where it appears that such employee is a potential subject of disciplinary action, have a right to representation and shall be notified in advance, in writing, of such right. If representation is requested a reasonable period of

time shall be afforded to obtain such representation. If the employee is unable to obtain representation within a reasonable period of time the employer has the right to then question the employee. A hearing officer under this section shall have the power to find that a reasonable period of time was or was not afforded. In the event the hearing officer finds that a reasonable period of time was not afforded then any and all statements obtained from said questioning as well as any evidence or information obtained as a result of said questioning shall be excluded, provided, however, that this subdivision shall not modify or replace any written collective agreement between a public employer and employee organization negotiated pursuant to article fourteen of this chapter. A person against whom removal or other disciplinary action is proposed shall have written notice thereof and of the reasons therefor, shall be furnished a copy of the charges preferred against him and shall be allowed at least eight days for answering the same in writing. The hearing upon such charges shall be held by the officer or body having the power to remove the person against whom such charges are preferred, or by a deputy or other person designated by such officer or body in writing for that purpose. In case a deputy or other person is so designated, he shall, for the purpose of such hearing, be vested with all the powers of such officer or body and shall make a record of such hearing which shall, with his recommendations, be referred to such officer or body for review and decision. The person or persons holding such hearing shall, upon the request of the person against whom charges are preferred, permit him to be represented by counsel, or by a representative of a recognized or certified employee organization, and shall allow him to summon witnesses in his behalf. The burden of proving incompetency or misconduct shall be upon the person alleging the same. Compliance with technical rules of evidence shall not be required.

3.Suspension pending determination of charges; penalties. Pending the hearing and determination of charges of incompetency or misconduct, the officer or employee against whom such charges have been preferred may be suspended without pay for a period not exceeding thirty days. If such officer or employee is found guilty of the charges, the penalty or punishment may consist of a reprimand, a fine not to exceed one hundred dollars to be deducted from the salary or wages of such officer or employee, suspension without pay for a period not exceeding two months, demotion in grade and title, or dismissal from the ***service***; provided, however, that the time during which an officer or employee is suspended without pay may be considered as part of the penalty. If he is acquitted, he shall be restored to his position with full pay for the period of suspension less the amount of any unemployment insurance benefits he may have received during such period. If such officer or employee is found guilty, a copy of the charges, his written answer thereto, a transcript of the hearing, and the determination shall be filed in the office of the department or agency in which he has been employed, and a copy thereof shall be filed with the ***civil service*** commission having jurisdiction over such position. A copy of the transcript of the hearing shall, upon request of the officer or employee affected, be furnished to him without charge.

3-a. Suspension pending determination of charges and penalties relating to police officers of the police department of the city of New York. Pending the hearing and determination of charges of incompetency or misconduct, a police officer employed by the police department of the city of New York may be suspended without pay for a period not exceeding thirty days. If such officer is found guilty of the charges, the police commissioner of such department may punish the police officer pursuant to the provisions of sections 14-115 and 14-123 of the administrative code of the city of New York.

4.Notwithstanding any other provision of ***law***, no removal or disciplinary proceeding shall be commenced more than eighteen months after the occurrence of the alleged incompetency or misconduct complained of and described in the charges or, in the case of a state employee who is designated managerial or confidential under article fourteen of this chapter, more than one year after the occurrence of the alleged incompetency or misconduct complained of and described in the charges, provided, however, that such limitations shall not apply where the incompetency or misconduct complained of and described in the charges would, if proved in a court of appropriate jurisdiction, constitute a crime.

History

Add, L 1958, ch 790, § 1, eff April 1, 1959, with substance transferred from former § 22(1, 2, 3–a, 4); amd, L 1960, ch 312, § 1; L 1962, ch 645, § 1; L 1965, ch 738, § 1; L 1970, ch 942, § 1, eff Oct 1, 1970; L 1978, ch 240, § 1; L

1983, ch 774, § 1; L 1984, ch 710, § 1, eff Aug 3, 1984; L 1985, ch 842, §§ 1, 2, eff Sept 1, 1985; L 1986, ch 439, § 2, eff July 1, 1988; L 1989, ch 350, § 1, eff July 12, 1989; *L 1990, ch 753, § 2*, eff July 22, 1990; *L 1993, ch 279, § 1*; *L 1994, ch 226, § 1*, eff July 6, 1994; *L 1995, ch 197, § 1*, eff July 26, 1995; *L 2018, ch 271, § 1*, effective September 7, 2018; *L 2019, ch 490, § 3*, effective November 12, 2020.

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NY CLS Unconsol, Ch. 51, § 1

Current through 2021 released Chapters 1-240

New York Consolidated Laws Service > UNCONSOLIDATED LAWS > Civil Service (Chs. 44-B — 59-B) > Chapter 51 Removal of Policemen (§ 1)

§ 1. Removal of policemen serving in the competitive class of civil service in the several cities, counties, towns and villages of the state

A policeman serving in the competitive class of civil service in any city, county, town or village of the state, any provision of law, rule or regulation to the contrary notwithstanding, shall not be removed from his position except for incompetency or misconduct shown after a hearing upon due notice upon stated charges, and with the right to such policeman to be represented by counsel at such hearing and to a judicial review in accordance with the provisions of article seventy-eight of the civil practice act.* The burden of proving incompetency or misconduct shall be upon the person alleging the same. Hearings upon charges pursuant to this act shall be held by the officer or body having the power to remove the person charged with incompetency or misconduct or by a deputy or other employee of such officer or body designated in writing for that purpose. In case a deputy or other employee is so designated, he shall, for the purpose of such hearing, be vested with all the powers of such officer or body, and shall make a record of such hearing which shall, with his recommendations, be referred to such officer or body for review and decision.

History

Add, L 1940, ch 834, eff April 28, 1940.

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McKinney's Consolidated Laws Of New York Annotated, Section 891

* Comparable provisions are now found in CPLR Article 78.

AGREEMENT

BETWEEN

THE CITY OF ALBANY, NEW YORK

AND

THE ALBANY POLICE OFFICERS UNION
LOCAL 2841, LAW ENFORCEMENT OFFICERS UNION COUNCIL 82,
AFSCME, AFL-CIO

(PATROL UNIT)

JANUARY 1, 2014 – DECEMBER 31, 2015

ARTICLE 4 – DISCIPLINE

4.1 Exercise of Rights

4.1.1 No permanent employee shall be disciplined or otherwise removed except in accordance with the provisions of this Article.

4.1.2 An employee against whom a disciplinary action or measure is pending may elect to follow Sections 75 and 76 of the Civil Service Law or the procedure set forth hereunder. The employee's selection of one shall preclude the use of the other.

4.1.3 The parties to this Agreement recognize that a certain amount of discipline is necessary for the efficiency of the operation of the Department. It is therefore agreed that the following disciplinary measures may be imposed on the employee for misconduct or incompetence:

- Oral Reprimand/Warning
- Written Reprimand/Warning
- Loss of Leave Credits
- Suspension Without Pay
- Demotion
- Discharge

4.1.4 The Commanding Officer may impose summary discipline for the violation of the following rules and regulations:

a. Absent Over Leave
b. Absent Without Leave
c. Grooming Code
d. Uniform or Dress Code
e. Any and All Offenses by Agreement of the Parties in Writing

The procedure for Commanding Officer discipline shall be:

- For the first incident, the discipline shall be an oral reprimand;
- For the second incident, occurrence within a reasonable period but not to exceed ninety (90) days, the discipline shall be a written reprimand.
- For a third incident, occurrence within a reasonable period but not to exceed ninety (90) days, the discipline shall be a suspension or loss of leave credits of up to three (3) work days.

4.1.5 The procedure of 4.1.4 is optional, but shall be encouraged to correct deficiencies in an employee's work habits. If formal written charges are filed pursuant to this Article, the formal disciplinary procedure set forth in this Article shall be followed. The Union will be given a copy of any actions taken under this Section.

4.1.6 Any discipline administered pursuant to the procedure set forth in 4.1.4 shall be subject to the grievance and arbitration procedure. An employee shall be entitled to Union representation during all stages of the disciplinary process.

4.1.7 Whenever the Employer seeks imposition of discipline beyond the Commanding Officer level, the employee shall be served with a written notice of specific charges being brought against him and the proposed penalty. The notice of discipline shall contain a detailed description of the charges, including dates, times and places. A copy of the charges shall be sent to the Union at the same time it is sent to the employees.

4.1.8 No disciplinary action or measure beyond 4.1.4 shall imposed upon an employee prior to the exhaustion of the appeal procedure set forth herein. An employee may, however, be suspended without pay pending the outcome of such proceedings only if the Employer determines that there is probable cause to believe that the employee's continued presence on the job represents an actual danger to persons or property, or would severely interfere with operations. Suspensions without pay may not exceed thirty (30 calendar days. An employee shall not be entitled to pay, however, during any period in which the Union or the employee is not ready to proceed, or the hearing is adjourned at the request of the Union or the employee, or the Union or the employee obtain a stay of arbitration. If the employee is suspended without pay, the determination shall be reviewable by an arbitrator. Before any suspension begins, the disciplined employee, upon request, will be allowed to discuss the matter with his Union Steward or other authorized representative of the Union before he may be required to leave the premises or his duty assignment. The Employer will make an area available for this purpose. Disciplinary charges shall be served within ten (10) work days of any official verbal notification.

The demand for arbitration filed by the Union shall list two separate proposed dates for the arbitration hearing during a period from fourteen (14) calendar days to and including thirty-five (35) calendar days from the date of filing its demand. Within seven (7) calendar days from the receipt of the demand, the City shall select one of the proposed dates.

4.2 Appeals Procedure

4.2.1 An employee against whom disciplinary charges are brought shall have the right to appeal such action. Upon receipt of such notification, an employee shall have eight (8) calendar days to file with the Chief of Police a written response to the charges, a copy of which shall be sent to the Union. The employee, in his response, may deny the charges, may admit the charges and accept the penalty proposed, or admit the charges but reject the penalty proposed. Should the employee deny the charges, or admit the charges but reject the penalty proposed, he shall also include in his response whether he desires to utilize Sections 75 and 76 of the Civil Service Law or the procedures set forth in this Article, and whether he desires to be represented by the Union or his own attorney.

4.2.2 Except as provided in 4.1.4 of this Article, it is understood that any penalty proposed may not be implemented until the employee:

a) fails to file a response within eight (8) calendar days of the service of notification of discipline, or

b) having filed a disciplinary grievance response, fails to file a timely appeal to arbitration, or request for a Civil Service hearing, whichever the case may be, or

c) having appealed to arbitration, until and to the extent that it is upheld by a disciplinary arbitrator.

4.2.3 In any case where an employee, in his response to the charges, disagrees with the penalty proposed or denies the charges brought against him, the Chief of Police, or his designee, shall meet with the Union Grievance Committee within ten (10) work days of receipt of the employee's response in an effort to resolve the matter. Any settlement shall be reduced to writing. Under no circumstances may an employee be required to execute a settlement without being afforded a reasonable opportunity to have a representative of the Union or his own attorney present. A copy of any settlement shall be provided to the Union.

4.2.4 If the matter is not resolved at the meeting with the Chief of Police or his designee, then the employee, within ten (10) work days of the date the meeting is held, may file for arbitration as provided for under Article 3.7 of this Agreement, or request a Civil Service hearing, whichever the case may be.

4.2.5 Disciplinary arbitrators shall confine themselves to determinations of whether an employee is guilty or innocent of the charges being brought against him, and whether the proposed penalty is arbitrary or capricious. Such arbitrator shall neither add to, subtract from, nor modify any provisions of this Agreement. The disciplinary arbitrator's decision with respect to guilt or innocence, penalty, or probable cause for suspension pursuant to 4.1.3 of this Article, shall be final and binding upon the parties. If the arbitrator, upon review, finds probable cause for the suspension, he may consider such suspension in determining whether the proposed penalty is arbitrary.

4.2.6 In a disciplinary arbitration, the burden of proving the employee's guilt by preponderance of evidence shall be that of the Employer.

4.2.7 Upon request of either party, the disciplinary arbitrator shall schedule a pre-hearing conference reasonable in advance of the arbitration date.

4.3 Rights of the Parties

4.3.1 Either party may inspect and copy, upon written request or recorded oral statements of witnesses or records which are relevant to the disciplinary charges and which are in the possession of the other party, in advance of the date of such proceeding and no later than 5 workdays from the request. The parties will acknowledge in writing receipt of these materials.

4.3.2 The Grievance Committee Chairman, the Local Union President, or his designee, that aggrieved employee, and necessary employee witness, shall not suffer any loss of time or pay, or

be required to charge accrued leave credits as the result of time spent in any disciplinary hearing or arbitration proceeding during their regular working hours.

4.3.3 No employee shall be coerced or intimidated, or suffer any reprisal, either directly or indirectly, including changes that may adversely affect his hours, wages or working conditions, as the result of his exercising the rights guaranteed by this Agreement.

4.3.4 Work shift changes or reassignments shall not be considered a disciplinary measure but may be made by the Chief, or his designee, in the exercise of his sound discretion, pending the determination of serious disciplinary charges.

4.3.5 No employee shall be brought up on disciplinary charges for acts which occurred more than one (1) year prior to the serving of disciplinary charges upon him, except that the above limit shall not apply to acts which, if proved in a court of appropriate jurisdiction, would constitute of crime.

4.3.6 Time Out on Suspension

Notwithstanding the provisions of subsections 10.1.1, 12.1.3, 13.1.2 and 17.1.3 of this Agreement, the bargaining unit members shall not accrue vacation credits or receive roll call pay, holiday pay, and uniform cleaning allowance for any period of time during which the bargaining unit member is out on suspension pending the outcome of criminal charges and/or internal departmental charges. In the event that the bargaining unit member should be subsequently be found not guilty of all pending criminal charges and departmental charges related to the suspension, then he or she shall be reimbursed for that portion of the vacation credits, roll call pay, holiday pay, and uniform cleaning allowance not paid during the suspension.

ROCKLAND COUNTY POLICE ACT

VILLAGE POLICE DEPARTMENTS

AS AMENDED

CHAPTER 524

AN ACT providing for the employment of village policeman and the establishment, organization and operation of police departments in the village of Rockland County.

Became a law May 11, 1936, with the approval of the Governor, Passed, three-fifths being present

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Employment of village policemen and establishment, organization and operation of police departments in the villages of Rockland County. Applicability of laws. Not withstanding any other provisions of law, the employment of village policemen and the establishment, organization and operation and all matters concerning police or police departments in all villages in the County of Rockland shall be governed by the provisions of this act. The employment of such policemen shall continue to be in accordance with the rules of the state civil service commission as heretofore extended to the employment of policemen who were serving as such in all villages of the first, second and third class in the County of Rockland on May sixteenth, nineteen hundred thirty-five or who have been appointed to permanent positions pursuant to law since such date, and who are lawfully entitled to continue in such positions at the time this act takes effect, shall continue to be members of the village police department without further civil service examination regardless of their age, and shall retain their present lawful rank. All appointments made hereafter to any such police department shall be made in accordance with the provisions of section four of this act.

Village policemen who were serving as such in all villages of the fourth class in the County of Rockland on May sixteenth, nineteen hundred thirty-five or who were appointed to such provisions pursuant to law since such date, and who are lawfully entitled to continue to such positions at the time this act takes effect, shall continue to be members of the village police department without further civil service examination regardless of their age, and shall retain their present lawful rank. All appointments made hereafter to any such police department shall be made in accordance with the provisions of section two of this act.

Section 2. Village policemen. The mayor, each trustee, street commissioner and the superintendent of public works are ex-officio members of the police department, and have all the powers conferred upon policemen by this article. In any village of the fourth class in said County, the board of trustees, or if a municipal board now acts as police commissioners, such may appoint and fix the terms not extended beyond the current official year, of one or more

village policemen, one of whom may be designated as chief of police. No person shall be eligible to appointment or reappointment on such police force, or continue as a member thereof, who shall not be a citizen of the United States, who has been or shall have been convicted of a felony, who shall be unable to read and write understandingly the English language, or who shall not have resided within the State of New York one year, and within any village or town in Rockland County six months next preceding his appointment. No person shall be appointed a member of such police force unless he shall have passed an examination held by the state civil service commission, unless at the time of his appointment his name shall be on the eligible list of the state civil service commission. No person shall be eligible for appointment on such village police force who is over the age of thirty-five years, unless he shall have been previously appointed a member of a village or town police force in Rockland County.

Section 3. Police departments. The board of trustees or municipal board acting as police commissioners of each village of the first, second and third class shall, and of any other village may, instead of appointing policemen for fixed terms, by resolution, establish a police department in such village and appoint a chief of police, and such lieutenants of police, sergeants of police, and patrolmen as may be needed, and fix the compensation. The board of trustees may, at their option determine that the village shall pay all or part of the cost of the uniforms and other necessary equipment of its policemen, and the expense of same, if any, shall be deemed part of the cost of maintenance of the village police department. The board of trustees may submit to the qualified voters of the village at a general or special election a proposition to abolish a police department established pursuant to this section and upon the adoption thereof by a majority of the qualified voters of the village voting upon the proposition, the department shall be deemed abolished. (Amended by laws of 1941 Ch. 431)

Section 4. Qualifications. No person shall be eligible to appointment or reappointment on such police force of a village or continue as a member thereof, who shall not be a citizen of the United States, who has been or shall have been convicted of a felony, who shall be unable to read and write understandingly the English language or who shall not have resided within the State of New York one year, and within any village or town in Rockland County six months next preceding his appointment. No person shall be appointed a member of such police force who is over the age of thirty-five years. In the case of a village establishing a police department by resolution, village policemen who are over the age of thirty-five years and who are at that time serving as policemen in the village establishing the department shall be eligible for appointment as members of such village police department only. No personal shall be appointed a member of such police forces unless he shall have passed an examination held by the state civil service commission, and unless at the time of his appointment his name shall be on the eligible list of the state civil service commission.

Section 5. Promotions. Promotions of officers and members of such police forces shall be made, and all vacancies above the grade of patrolmen filled whenever possible by promotion from among persons holding positions in a lower grade in the department in which the vacancy exists, by the board of trustees or municipal board on the basis of seniority, meritorious police service and superior capacity, as shown by competitive examination, such examination to be conducted by the state civil service commission. Individual acts of personal bravery may be treated as an element of meritorious service in such examination by the commission or board

holding the examination. The board of trustees or municipal board shall keep a complete service record of each member of such police force in accordance with the rules and regulations of the state civil service commission and shall transmit the record of each candidate for promotion to the state civil service commission in advance of such examination. (Amended By Laws of 1941 Ch.429)

Section 6. Transfers. Transfers from one village police department to another village or town police department in Rockland County may be made upon the mutual consent of the appointing officers of the departments affected. Any member of such police force who has been or who shall hereafter be so transferred shall receive credit with the village department to which he is transferred for time served on the police force of any village or town within Rockland County, as though the full time was served with the department to which he has been transferred, for the purposes of seniority, promotions, pensions and general administration.

Section 7. Administration. The board of trustees or municipal board acting as police commissioners of any such village, may make, adopt and enforce rules, orders and regulations for the government, discipline, administration and disposition of the police department of such village, and the members thereof. Any such rules and regulations or any amendment thereto shall be in written form and a copy of the same distributed to each member of the police department and posted in a conspicuous place in the police headquarters.

Section 8. Discipline and charges. Except as otherwise provided by law, a member of such police force shall continue in office unless suspended or dismissed. The board of trustees or municipal board shall have power and is authorized to adopt and make rules and regulations for the examination, hearing, investigation and determination of charges, made or preferred, against any member or members of such police force. Except as otherwise provided, no member or members of such police force shall be fined, reprimanded, suspended, removed or dismissed until written charges shall have been examined, heard and investigated in such manner or procedure, practice, examination and investigation as such board may by rules and regulations from time to time prescribe. Such charges shall not be brought more than sixty days after the time when the facts upon which such charges are based are known to the board of trustees or municipal board. Any member of such police force at the time of the hearing or trial of such charges shall have the right to a public hearing and trial and to be represented by counsel at any such hearing or trial, and any person who shall have preferred such charges or any part of the same shall not sit as judge upon such hearing or trial. Any and all witnesses produced in support of all or any part of such charges shall testify thereto under oath. Any member of such force who shall have been so dismissed shall not be reinstated as a member of such force unless he shall within twelve months of his dismissal file with such board a written application for a rehearing of the charges upon which he was dismissed. Such board shall have the power to rehear such charges and, in its discretion, reinstate a member of the force after he has filed such written application therefor. Any member of such force found guilty upon charges, after five days' notice and an opportunity to be heard in his defense, of neglect or dereliction in the performance of official duty, or violation of rule and regulations, or disobedience, or incompetency to perform official duty, or an act of delinquency seriously affecting his general character or fitness for office, may be punished by the board of trustees or other municipal board having jurisdiction, by reprimand, forfeiture and the withholding of salary or compensation for a specified time not

exceeding twenty days and the withholding of salary or compensation during such suspension, or by dismissal from the department. Such board shall have the power to suspend, without pay, pending the trial of charges, any member of such police force. If any member of such police force so suspended shall not be convicted by such board of the charges so preferred, he shall be entitled to full pay from the date of suspension, notwithstanding such charges and suspension.

Section 9. Certiorari. The conviction of any member of such police force shall be subject to review by certiorari to the supreme court in the judicial district in which such village is located, provided a verified petition for such a review setting forth that said conviction is illegal and specifying the grounds of illegality, be presented to the court within sixty days after the conviction.

Section 10. REPEALED BY LAWS OF 1951, CHAPTER 825

Section 11. Absentee leave. Every member of such police department shall be entitled, in addition to any vacation or absentee leave now prescribed by law, to one day of rest in seven, and the chief or acting chief of the police department shall keep a time book showing the name and shield number of each member of the department and the hours worked by each of such policemen in each day. In case of a public emergency the board of trustees may make a variation from the above hours of vacation, provided the member shall receive during each year the actual number of days' absentee leave to which he is entitled. The determination of the board as to the number of days' leave to which a member is entitled during any given period shall be subject to review by certiorari. Whenever the board of trustees or municipality shall designate any policemen to attend police school, such attendance shall be deemed in the cause of duty and when so attending he shall receive his usual pay and reimbursement for actual and necessary expenses. Sick leave with full pay may be granted whenever such sickness or disability has been incurred without the delinquency of the policeman. (Amended By Laws of 1941 Ch. 430)

Section 12. Vacations. Every member of such police departments shall be allowed an annual vacation of not less than fourteen consecutive days without diminution of salary or compensation as fixed by or pursuant to law, except in case of public emergency. In the event of a public emergency during which the vacation or portion of a vacation of a member shall have been withheld, upon the cessation of such emergency, such member shall then receive with pay the number of days such vacation withheld.

Section 13. Powers and duties of policemen. The policemen so appointed shall have all the powers and be subject to the duties and liabilities of constables of towns in serving process in any civil action or proceeding. Said policemen shall have power to execute any warrant or process issued by justices of the peace of Rockland County.

Section 14. Fees, salaries and expenses of policemen. The board of trustees shall fix the amount of the salary of each village police officer. All fees collected or received by such officer belong to the village and he must account therefor to the village, except those fees received for the execution of all process, civil or criminal, outside of the corporate limits of the said village, and for the execution of all civil process within the village while not on duty as a police officer. A village policeman shall not receive any present or reward for his service other

CHAPTER 825

AN ACT to repeal section ten of chapter five hundred twenty-four of the laws of nineteen hundred thirty-six, entitled "An act providing for the employment of village policemen and the establishment, organization and operation of police departments in the villages of Rockland County," relating to the reinstatement of patrolmen after resignation

Became a law April 13, 1951, with the approval of the Governor. Passed, on two village messages, pursuant to article IX, section 16 of the Constitution, by two-thirds vote

The People of the State of New York, represented in Senate and Assembly, to enact as follows:

Section 1. Section ten of chapter five hundred twenty-four of the laws of nineteen hundred thirty-six, entitled "An act providing for the employment of village policemen and the establishment, organization, and operation of police departments in the villages of Rockland County," is hereby repealed.

Section 2. This act shall take effect immediately.

§ 18. Employment of village policemen and establishment, organization and operation of *police* departments in the villages of *Westchester county*; applicability of laws

1.Notwithstanding any other provisions of law, the employment of village policemen and the establishment, organization and operation and all matters concerning ***police*** or ***police*** departments in all villages in the ***county*** of ***Westchester*** shall be governed solely by the provisions of this article except that nothing herein shall be construed to prohibit the establishment of ***police*** pension funds in such villages in accordance with the provisions of this chapter. The employment of such policemen shall continue to be in accordance with the rules of the state civil service commission as heretofore extended by it to the employment of policemen in the villages of ***Westchester county***.

2.Definitions. Whenever the term "municipal board" is used in this section it shall be construed as referring to a municipal board, ***acting*** as ***police*** commissioners of a village, created as provided by *section 4-412 of the village law*.

3.Village policemen. The mayor, each trustee, street commissioner and the superintendent of public works are ex-officio members of the ***police*** department, and have all the powers conferred upon policemen by this article. In any village in said ***county***, the board of trustees, or if a municipal board now ***acts*** as ***police*** commissioner, such board may appoint and fix the terms not extending beyond the current official year, of one or more village policemen, one of whom may be designated as chief of ***police***. No person shall be eligible to appointment or reappointment on such ***police*** force, or continue as a member thereof, who shall not be a citizen of the United States, who has been or shall have been convicted of a felony, who shall be unable to read and write understandingly the English language, or who shall not have resided within the state of New York one year, and within any village or town in ***Westchester county*** six months next preceding his appointment. No person shall be appointed a member of such ***police*** force unless he shall have passed an examination held by the state civil service commission, and unless at the time of his appointment his name shall be on the eligible list of the state civil service commission. No person shall be eligible for appointment on such village ***police*** force who is over the age of thirty-five years, unless he shall have been previously appointed a member of a village or town ***police*** force in ***Westchester county***.

4.*Police* departments. The board of trustees or municipal board ***acting*** as ***police*** commissioners of each village shall, and of any other village may, instead of appointing policemen for fixed terms, by resolution, establish a ***police*** department in such village and appoint a chief of ***police***, and such lieutenants of ***police***, sergeants of ***police***, and patrolmen as may be needed, and fix their compensation. The board of trustees may submit to the qualified voters of the village at a general or special election a proposition to abolish a ***police*** department established pursuant to this section and upon the adoption thereof by a majority of the qualified voters of the village voting upon the proposition, the department shall be deemed abolished.

5.Qualifications. No person shall be eligible to appointment or reappointment on such ***police*** force of a village, or continue as a member thereof, who shall not be a citizen of the United States, who has been or shall have been convicted of a felony, who shall be unable to read and write understandingly the English language or who shall not have resided within the state of New York one year, and within any village or town in ***Westchester county*** six months next preceding the date of filing his application to take the examination or who shall not

have continued to reside in a village or town in ***Westchester county*** up to and including the time of his appointment. Except in the case of a transfer, no person shall be appointed a member of such ***police*** force who is over the age of thirty-five years. In the case of a village establishing a ***police*** department by resolution, village policemen who are over the age of thirty-five years and who are at that time serving as policemen in the village establishing the department shall be eligible for appointment as members of such village ***police*** department at the time of the organization of said ***police*** department only. Except in the case of a transfer as in this article provided, no person shall be appointed a member of such ***police*** force unless he shall have passed an examination held by the state civil service commission, and unless at the time of his appointment his name shall be on the eligible list of the state civil service commission. The civil service commission shall certify for appointment names from the eligible list in the order in which the names appear on such list according to their rating irrespective of the residence of the applicants. Any village requesting the civil service commission to certify names for appointment may request the civil service commission to first certify the names of residents of the village in which the appointment is to be made and in such case, the residents so certified shall have preference in appointment over all names on said list. In all other instances, the civil service commission shall certify names from the general list in the order in which they appear. The residence of an applicant shall be the place of residence given by such applicant in his application to take the examination of the civil service commission during the period of the existence of such list and shall receive preference therein so long as he actually resides in the municipality given in his application.

6.Promotions. Promotions of officers and members of such ***police*** forces shall be made by the board of trustees or municipal board on the basis of seniority, meritorious ***police*** service and superior capacity, as shown by competitive examination, such examination to be conducted by the state civil service commission. Individual ***acts*** of personal bravery may be treated as an element of meritorious service in such examination by the commission or board holding the examination. The board of trustees or municipal board shall keep a complete service record of each member of such ***police*** force, in accordance with the rules and regulations of the state civil service commission and shall transmit the record of each candidate for promotion to the state civil service commission in advance of such examination. Notwithstanding any other special or general laws to the contrary such promotion examinations shall be competitive examinations held by the state civil service commission regardless of the number of candidates eligible for such promotion, and if the number of candidates is restricted to less than four by the action of the board of trustees or municipal board and if the names of one or more candidates are certified as having passed such examination such name or names shall constitute an eligible list under the civil service law. No patrolman shall be eligible to take a promotion examination until he has become a patrolman of the first grade. No person shall be eligible to take such promotion examination for positions on the ***police*** force of villages in ***Westchester county*** unless he is serving as a policeman on the ***police*** force of a town or village in ***Westchester county***.

7.Transfers. Transfers from one village ***police*** department to another village or town ***police*** department in ***Westchester county*** may be made upon the mutual consent of the appointing officers of the departments affected. Any member of such ***police*** force who has been or who shall hereafter be so transferred shall receive credit with the village department to which he is transferred for time served on the ***police*** force of any village or town within ***Westchester county***, as though the full time was served with the department to which he has been transferred, for the purpose of seniority, promotions, pensions and general administration.

8.Administration. The board of trustees or municipal board ***acting*** as ***police*** commissioners of any village, may make, adopt and enforce rules, orders and regulations for the government, discipline, administration and disposition of the ***police*** department of such village, and the members thereof. Any such rules and regulations or any amendment thereto shall be in written form and a copy of the same distributed to each member of the ***police*** department and posted in a conspicuous place in the ***police*** headquarters.

9.Discipline and charges. Except as otherwise provided by law, a member of such ***police*** force shall continue in office unless suspended or dismissed. The board of trustees or municipal board shall have power and is authorized to adopt and make rules and regulations for the examination, hearing, investigation and determination of charges, made or preferred against any member or members of such ***police*** force, but no member or members of such ***police*** force shall be fined, reprimanded, removed or dismissed until written charges shall have been made and preferred against him or them, nor until such charges have been

investigated, examined, heard and determined by such board of trustees or municipal board in such manner, procedure, practice, examination and investigation as such board may by such rules and regulations from time to time prescribe, except that the trial of such charges shall not be delegated and must be heard before the full board of trustees or full municipal board, or a majority of the members of either of such boards, and the affirmative vote of a majority of such members shall be necessary to a conviction on any such charges. Such charges shall not be brought more than ninety days after the time when the facts upon which such charges are based are known to such board of trustees or municipal board. Any member of such ***police*** force at the time of the hearing or trial of such charges before such board of trustees or municipal board shall have the right to a public hearing and trial and to be represented by counsel at any such hearing or trial, and any person who shall have preferred such charges or any part of the same shall not sit as a member of such board of trustees or municipal board upon such hearing or trial. Any and all witnesses produced upon the trial shall testify under oath. Any member of such force found quilty upon charges, after five days' written notice and an opportunity to be heard in his defense, of neglect or dereliction in the performance of official duty, or violation of rules and regulations, or disobedience, or incompetency to perform official duty, or an ***act*** of delinquency seriously affecting his general character or fitness for office, may be punished by such board of trustees or municipal board before which such charges are tried, by reprimand, forfeiture and the withholding of salary or compensation for a specified time not exceeding twenty days and the withholding of salary or compensation during such suspension, or by dismissal from the department. Such board of trustees or municipal board shall have the power to suspend without pay, pending the trial of charges, any member of such ***police*** force. If any member of such ***police*** force so suspended shall not be convicted by such board of the charges so preferred, or if on review his conviction shall be reversed, then, notwithstanding such charges and suspension, he shall be entitled to receive full pay from the date of suspension to the date of reimbursement less the amount of compensation, if any, received by him from any other employment or occupation during the period beginning with such date of suspension to the date of his reinstatement and he shall be entitled to an order as provided in article seventy-eight of the civil practice ***act***[*] to enforce the payment thereof.

10. Review of convictions. The conviction of any member of such ***police*** force shall be subject to review, as provided in article seventy-eight of the civil practice law and rules by the supreme court in the judicial district in which such village is located on the ground that said conviction is illegal provided the proceeding is commenced within sixty days after the conviction.

11. Reinstatement after dismissal. Any member of such ***police*** force who shall have been so dismissed or who is hereafter dismissed, may be reinstated as a member of such ***police*** force, whether he has made application for a review, as authorized in the preceding section [subdivision][**] or not, provided he shall within twelve months of his dismissal file with such board a written application for a rehearing of the charges upon which he was dismissed. Such board shall have the power to rehear such charges and in its discretion, reinstate a member of the force after he has filed such written application therefor.

12. Reinstatement after resignation. Any member of such force, who shall resign, shall not be reinstated by such board unless he shall make written application, within twelve months of his resignation, to such board for reappointment as a member of such force.

13. Absentee leave. Every member of such ***police*** department shall be entitled, in addition to any vacation or absentee leave now prescribed by law, to one day of rest in seven, and the chief or ***acting*** chief of the ***police*** department shall keep a time book showing the name and shield number of each member of the department and the hours worked by each of such policemen in each day. In case of public emergency the board of trustees may make a variation from the above hours of vacation, provided the member shall receive during each year the actual number of days' absentee leave to which he is entitled. The determination of the board as

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[*] Repealed, L 1962, ch 308, eff Sept 1, 1963; see now CLS *CPLR §§ 7801* et seq.

[**] The bracketed word has been inserted by Publisher.

to the number of days' leave to which a member is entitled during any given period shall be subject to review as provided in article seventy-eight of the civil practice ***act***.*

14. Hours of duty and vacations. In all such ***police*** departments, no lieutenant of ***police***, sergeant of ***police*** or patrolman shall be required to work more than eight hours in any day, or more than forty hours in any seven consecutive day period, except in cases of fire, riot, flood, or other cases of emergency endangering life or property, or for the purpose of changing tours of duty, or on a day on which an election authorized by law shall be held, in all of which cases the foregoing members of such ***police*** departments may be continued on duty for such hours as may be necessary. Every member of such ***police*** department shall be allowed an annual vacation of not less than fourteen consecutive days without diminution of salary or compensation as fixed by or pursuant to law, except in case of public emergency. In the event of a public emergency during which the vacation or portion of a vacation of a member shall have been withheld, upon the cessation of such emergency, such member shall then receive with pay the number of days of such vacation withheld.

15. Assignment to desk duty. In the ***police*** department of any such village, no person shall be assigned to desk duty or ***act*** as a desk officer except a member of the ***police*** department, except in a case of a public emergency, and if a patrolman shall be so assigned, he shall have the full power and authority of an ***acting*** sergeant of such department and shall be governed by the regulations and orders affecting the rank during such assignment. The rank and grade of desk officer in the ***police*** department of any such village is hereby abolished; desk officers serving in that capacity when this article takes effect, providing they have been appointed to such position pursuant to civil service rules and regulations, and their names have been approved and certified by the civil service commission, shall become and have all the rights and privileges of patrolmen of such department and the time so served as desk officers shall for all purposes be counted as if served as patrolmen of such department.

16. Powers and duties of policemen. The policemen so appointed shall have all the powers and be subject to the duties and liabilities of constables of towns in serving process in any civil action or proceeding. Said policemen shall have power to execute any warrant or process issued by justices of the peace of ***Westchester county***.

17. Fees, salaries and expenses of policemen. The board of trustees shall fix the amount of the salary of each village ***police*** officer and may, at its option, determine that the village shall pay all or part of the cost of the uniforms and necessary equipment of its ***police*** officers. All fees collected or received by such officer belong to the village and he must account therefor to the village, except those fees received for the execution of all process, civil or criminal, outside of the corporate limits of the said village, and for the execution of all civil process within the village while not on duty as a ***police*** officer. A village policemen [policeman]* shall not receive any present or reward for his services other than his fees or salary, except by the consent of the board of trustees or municipal board. Every village policeman shall keep a book in which shall be entered all services performed by him which are a town or ***county*** charge, and shall present claims therefor against the town or ***county*** to which chargeable. All orders or warrants for such claims, except those hereinabove specified, shall be made payable to the village treasurer, who shall collect the amount thereof.

18. Retirement of policemen in certain villages. In any village in ***Westchester county***, a member of the ***police*** force, who is not a member of any pension fund or retirement system and whose compensation is a fixed salary, who shall have served a continuous term of employment as such of twenty years in one or more ***police*** departments in such ***county***, or whose employment in two or more such terms shall in the aggregate amount to a total period of employment of twenty years, may if unable to perform his regular duties in a manner satisfactory to the board of trustees of such village, be retired. A policeman so retired shall be paid one-half of the salary paid a member of such ***police*** department of the rank of the retiring member for the year immediately preceding such retirement. If any policeman so retired shall die leaving a widow surviving him who was his

* Repealed, L 1962, ch 308, eff Sept 1, 1963; see now CLS *CPLR §§ 7801* et seq.

* The bracketed word has been inserted by Publisher.

lawful wedded wife and cohabiting with him at the time of such retirement and at the time of his death, such widow shall be paid the sum of six hundred dollars per annum during her lifetime, but such payment shall cease in the event of her remarriage. Such payment in the case of a policeman so retired shall in no case exceed one thousand dollars per annum and such payments to a policeman so retired or to the widow of a policeman so retired shall be paid out of moneys provided by such board of trustees to be levied and collected in the same manner as other village funds are levied and collected and shall not be subject to claims of creditors.

19. Grades of policemen. The annual salary and compensation of the members of such ***police*** force shall be uniform in accordance with their rank and grade except as provided by section thirty-seven** of this chapter and a copy of such salary scale and any changes made therein shall be filed with the state civil service commission. All patrolmen who shall have served four years or upwards on such ***police*** force shall be patrolmen of the first grade. All patrolmen who shall have served for less than four years and more than three years shall be patrolmen of the second grade. All patrolmen who shall have served for less than three years and more than two years shall be patrolmen of the third grade. All patrolmen who shall have served for less than two years and more than one year shall be patrolmen of the fourth grade. All patrolmen who shall have served for less than one year shall be patrolmen of the fifth grade. Whenever any patrolman of the fifth grade shall have served therein for one year, he shall be advanced to the fourth grade and whenever any patrolman of the fourth grade shall have served therein for one year, he shall be advanced to the third grade and whenever any patrolman of the third grade shall have served therein for one year, he shall be advanced to the second grade and whenever any patrolman of the second grade shall have served therein for one year, he shall be advanced to the first grade.

20. Detective service. The chief of ***police*** may, from time to time, detail to detective duty as many members of the force as he may deem necessary to make the service efficient, and he may at any time revoke such detail. Any policeman who may be so assigned by the chief of ***police*** to detective duty may be paid a salary in excess of that paid a member of his rank and grade. Any policeman detailed to detective duty, while so detailed, shall retain his rank and shall be eligible for promotion, the same as if serving in the uniformed force and the time during which he serves in detective duty shall be counted for all purposes as if served in his rank or grade in the uniformed force. None of the provisions of section one hundred ninety-nine-w*** of this chapter shall apply to or govern the hours or tours of duty of policemen detailed to detective duty.

21. Composition of ***police*** force; duties and powers. Until otherwise provided by law, the ***police*** force in the ***police*** department of such village, shall consist of a chief of ***police*** and such lieutenants of ***police***, sergeants of ***police*** and patrolmen as may be needed. The chief of ***police*** of such village shall be the executive officer of the ***police*** force. He shall be chargeable with and responsible for the execution of all laws and the rules and regulations of the department. He shall assign to duty the officers and members of the ***police*** force, and shall have power to change such assignments from time to time whenever in his judgment the exigencies of the service may require such change, provided, however, that officers and members of the ***police*** force only hereafter shall be assigned to ***police*** duty. He shall, with the consent of the board of trustees or municipal board, have power to relieve from active duty on patrol any member of the ***police*** force who, whilst in the actual performance of duty and without fault or misconduct on his part, shall have become disabled physically as a result of injuries or illness attributable thereto, so as to be unfit to perform full ***police*** duty, and such disability having been certified to by so many of the ***police*** surgeons as the board may require, and assign such member to the performance of such light duties as he may be qualified to perform. He shall have the power to suspend without pay, pending investigation of charges by the board, any member of the ***police*** force. If any member of the ***police*** force so suspended shall not be convicted by the municipal board of the charges so preferred, he shall be entitled to full pay from the date of suspension, notwithstanding such charges and suspensions.

22. Special patrolmen. The board of trustees or municipal board may appoint as many citizens as they deem advisable to serve as special patrolmen, without pay, in the case of riot, pestilence or invasion, on election day, or a day of public celebration. Such appointment shall be made only for a specified time. Such special

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** There is no section thirty-seven of this chapter.

*** This is probably a reference to former Village Law § 199-w which generally appears now as sub 14 of this section.

patrolmen shall be vested with all the powers and privileges and perform all the duties of patrolmen in the regular ***police*** force of the village. Each such special patrolman shall wear a badge, to be furnished by the board. In making the appointments as special patrolmen preference shall be given those on the civil service list for patrolmen available.

History

Add, L 1972, ch 891, § 2, eff Sept 1, 1973, with substance transferred from Vill Law § 199–j; L 1972, ch 891, § 2, eff Sept 1, 1973, with substance transferred from Vill Law § 199–n,m,l,k; L 1972, ch 891, § 2, eff Sept 1, 1973. with substance transferred from Vill Law § 199–o; L 1972, ch 891, § 2, eff Sept 1, 1973, with substance transferred from Vill Law § 199–ee,dd,cc,bb,aa,z,y,x,w,v,u,t,s,r,q,p.

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Matter of Patrolmen's Benevolent Assn. of City of N.Y., Inc. v. New York State Pub. Empl. Relations Bd., 6 N.Y.3d 563

Copy Citation

Court of Appeals of New York

February 8, 2006, Argued ; March 28, 2006, Decided

No. 32, No. 34

Reporter

6 N.Y.3d 563 * | 848 N.E.2d 448 ** | 815 N.Y.S.2d 1 *** | 2006 N.Y. LEXIS 584 **** | 2006 NY Slip Op 2288 | 152 Lab. Cas. (CCH) P60,168

[1] In the Matter of Patrolmen's Benevolent Association of the City of New York, Inc., Appellant, v. New York State Public Employment Relations Board et al., Respondents.In the Matter of Town of Orangetown et al., Respondents v. Orangetown Policemen's Benevolent Association et al., Appellants.

Prior History: [****1] Appeal, in the first above-entitled proceeding, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered December 16, 2004. The Appellate Division affirmed a judgment of the Supreme Court, Albany County (Edward A. Sheridan, J.), which had dismissed the petition, in a proceeding pursuant to CPLR article 78, to review so much of a determination of respondent Public Employment Relations Board as found that certain proposed contract terms were not mandatory subjects of collective bargaining.

Appeal, in the second above-entitled proceeding, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered May 31, 2005. The Appellate Division (1) affirmed a judgment of the Supreme Court, Rockland County (William E. Sherwood, J.), which had (a) granted the petition in a proceeding pursuant to CPLR article 75 to permanently stay arbitration of an employee disciplinary dispute and (b) permanently stayed the arbitration, and (2) dismissed an appeal from so much of an order of that Supreme Court as had denied respondents' cross motion to dismiss the petition upon the ground that the order was subsumed in the judgment.

Matter of Town of Orangetown v. Orangetown Policemen's Benevolent Assn., 18 A.D.3d 879, 796 N.Y.S.2d 626, 2005 N.Y. App. Div. LEXIS 5858 (N.Y. App. Div. 2d Dep't, 2005), modified.
Matter of Patrolmen's Benevolent Assn. of City of N.Y., Inc. v. New York State Pub. Empl. Relations Bd., 13 A.D.3d 879, 786 N.Y.S.2d 269, 2004 N.Y. App. Div. LEXIS 15282 (N.Y. App. Div. 3d Dep't, 2004), affirmed.

Disposition: Case No. 32: Order affirmed, with costs. Case No. 34: Order modified by converting proceeding to declaratory judgment action and declaring in accordance with the opinion herein, and, as so modified, affirmed, with costs to the Town of Orangetown and the Town Board of the Town of Orangetown.

Core Terms

discipline, collective bargaining, disciplinary, police officer, collective bargaining agreement, police department, Taylor Law, police commissioner, town board, favoring, cases, Rockland County Police Act

Case Summary

Procedural Posture

The New York Supreme Court, Appellate Division, affirmed trial court decisions finding in Case No. 32, involving appellant city police officers' union, and Case No. 34, concerning appellant town police officers' union, that police discipline could not be a collective bargaining subject under the Taylor Law since the legislature had given that power to local officials. The city police officers' union and the town police officers' union appealed.

town could not be the subjective of collective bargaining because the legislature had expressly committed disciplinary authority over the police department to local officials. On appeal by the aggrieved parties, the city police officers' union and the town police officers' union, the appellate court affirmed. On further review, the state's highest court agreed with the trial court and the appellate court's conclusions. It held that police discipline could not be the subject of collective bargaining under the Taylor Law when the legislature had expressly committed disciplinary authority over a police department to local officials and because the legislature had done so in the case of the city and the town, the subject of police discipline could not be part of the collective bargaining subjects between them, and, respectively, the city police officers' union and the town police officer's union.

Outcome

The appellate court's judgment in Case No. 32 was affirmed. The appellate court's judgment in Case No. 34 was modified by converting the proceeding to a declaratory judgment action and declaring that police discipline could not be a subject of collective bargaining.

LexisNexis® Headnotes

Governments > Local Governments > Employees & Officials
Labor & Employment Law > Collective Bargaining & Labor Relations > Labor Arbitration > Discipline, Layoffs & Terminations

HN1 **Local Governments, Employees & Officials**

The policy of the Taylor Law, N.Y. Civ. Serv. Law art. 14, prevails, and collective bargaining is required, where no legislation specifically commits police discipline to the discretion of local officials. Where such legislation is in force, the policy favoring control over the police prevails, and collective bargaining over disciplinary matters is prohibited. More like this Headnote

Shepardize® - Narrow by this Headnote (17) 5

Business & Corporate Compliance > ... > Labor & Employment Law > Collective Bargaining & Labor Relations > Bargaining Subjects
Evidence > Inferences & Presumptions > Presumptions
Labor & Employment Law > Collective Bargaining & Labor Relations > Judicial Review

HN2 **Collective Bargaining & Labor Relations, Bargaining Subjects**

The Taylor Law, N.Y. Civ. Serv. Law art. 14, requires collective bargaining over all terms and conditions of employment: where an employee organization has been certified or recognized, the appropriate public employer shall be, and is, required to negotiate collectively with such employee organization in the determination of, and administration of, grievances arising under, the terms and conditions of employment of the public employees. N.Y. Civ. Serv. Law § 204(2). Reviewing courts have often stressed the importance of that policy, and have made clear that the presumption that all terms and conditions of employment are subject to mandatory bargaining cannot easily be overcome. More like this Headnote

Shepardize® - Narrow by this Headnote (16)

Business & Corporate Compliance > ... > Labor & Employment Law > Collective Bargaining & Labor Relations > Bargaining Subjects

HN3 **Collective Bargaining & Labor Relations, Bargaining Subjects**

Some subjects are excluded from collective bargaining as a matter of policy, even where no statute explicitly says so. More like this Headnote

Shepardize® - Narrow by this Headnote (3)

Business & Corporate Compliance > ... > Labor & Employment Law > Collective Bargaining & Labor Relations > Bargaining Subjects

HN4 **Collective Bargaining & Labor Relations, Bargaining Subjects**

The scope of collective bargaining may be limited by plain and clear, rather than express, prohibitions in a statute or decisional law or in some instances, by public policy whether explicit or implicit in statute or decisional law, or in neither. More like this Headnote

Governments > Local Governments > Duties & Powers
View more legal topics

HN5 **Local Governments, Duties & Powers**
N.Y. Civ. Serv. Law § 76(4) says that N.Y. Civ. Serv. Law §§ 75 and 76 shall not "be construed to repeal or modify" pre-existing laws, and among the laws thus grandfathered are several that, in contrast to N.Y. Civ. Serv. Law §§ 75 and 76, provide expressly for the control of police discipline by local officials in certain communities. More like this Headnote

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HN6 **Local Governments, Duties & Powers**
See New York City, N.Y., Charter § 434(a). More like this Headnote

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HN7 **Local Governments, Duties & Powers**
See New York City, N.Y. Admin. Code § 14-115(a). More like this Headnote

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HN8 **Local Governments, Duties & Powers**
See Rockland County, N.Y., Police Act § 7. More like this Headnote

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Headnotes/Summary

Headnotes

Civil Service -- Public Employees' Fair Employment Act -- Collective Bargaining -- Discipline of Police

Police discipline may not be a subject of collective bargaining under the Taylor Law (Civil Service Law art 14) when the Legislature has expressly committed disciplinary authority over a police department to local officials. In general, the procedures for disciplining public employees, including police officers, are governed by Civil Service Law §§75 and 76, which provide for a hearing and an appeal. Where Civil Service Law §§75 and 76 apply, police discipline may be the subject of collective bargaining. However, Civil Service Law § 76 (4) provides that sections 75 and 76 shall not "be construed to repeal or modify" preexisting laws, and among the laws thus grandfathered are several that provide expressly for the control of police discipline by local officials in certain communities, as in the municipalities involved here (*see* New York City Charter § 434 [a]; Administrative Code of City of NY § 14-115 [a]; L 1936, ch 526, § 7 [Rockland County Police Act]).

Counsel: *Kaye Scholer LLP*, New York City (*Peter M. Fishbein*, *Jay W. Waks*, *John D. Geelan* and *Christine A. Neagle* of counsel), *Gleason, Dunn, Walsh & O'Shea*, Albany (*Ronald G. Dunn* of counsel), and *Office of the Patrolmen's Benevolent Association of City of New York, Inc. General Counsel,* New York City (*Michael T. Murray* of counsel), for appellant in the first above-entitled proceeding. I. The Taylor Law mandates that the City of New York must bargain over discipline. (*Parker v Borock*, 5 N.Y.2d 156, 156 N.E.2d 297, 182 N.Y.S.2d 577; *Matter of Uniform Firefighters of Cohoes, Local 2562, IAFF, AFL-CIO v Cuevas*, 276 A.D.2d 184, 714 N.Y.S.2d 802; *Board of Educ. of Union Free School Dist. No. 3 of Town of Huntington v Associated Teachers of Huntington*, 30 N.Y.2d 122, 282 N.E.2d 109, 331 N.Y.S.2d 17; *Matter of Board of Educ. of City School Dist. of City of N.Y. v New York State Pub. Empl. Relations Bd.*, 75 N.Y.2d 660, 554 N.E.2d 1247, 555 N.Y.S.2d 659.) II. There is no legislation that

Newark Val. Cent. School Dist. v Public Empl. Relations Bd., 65 N.Y.2d 913, 892 N.E.2d 443, 863 N.Y.S.2d 194; Matter of City of Watertown v State of N.Y. Pub. Empl. Relations Bd., 95 N.Y.2d 73, 733 N.E.2d 171, 711 N.Y.S.2d 99; Meringolo v Jacobson, 256 A.D.2d 20, 680 N.Y.S.2d 521; Matter of Auburn Police Local 195, Council 82, Am. Fedn. of State, County & Mun. Empls., AFL-CIO v Helsby, 62 A.D.2d 12, 404 N.Y.S.2d 396, 46 N.Y.2d 1034, 389 N.E.2d 1106, 416 N.Y.S.2d 586; Matter of Board of Educ. of City School Dist. of City of N.Y. v New York State Pub. Empl. Relations Bd., 75 N.Y.2d 660, 554 N.E.2d 1247, 555 N.Y.S.2d 659; Board of Educ. of Union Free School Dist. No. 3 of Town of Huntington v Associated Teachers of Huntington, 30 N.Y.2d 122, 282 N.E.2d 109, 331 N.Y.S.2d 17; Matter of Astwood v Cohen, 291 N.Y. 484, 53 N.E.2d 358; Procaccino v Board of Elections of City of N.Y., 73 Misc. 2d 462, 341 N.Y.S.2d 810; Elliott v City of New York, 95 N.Y.2d 730, 747 N.E.2d 760, 724 N.Y.S.2d 397.) III. New York City Charter § 434 and Administrative Code of the City of New York § 14-115 do not prohibit collective bargaining over discipline under the rigorous Matter of City of Watertown v State of N.Y. Pub. Empl. Relations Bd. (95 N.Y.2d 73, 733 N.E.2d 171, 711 N.Y.S.2d 99 [2000]) standard. (Matter of Board of Educ. of City School Dist. of City of N.Y. v New York State Pub. Empl. Relations Bd., 75 N.Y.2d 660, 554 N.E.2d 1247, 555 N.Y.S.2d 659; Board of Educ. of Union Free School Dist. No. 3 of Town of Huntington v Associated Teachers of Huntington, 30 N.Y.2d 122, 282 N.E.2d 109, 331 N.Y.S.2d 17; Matter of City of New York v Lieutenants Benevolent Assn., 285 A.D.2d 329, 730 N.Y.S.2d 78; Matter of Town of Carmel v Public Empl. Relations Bd. of State of N.Y., 246 A.D.2d 791, 667 N.Y.S.2d 789; Matter of State of N.Y. [Div. of Military & Nav. Affairs] v New York State Pub. Empl. Relations Bd., 187 A.D.2d 78, 592 N.Y.S.2d 847.) IV. Even if New York City Charter § 434 and Administrative Code of the City of New York § 14-115 could meet the Matter of City of Watertown v State of N.Y. Pub. Empl. Relations Bd. (95 N.Y.2d 73, 733 N.E.2d 171, 711 N.Y.S.2d 99 [2000]) standard, at most they preclude bargaining over the Police Commissioner's ultimate disciplinary determination, not over disciplinary procedures. (Matter of City of Syracuse v Public Empl. Relations Bd., 279 A.D.2d 98, 719 N.Y.S.2d 401.)

Sandra M. Nathan, Albany, and William L. Busler for New York State Public Employment Relations Board, respondent in the first above-entitled proceeding. The Court of Appeals should clarify whether or not the Patrolmen's Benevolent Association of the City of New York, Inc.'s collective bargaining demands involving the discipline of police officers employed by respondent City of New York are prohibited subjects of bargaining and, therefore, whether or not they are properly submitted to interest arbitration. (Matter of City of Mount Vernon v Cuevas, 289 A.D.2d 674, 733 N.Y.S.2d 793; Matter of Town of Greenburgh [Police Assn. of Town of Greenburgh], 94 A.D.2d 771, 462 N.Y.S.2d 718, 60 N.Y.2d 551; Matter of City of New York v MacDonald, 201 A.D.2d 258, 607 N.Y.S.2d 24, 83 N.Y.2d 759, 639 N.E.2d 417, 615 N.Y.S.2d 876; Matter of Board of Educ. of City School Dist. of City of N.Y. v New York State Pub. Empl. Relations Bd., 75 N.Y.2d 660, 554 N.E.2d 1247, 555 N.Y.S.2d 659; Matter of Rockland County Patrolmen's Benevolent Assn. v Town of Clarkstown, 149 A.D.2d 516, 539 N.Y.S.2d 993; Matter of Lynch v Giuliani, 301 A.D.2d 351, 755 N.Y.S.2d 6; Syracuse Teachers Assn. v Board of Educ., Syracuse City School Dist., 35 N.Y.2d 743, 320 N.E.2d 646, 361 N.Y.S.2d 912; Matter of West Irondequoit Teachers Assn. v Helsby, 35 N.Y.2d 46, 315 N.E.2d 775, 358 N.Y.S.2d 720; Board of Educ. of Union Free School Dist. No. 3 of Town of Huntington v Associated Teachers of Huntington, 30 N.Y.2d 122, 282 N.E.2d 109, 331 N.Y.S.2d 17; Matter of Union Free School Dist. No. 2 of Town of Cheektowaga v Nyquist, 38 N.Y.2d 137, 341 N.E.2d 532, 379 N.Y.S.2d 10.)

Michael A. Cardozo, Corporation Counsel, New York City (Edward F.X. Hart, Leonard Koerner and *Spencer Fisher* of counsel), for City of New York, respondent in the first above-entitled proceeding. The Appellate Division, Third Department, properly affirmed the judgment of the Supreme Court, which confirmed the Public Employment Relations Board's (PERB) determination that five Patrolmen's Benevolent Association of the City of New York, Inc. proposals involving police discipline are prohibited subjects of collective bargaining because the New York City Charter and Administrative Code of the City of New York have charged the Police Commissioner with exclusive discretion in implementation and imposition of police discipline. PERB's decision was rationally based and neither arbitrary nor capricious. (Matter of Civil Serv. Empls. Assn., Local 1000, AFSCME, AFL-CIO, Ichabod Crane Cent. School Dist. CSEA Unit v New York State Pub. Empl. Relations Bd., 300 A.D.2d 929, 753 N.Y.S.2d 171; Matter of Benson v Cuevas, 272 A.D.2d 764, 708 N.Y.S.2d 494; Matter of Schenectady Police Benevolent Assn. v New York State Pub. Empl. Relations Bd., 85 N.Y.2d 480, 650 N.E.2d 373, 626 N.Y.S.2d 715; Matter of Board of Educ. of City School Dist. of City of N.Y. v New York State Pub. Empl. Relations Bd., 75 N.Y.2d 660, 554 N.E.2d 1247, 555 N.Y.S.2d 659; Matter of Webster Cent. School Dist. v Public Empl. Relations Bd. of State of N.Y., 75 N.Y.2d 619, 554 N.E.2d 886, 555 N.Y.S.2d 245; Matter of City of Mount Vernon v Cuevas, 289 A.D.2d 674, 733 N.Y.S.2d 793, 97 N.Y.2d 613, 769 N.E.2d 353, 742 N.Y.S.2d 606; Matter of West Irondequoit Teachers Assn. v Helsby, 35 N.Y.2d 46, 315 N.E.2d 775, 358 N.Y.S.2d 720; Matter of City of Watertown v State of N.Y. Pub. Empl. Relations Bd., 95 N.Y.2d 73, 733 N.E.2d 171, 711 N.Y.S.2d 99; Matter of Incorporated Vil. of Lynbrook v New York State Pub. Empl. Relations Bd., 48 N.Y.2d 398, 399 N.E.2d 55, 423 N.Y.S.2d 466; Matter of City of New York v MacDonald, 201 A.D.2d 258, 607 N.Y.S.2d 24, 83 N.Y.2d 759, 639 N.E.2d 417, 615 N.Y.S.2d 876.)

Donna M.C. Giliberto, Albany, for New York State Conference of Mayors and Municipal Officials, amicus curiae in the first above-entitled proceeding. I. Terms and conditions of employment in New York's public sector differ from those in the private sector. II. The establishment of public sector bargaining rights created a tension with preexisting statutory or charter provisions addressing terms and conditions of employment. (Board of Educ. of Union Free School Dist. No. 3 of Town of Huntington v Associated Teachers of Huntington, 30 N.Y.2d 122, 282 N.E.2d 109, 331 N.Y.S.2d 17.) III. Resolving whether bargaining over an alternative to a statutory or municipal charter disciplinary provision should be required is a function of the State Legislature. (Alweis v Evans, 69 N.Y.2d 199, 505 N.E.2d 605, 513 N.Y.S.2d 95; Iazzetti v City of New York, 94 N.Y.2d 183, 723 N.E.2d 81, 701 N.Y.S.2d 332; Matter of Auburn Police Local 195, Council 82, Am. Fedn. of State, County & Mun. Empls., AFL-CIO v Helsby, 46

Patterson, Belknap, Webb & Tyler, LLP, New York City (Anthony P. Coles and Walter M. Eders of counsel), for Sergeants Benevolent Association of the City of New York, amicus curiae in the first above-entitled proceeding. I. New York City Charter § 434 and Administrative Code of the City of New York § 14-115 are not general laws. (*DJL Rest. Corp. v City of New York*, 96 N.Y.2d 91, 749 N.E.2d 186, 725 N.Y.S.2d 622; *City of Amsterdam v Helsby*, 37 N.Y.2d 19, 332 N.E.2d 290, 371 N.Y.S.2d 404; *Matter of Doyle v City of Troy*, 51 A.D.2d 845, 380 N.Y.S.2d 789.) II. New York City Charter § 434 is a local law. (*Procaccino v Board of Elections of City of N.Y.*, 73 Misc. 2d 462, 341 N.Y.S.2d 810.) III. Administrative Code of the City of New York § 14-115 is a local law. IV. Because local laws that are inconsistent with the Taylor Law cannot stand, New York City Charter § 434 and Administrative Code of the City of New York § 14-115 are invalid. (*Matter of Doyle v City of Troy*, 51 A.D.2d 845, 380 N.Y.S.2d 789; *DJL Rest. Corp. v City of New York*, 96 N.Y.2d 91, 749 N.E.2d 186, 725 N.Y.S.2d 622; *Davis Constr. Corp. v County of Suffolk*, 95 A.D.2d 819, 464 N.Y.S.2d 519; *Cliff v Blydenberg*, 173 Misc. 2d 366, 661 N.Y.S.2d 736.) V. If New York City Charter § 434 and Administrative Code of the City of New York §14-115 are special state laws, they are abrogated by the Taylor Law. (*Ling Ling Yung v County of Nassau*, 77 N.Y.2d 568, 571 N.E.2d 669, 569 N.Y.S.2d 361.)

Certilman Balin Adler & Hyman, LLP, East Meadow (*Wayne J. Schaefer* and *Michael C. Axelrod* of counsel), for Police Benevolent Association of the New York State Troopers, Inc. and another, amici curiae in the first above-entitled proceeding. I. The history of Civil Service Law § 76 (4) does not support an inference that the State Legislature, in addition to deciding not to replace general, special or local law or charter provisions with Civil Service Law disciplinary procedures, also intended to prohibit collective bargaining wherever such provisions are found. (*Matter of City of Albany v Helsby*, 56 A.D.2d 976, 393 N.Y.S.2d 195; *Matter of City of Watertown v State of N.Y. Pub. Empl. Relations Bd.*, 95 N.Y.2d 73, 733 N.E.2d 171, 711 N.Y.S.2d 99; *Board of Educ. of Union Free School Dist. No. 3 of Town of Huntington v Associated Teachers of Huntington*, 30 N.Y.2d 122, 282 N.E.2d 109, 1331 N.Y.S.2d 17; *Syracuse Teachers Assn. v Board of Educ., Syracuse City School Dist.*, 35 N.Y.2d 743, 320 N.E.2d 646, 361 N.Y.S.2d 912; *Matter of Board of Educ. of City School Dist. of City of N.Y. v New York State Pub. Empl. Relations Bd.*, 75 N.Y.2d 660, 554 N.E.2d 1247, 555 N.Y.S.2d 659; *Matter of City of Schenectady v New York State Pub. Empl. Relations Bd.*, 135 Misc. 2d 1088, 517 N.Y.S.2d 845, 132 A.D.2d 242, 522 N.Y.S.2d 325, 71 N.Y.2d 803, 522 N.E.2d 1067, 527 N.Y.S.2d 769; *Matter of Montella v Bratton*, 93 N.Y.2d 424, 713 N.E.2d 406, 691 N.Y.S.2d 372; *Matter of Lynch v Giuliani*, 301 A.D.2d 351, 755 N.Y.S.2d 6; *City of New York v MacDonald*, 201 A.D.2d 258, 607 N.Y.S.2d 24; *Matter of Town of Greenburgh [Police Assn. of Town of Greenburgh]*, 94 A.D.2d 771, 462 N.Y.S.2d 718, 60 N.Y.2d 551.)

Bunyan & Baumgartner, LLP, Blauvelt (*Joseph P. Baumgartner* and *Richard P. Bunyan* of counsel), for appellants in the second above-entitled proceeding. I. The decision of the Appellate Division directly conflicts with prior decisions of this Court with respect to permissive and prohibited subjects of negotiations. (*Matter of Board of Educ. of City School Dist. of City of N.Y. v New York State Pub. Empl. Relations Bd.*, 75 N.Y.2d 660, 554 N.E.2d 1247, 555 N.Y.S.2d 659; *Board of Educ. of Union Free School Dist. No. 3 of Town of Huntington v Associated Teachers of Huntington*, 30 N.Y.2d 122, 282 N.E.2d 109, 331 N.Y.S.2d 17; *Matter of City of Watertown v State of N.Y. Pub. Empl. Relations Bd.*, 95 N.Y.2d 73, 733 N.E.2d 171, 711 N.Y.S.2d 99; *Matter of Rockland County Patrolmen's Benevolent Assn. v Town of Clarkstown*, 149 A.D.2d 516, 539 N.Y.S.2d 993; *Matter of Incorporated Vil. of Lynbrook v New York State Pub. Empl. Relations Bd.*, 48 N.Y.2d 398, 399 N.E.2d 55, 423 N.Y.S.2d 466.) II. Civil Service Law § 76 (4) does not prohibit bargaining alternatives to disciplinary procedures contained in special police acts. (*Matter of Town of Greenburgh [Police Assn. of Town of Greenburgh]*, 94 A.D.2d 771, 462 N.Y.S.2d 718, 60 N.Y.2d 551; *Matter of Rockland County Patrolmen's Benevolent Assn. v Town of Clarkstown*, 149 A.D.2d 516, 539 N.Y.S.2d 993; *Matter of City of New York v MacDonald*, 201 A.D.2d 258, 607 N.Y.S.2d 24, 83 N.Y.2d 759, 639 N.E.2d 417, 615 N.Y.S.2d 876; *Matter of City of Mount Vernon v Cuevas*, 289 A.D.2d 674, 733 N.Y.S.2d 793, 97 N.Y.2d 613, 769 N.E.2d 353, 742 N.Y.S.2d 606; *Matter of Auburn Police Local 195, Council 82, Am. Fedn. of State, County & Mun. Empls., AFL-CIO v Helsby*, 62 A.D.2d 12, 404 N.Y.S.2d 396, 46 N.Y.2d 1034, 389 N.E.2d 1106, 416 N.Y.S.2d 586; *Matter of City of Watertown v State of N.Y. Pub. Empl. Relations Bd.*, 95 N.Y.2d 73, 733 N.E.2d 171, 711 N.Y.S.2d 99; *Board of Educ. of Union Free School Dist. No. 3 of Town of Huntington v Associated Teachers of Huntington*, 30 N.Y.2d 122, 282 N.E.2d 109, 331 N.Y.S.2d 17; *Baker v Cawley*, 459 F. Supp. 1301, 607 F.2d 994; *Matter of Coscette v Town of Wallkill*, 281 A.D.2d 479, 721 N.Y.S.2d 784, 97 N.Y.2d 602, 760 N.E.2d 1287, 735 N.Y.S.2d 491; *Meringolo v Jacobson*, 256 A.D.2d 20, 680 N.Y.S.2d 521, 93 N.Y.2d 948, 716 N.E.2d 177, 694 N.Y.S.2d 342.) III. Even if Civil Service Law § 76 is relevant, it does not prohibit negotiation of the disciplinary procedure contained in the collective bargaining agreement. (*Matter of City of Mount Vernon v Cuevas*, 289 A.D.2d 674, 733 N.Y.S.2d 793; *Matter of City of New York v MacDonald*, 201 A.D.2d 258, 607 N.Y.S.2d 24; *Matter of Montella v Bratton*, 93 N.Y.2d 424, 713 N.E.2d 406, 691 N.Y.S.2d 372.) IV. Assuming, arguendo, that article 15 of the collective bargaining agreement (CBA) is not enforceable as part of the CBA, it is still enforceable as a town resolution. (*Matter of Moran v LaGuardia*, 270 N.Y. 450, 1 N.E.2d 961; *JEM Realty Co. v Town Bd. of Town of Southold*, 297 A.D.2d 278, 746 N.Y.S.2d 41.)

Keane & Beane, P.C., White Plains (*Lance H. Klein* and *Edward J. Phillips* of counsel), for respondents in the second above-entitled proceeding. I. The area of police officer discipline is not subject to collective bargaining in Rockland County. (*Matter of Schenectady Police Benevolent Assn. v New York State Pub. Empl. Relations Bd.*, 85 N.Y.2d 480, 650 N.E.2d 373, 626 N.Y.S.2d 715; *Binghamton Civ. Serv. Forum v City of Binghamton*, 44 N.Y.2d 23, 374 N.E.2d 380, 403 N.Y.S.2d 482; *Matter of City of Watertown v State of N.Y. Pub. Empl. Relations Bd.*, 95 N.Y.2d 73, 733 N.E.2d 171, 711 N.Y.S.2d 99; *Matter of Board of Educ. of City School Dist. of City of N.Y. v New York State Pub. Empl. Relations Bd.*, 75 N.Y.2d 660, 554 N.E.2d 1247, 555 N.Y.S.2d 659; *Matter of Union Free School Dist. No. 2 of Town of Cheektowaga v Nyquist*, 38 N.Y.2d 137, 341 N.E.2d 532, 379 N.Y.S.2d 10; *Matter of Town of Mamaroneck PBA v New York State Pub. Empl. Relations Bd.*, 66 N.Y.2d 722, 487 N.E.2d 905, 496 N.Y.S.2d

N.Y.S.2d 1; *People ex rel. Masterson v Heath*, 110 N.Y. 494, 18 N.E. 133, 19 N.Y. St. Rep. 291; *Matter of Kopp v Valentine*, 280 N.Y. 268, 20 N.E.2d 751.) II. Collective bargaining agreement article 15 is void as a matter of law. (*JEM Realty Co. v Town Bd. of Town of Southold*, 297 A.D.2d 278, 746 N.Y.S.2d 41 , 99 N.Y.2d 504, 784 N.E.2d 76, 754 N.Y.S.2d 203; *Matter of Union Free School Dist. No. 2 of Town of Cheektowaga v Nyquist*, 38 N.Y.2d 137, 341 N.E.2d 532, 379 N.Y.S.2d 10; *Matter of Cohoes City School Dist. v Cohoes Teachers Assn.*, 40 N.Y.2d 774, 358 N.E.2d 878, 390 N.Y.S.2d 53; *Matter of Rockland County Patrolmen's Benevolent Assn. v Town of Clarkstown*, 149 A.D.2d 516, 539 N.Y.S.2d 993; *Matter of Town of Greenburgh [Police Assn. of Town of Greenburgh]*, 94 A.D.2d 771, 462 N.Y.S.2d 718; *Philipstown Indus. Park v Town Bd. of Town of Philipstown*, 247 A.D.2d 525, 669 N.Y.S.2d 340; *Matter of Llana v Town of Pittstown*, 245 A.D.2d 968, 667 N.Y.S.2d 112, 91 N.Y.2d 812, 695 N.E.2d 717, 672 N.Y.S.2d 848.)

Donna M.C. Giliberto, Albany, for New York State Conference of Mayors and Municipal Officials, amicus curiae in the second above-entitled proceeding. I. Terms and conditions of employment in New York's public sector differ from those in the private sector. II. The establishment of public sector bargaining rights created a tension with preexisting statutory or charter provisions addressing terms and conditions of employment. (*Board of Educ. of Union Free School Dist. No. 3 of Town of Huntington v Associated Teachers of Huntington*, 30 N.Y.2d 122, 282 N.E.2d 109, 331 N.Y.S.2d 17.) III. Whether bargaining over an alternative to a statutory or municipal charter disciplinary provision should be required is a function of the State Legislature. (*Alweis v Evans*, 69 N.Y.2d 199, 505 N.E.2d 605, 513 N.Y.S.2d 95; *Iazzetti v City of New York*, 94 N.Y.2d 183, 723 N.E.2d 81, 701 N.Y.S.2d 332; *Matter of Auburn Police Local 195, Council 82, Am. Fedn. of State, County & Mun. Empls., AFL-CIO v Helsby*, 46 N.Y.2d 1034, 389 N.E.2d 1106, 416 N.Y.S.2d 586.)

Judges: Opinion by Judge R.S. Smith. Judges G.B. Smith, Ciparick, Rosenblatt, Graffeo and Read concur; Chief Judge Kaye taking no part.

Opinion by: R. S. SMITH

Opinion

[**449] [***2] **[*570]** R.S. Smith, J.

We hold that police discipline may not be a subject of collective bargaining [****2] under the Taylor Law when the Legislature has expressly committed disciplinary authority over a police department to local officials.

Facts and Procedural History

Matter of Patrolmen's Benevolent Assn. of City of N.Y., Inc. v New York State Pub. Empl. Relations Bd.

The Patrolmen's Benevolent Association of the City of New York (NYCPBA) seeks to annul a decision by the Public Employment Relations Board (PERB) that the City need not bargain with the NYCPBA over five subjects, even though those subjects had been dealt with in an expired collective bargaining agreement. The expired agreement had provided: (1) that police officers being questioned in a departmental investigation would have up to four hours to confer with counsel; (2) that certain guidelines for interrogation of police officers would remain unchanged; (3) that a "joint subcommittee" would "develop procedures" to assure the timely resolution of disciplinary charges; (4) that a pilot program would be established to refer disciplinary matters to an agency outside the police department; and (5) that employees charged but not found guilty could petition to have the records of disciplinary proceedings expunged. PERB found that all these provisions concerned "prohibited subjects of bargaining."

[****3] Supreme Court upheld PERB's decision on the ground that the New York City Charter and Administrative Code, as interpreted in *Matter of City of New York v MacDonald* (201 A.D.2d 258, 259, 607 N.Y.S.2d 24 [1st Dept 1994]), required that the discipline of New York City police [***3] [**450] officers be left to the discretion of the Police Commissioner. The Appellate Division affirmed, as do we.

[*571] *Matter of Town of Orangetown v Orangetown Policemen's Benevolent Assn.*

The Town of Orangetown and its Town Board brought this proceeding against the Orangetown Policemen's Benevolent Association (Orangetown PBA) and a police officer, seeking to stay arbitration of a dispute between the Town and the officer over a disciplinary issue. The Orangetown PBA and the officer had sought arbitration pursuant to article 15 of the collective bargaining agreement between the Town and the union, which prescribed detailed procedures, culminating in an arbitration, for any "dispute concerning the discipline or discharge" of an Orangetown police officer. Supreme Court granted the application to stay arbitration. Relying on *Matter of Rockland County Patrolmen's Benevolent Assn. v Town of Clarkstown* (149 A.D.2d 516, 539 N.Y.S.2d 993 [2d Dept 1989]) [****4] and *Matter of Town of Greenburgh (Police Assn. of Town of Greenburgh)* (94 A.D.2d 771, 772, 462 N.Y.S.2d 718 [2d Dept 1983]), Supreme Court held that article 15 is invalid under the Rockland County Police Act, because that act commits police discipline to the discretion of local authorities. The Appellate Division affirmed.

The specific issue that gave rise to this case is now moot, because the Town and the officer have settled their differences, but the Town and the Orangetown PBA continue to disagree about article 15's validity, and both sides have asked us to decide that

Discussion

We confront, not for the first time, a tension between the "strong and sweeping policy of the State to support collective bargaining under the Taylor Law" (*Matter of Cohoes City School Dist. v Cohoes Teachers Assn.*, 40 N.Y.2d 774, 778, 358 N.E.2d 878, 390 N.Y.S.2d 53 [1976]) and a competing policy--here, the policy favoring strong disciplinary authority for those in charge of police forces. We have held that ***HN1*** the policy of the Taylor Law prevails, [****5] and collective bargaining is required, where no legislation specifically commits police discipline to the discretion of local officials (*Matter of Auburn Police Local 195, Council 82, Am. Fedn. of State, County & Mun. Empls., AFL-CIO v Helsby*, 46 N.Y.2d 1034, 389 N.E.2d 1106, 416 N.Y.S.2d 586 [1979], *affg for reasons stated below* 62 A.D.2d 12, 404 N.Y.S.2d 396 [3d Dept 1978]). Since *Auburn* was decided, however, the First, Second and Third departments of the Appellate Division have held that, where such legislation **[*572]** is in force, the policy favoring control over the police prevails, and collective bargaining over disciplinary matters is prohibited (*MacDonald*, 201 A.D.2d at 259; *Rockland County Patrolmen's Benevolent Assn.*, 149 A.D.2d at 517; *Town of Greenburgh*, 94 A.D.2d at 771-772; *Matter of City of Mount Vernon v Cuevas*, 289 A.D.2d 674, 675-676, 733 N.Y.S.2d 793 [3d Dept 2001]). We decide today that these Appellate Division holdings were correct.

HN2 The Taylor Law (Civil Service Law art 14) requires collective bargaining over all "terms and conditions of employment":

> "Where an employee organization has been certified or recognized ... the appropriate public employer shall be, and hereby is, required to negotiate collectively [****6] with such employee organization in the determination of, and administration of grievances arising under, the terms and conditions of employment of the public employees" (Civil Service Law § 204 [2]).

[***4] [**451] We have often stressed the importance of this policy, and have made clear that "the presumption ... that all terms and conditions of employment are subject to mandatory bargaining" cannot easily be overcome (*Matter of City of Watertown v State of N.Y. Pub. Empl. Relations Bd.*, 95 N.Y.2d 73, 79, 733 N.E.2d 171, 711 N.Y.S.2d 99 [2000]; *see also, e.g.*, *Matter of Board of Educ. of City School Dist. of City of N.Y. v New York State Pub. Empl. Relations Bd.*, 75 N.Y.2d 660, 667-668, 554 N.E.2d 1247, 555 N.Y.S.2d 659 [1990]; *Board of Educ. of Union Free School Dist. No. 3 of Town of Huntington v Associated Teachers of Huntington*, 30 N.Y.2d 122, 129, 282 N.E.2d 109, 331 N.Y.S.2d 17 [1972]).

On the other hand, we have held that ***HN3*** some subjects are excluded from collective bargaining as a matter of policy, even where no statute explicitly says so. Thus, we have held that local boards of education may not surrender, in collective bargaining agreements, their ultimate responsibility for deciding on teacher tenure [****7] (*Cohoes*, 40 N.Y.2d at 778), or their right to inspect teachers' personnel files (*Board of Educ., Great Neck Union Free School Dist. v Areman*, 41 N.Y.2d 527, 362 N.E.2d 943, 394 N.Y.S.2d 143 [1977]). We have held that a police department may not be required to bargain over the imposition of certain requirements on officers receiving benefits following injuries in the line of duty (*Matter of Schenectady Police Benevolent Assn. v New York State* [3] *Pub. Empl. Relations Bd.*, 85 N.Y.2d 480, 483, 650 N.E.2d 373, 626 N.Y.S.2d 715 [1995]), and that a city may not surrender, in collective bargaining, its statutory right to choose among police officers seeking promotion (*Matter of Buffalo Police Benevolent Assn. [City of Buffalo]*, 4 N.Y.3d 660, 830 N.E.2d 308, 797 N.Y.S.2d 410 **[*573]** [2005]). And we have held that public policy bars enforcement of a provision in a collective bargaining agreement that would limit the power of the New York City Department of Investigation to interrogate city employees in a criminal investigation (*Matter of City of New York v Uniformed Fire Officers Assn., Local 854, IAFF, AFL-CIO*, 95 N.Y.2d 273, 739 N.E.2d 719, 716 N.Y.S.2d 353 [2000]).

In none of these cases did a statute exclude a subject from collective bargaining in so [****8] many words. In each case, however, we found a public policy strong enough to warrant such an exclusion. As we explained in *Cohoes*, ***HN4*** the scope of collective bargaining may be limited by " 'plain and clear, rather than express, prohibitions in the statute or decisional law' " or "in some instances[,] by '[p]ublic policy ... whether explicit or implicit in statute or decisional law, or in neither' " (40 N.Y.2d at 778, quoting *Syracuse Teachers Assn. v Board of Educ., Syracuse City School Dist.*, 35 N.Y.2d 743, 744, 320 N.E.2d 646, 361 N.Y.S.2d 912 [1974], and *Matter of Susquehanna Val. Cent. School Dist. at Conklin [Susquehanna Val. Teachers' Assn.]*, 37 N.Y.2d 614, 616-617, 339 N.E.2d 132, 376 N.Y.S.2d 427 [1975]).

Is there a public policy strong enough to justify excluding police discipline from collective bargaining? It might be thought this question could be answered yes or no, but the relevant statutes and case law are not so simple. In general, the procedures for disciplining public employees, including police officers, are governed by Civil Service Law §§ 75 and 76, which provide for a hearing and an appeal. In *Auburn*, a case involving police discipline, the [****9] Appellate Division rejected the argument that these statutes should be interpreted to prohibit collective bargaining agreements "that would supplement, modify or replace" [***5] [**452] their provisions (62 A.D.2d at 15), and we adopted the Appellate Division's opinion (46 N.Y.2d at 1035-1036). Thus, where Civil Service Law §§ 75 and 76 apply, police discipline may be the subject of collective bargaining.

But ***HN5*** Civil Service Law § 76 (4) says that sections 75 and 76 shall not "be construed to repeal or modify" preexisting laws, and among the laws thus grandfathered are several that, in contrast to sections 75 and 76, provide expressly for the control of police discipline by local officials in certain communities. Such laws are applicable in the City of New York and in the Town of Orangetown, and are at the center of these two cases.

Section 434 (a) of the New York City Charter provides: ***HN6*** "The [police] commissioner shall have cognizance and control of the government, administration, disposition *and discipline* of the **[*574]** department, and of the police force of the

two provisions are now New York City legislation, both were originally enacted as state statutes, the Charter provision was adopted by the State Legislature in 1897 (L 1897, ch 378, enacting NY City Charter § 271), and the Code provision in 1873 (L 1873, ch 335, §§ 41, 55). Thus, they reflect the policy of the State that police discipline in New York City is subject to the Commissioner's authority.

The Legislature has provided similarly for the discipline of town and village police forces, including those in Rockland County, where Orangetown is located. Section 7 of the Rockland County Police Act (L 1936, ch 526), similar in its wording to more general statutes, Town Law § 155 and Village Law § 8-804, provides in part:

> HN8 "The town board shall have the power and authority to adopt and make rules and regulations for the examination, hearing, investigation and determination of charges, made or preferred against any member or members of such police department. Except [****11] as otherwise provided by law, no member or members of such police department shall be fined, reprimanded, removed or dismissed until written charges shall have been examined, heard and investigated in such manner or by such procedure, practice, examination and investigation as the board, by rules and regulations from time to time, may prescribe."

Thus, the Legislature has committed police discipline in Orangetown to the "power and authority" of the Orangetown Town Board.

Appellate Division cases--one of which we have referred to favorably--have consistently held that legislation of this kind overcomes the presumption in favor of collective bargaining where police discipline is concerned. Thus, in 1983 the Appellate Division, Second Department held that police discipline in the Town of Greenburgh was not subject to collective bargaining; it distinguished *Auburn* on the ground that discipline in Greenburgh was committed to the authority of the Town Board or Board of Police Commissioners by the Westchester County **[*575]** Police Act (*Town of Greenburgh*, 94 A.D.2d at 771-772). In 1989, the same Court reached a similar conclusion under the Rockland County Police [****12] Act, one of the laws at issue here (*Rockland County Patrolmen's Benevolent Assn.*, 149 A.D.2d at 517). In 1994, the Appellate Division, First Department held that the other laws at issue here--section 434 of the New York City Charter and section 14-115 of the New York City Administrative Code [***6] [**453] --excluded police discipline in New York City from collective bargaining. The Court held that the legislation "discloses a legislative intent and public policy to leave the disciplining of police officers ... to the discretion of the Police Commissioner" (*MacDonald*, 201 A.D.2d at 259). We quoted these words with approval in *Matter of Montella v Bratton* (93 N.Y.2d 424, 430, 713 N.E.2d 406, 691 N.Y.S.2d 372 [1999]) where we held, in a case not involving collective bargaining, that police discipline in New York City is not subject to the procedures prescribed in Civil Service Law §§ 75 and 76. Finally, in 2001, the Appellate Division, Third Department, endorsed the decisions of the First and Second Departments in *Town of Greenburgh*, *Rockland County Patrolmen's Benevolent Assn.* and *MacDonald*, holding that the Charter of the City of Mount Vernon, like [****13] the [4] legislation involved in the other Appellate Division cases, removed police disciplinary procedures from the scope of collective bargaining (*Mount Vernon*, 289 A.D.2d at 675-676).

The NYCPBA and the Orangetown PBA argue that this line of Appellate Division cases is wrong. In this they are supported by PERB, which, although it is bound by and has followed the Appellate Division decisions, now urges us to reject them. This is not a case, however, in which we defer to PERB's judgment. The primary issue here is not the application of the Taylor Law to particular facts, an area in which PERB is entitled to deference (*Matter of Poughkeepsie Professional Firefighters' Assn., Local 596, IAFF, AFL-CIO-CLC v New York State Pub. Empl. Relations Bd.*, 6 N.Y.3d 514, 847 N.E.2d 1146, 814 N.Y.S.2d 572 [2006] [decided today]; *Matter of West Irondequoit Teachers Assn. v Helsby*, 35 N.Y.2d 46, 50-51, 315 N.E.2d 775, 358 N.Y.S.2d 720 [1974]), but the relative weight to be given to competing policies, including those reflected in the New York City Charter, the New York City Administrative Code, and the Rockland County Police Act--legislation not within PERB's area of expertise (*see Schenectady Police Benevolent Assn.*, 85 N.Y.2d at 485). We think the Appellate Division [****14] decisions evaluated these policies correctly.

While the Taylor Law policy favoring collective bargaining is a strong one, so is the policy favoring the authority of public officials **[*576]** over the police. As long ago as 1888, we emphasized the quasi-military nature of a police force, and said that "a question pertaining solely to the general government and discipline of the force ... must, from the nature of things, rest wholly in the discretion of the commissioners" (*People ex rel. Masterson v French*, 110 N.Y. 494, 499, 18 N.E. 133, 18 N.Y. St. 231 [1888]). This sweeping statement must be qualified today; as *Auburn* demonstrates, the need for authority over police officers will sometimes yield to the claims of collective bargaining. But the public interest in preserving official authority over the police remains powerful. It was the basis for our holding, only last June, that the statutory right of a police commissioner to select "an officer to fill a position important to the safety of the community" may not be surrendered in a collective bargaining agreement (*Buffalo Police Benevolent Assn.*, 4 N.Y.3d at 664). The same policy has determined the result of other cases, including *Matter of Silverman v McGuire* (51 N.Y.2d 228, 231-232, 414 N.E.2d 383, 433 N.Y.S.2d 1002 [1980]) [****15] , where we rejected a resolution of a police disciplinary proceeding negotiated by a subordinate official, in light of "the sensitive nature of the work of the police department and the [***7] [**454] importance of maintaining both discipline and morale."

The New York City Charter and Administrative Code, and the Rockland County Police Act, state the policy favoring management authority over police disciplinary matters in clear terms. In New York City, the police commissioner "shall have cognizance and control of the ... discipline of the department" (NY City Charter § 434 [a]) and "shall have power, in his or her discretion[,] ... to punish [an] offending party" (Administrative Code of City of NY § 14-115 [a]). In Rockland County, the town board "shall have

These legislative commands are to be obeyed even where the result is to limit the scope [*9] of collective bargaining. The issue is not, as the unions argue, whether [****16] these enactments were intended by their authors to create an exception to the Taylor Law; obviously they were not, since they were passed decades before the Taylor Law existed. The issue is whether these enactments express a policy so important that the policy favoring collective bargaining should give way, and we conclude that they do.

Accordingly, in *Matter of Patrolmen's Benevolent Assn. of City of N.Y., Inc. v New York State Pub. Empl. Relations Bd.*, the order **[*577]** of the Appellate Division should be affirmed, with costs. In *Matter of Town of Orangetown v Orangetown Policemen's Benevolent Assn.*, the proceeding should be converted to a declaratory judgment action, and the order of the Appellate Division modified to declare that article 15 of the collective bargaining agreement is invalid, and the order should otherwise be affirmed, with costs to the Town of Orangetown and the Town Board of the Town of Orangetown.

Judges G.B. Smith, Ciparick, Rosenblatt, Graffeo and Read concur; Chief Judge Kaye taking no part.

In *Matter of Patrolmen's Benevolent Assn. of City of N.Y., Inc. v New York State Pub. Empl. Relations Bd.:* Order affirmed, with costs.

In *Matter* [****17] *of Town of Orangetown v Orangetown Policemen's Benevolent Assn.:* Order modified, etc.

Matter of Rochester Police Locust Club v. City of Rochester

Supreme Court of New York, Appellate Division, Fourth Department

June 11, 2021, Decided; June 11, 2021, Entered

1239 CA 20-00826

Reporter
2021 N.Y. App. Div. LEXIS 3812 *; 2021 NY Slip Op 03787 **; 2021 WL 2389055

[1]** IN THE MATTER OF ROCHESTER POLICE LOCUST CLUB, INC., MICHAEL MAZZEO AND KEVIN SIZER, PETITIONERS-PLAINTIFFS-RESPONDENTS, v CITY OF ROCHESTER, LOVELY A. WARREN, AS MAYOR OF THE CITY OF ROCHESTER, ET AL., RESPONDENTS-DEFENDANTS, AND COUNCIL OF CITY OF ROCHESTER, RESPONDENT-DEFENDANT-APPELLANT.

Case Summary

Overview

HOLDINGS: [1]-Because the 1907 City Charter provision was not "in force" when the voters approved Local Law No. 2 in 2019, the city no longer qualified for the PBA-created exception to mandatory collective bargaining over police discipline, and without the PBA exception, the challenged Local Law No. 2 necessarily failed insofar as it took police discipline out of collective bargaining because, in that respect, it conflicted with the general law mandating collective bargaining over police discipline; [2]-The City Council's 1985 decision to repeal the 1907 provision could not be undone in the manner attempted in 2019; [3]-The court had no power to "refer" the challenged law back to the legislative body that enacted it for amendment or correction.

Outcome

Judgment affirmed as modified.

LexisNexis® Headnotes

Governments > Legislation > Interpretation

HN1[] **Legislation, Interpretation**

A CPLR art. 78 proceeding is not the proper vehicle to test the validity of a legislative enactment.

Governments > Local Governments > Charters

HN2[] **Local Governments, Charters**

Municipalities may now adopt local laws — including charter revisions — governing the removal of their employees, subject to the requirement of consistency with the Constitution and general laws.

Governments > Local Governments > Employees & Officials

Labor & Employment Law > Collective Bargaining & Labor Relations > Labor Arbitration > Discipline, Layoffs & Terminations

HN3[] **Local Governments, Employees & Officials**

The Court of Appeals has repeatedly held that police discipline falls presumptively within the broad category of terms and conditions of public employment for which collective bargaining is mandatory under *Civil Service Law § 204 (2)*. The high Court has recognized, however, a certain kind of legislation that overcomes the presumption in favor of collective bargaining where police discipline is concerned, to wit: preexisting laws that expressly provide for control of police discipline by local officials without regard to collective bargaining.

Governments > Local Governments > Claims By & Against

HN4[] **Local Governments, Claims By & Against**

There is an important caveat to the preexisting-law exception created by PBA: the preexisting law in question must be in force when the municipality refuses to collectively bargain over police discipline.

Governments > State & Territorial
Governments > Relations With Governments

HN5[] **State & Territorial Governments, Relations With Governments**

As the Court of Appeals has explained, a local law is inconsistent with the general law where local laws prohibit what would be permissible under State law.

Governments > Legislation > Statute of Limitations > Time Limitations

HN6[] **Statute of Limitations, Time Limitations**

By abandoning a grandfathered right or privilege, the abandoner necessarily deprives its successors of the ability to revive or reclaim that right or privilege at some future point.

Counsel: **[*1]** EMERY CELLI BRINCKERHOFF & ABADY, LLP, NEW YORK CITY (ANDREW G. CELLI, JR., OF COUNSEL), FOR RESPONDENT-DEFENDANT-APPELLANT.

TREVETT CRISTO P.C., ROCHESTER (DANIEL P. DEBOLT OF COUNSEL), FOR PETITIONERS-PLAINTIFFS-RESPONDENTS.

KEVIN R. BRYANT, CORPORATION COUNSEL, KINGSTON, FOR CITY OF KINGSTON, AMICUS CURIAE.

MICHAEL SISITZKY, NEW YORK CITY, FOR NEW YORK CIVIL LIBERTIES UNION FOUNDATION, AMICUS CURIAE.

Judges: PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, TROUTMAN, AND BANNISTER, JJ.

Opinion by: NeMoyer

Opinion

NeMoyer, J.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Monroe County (John J. Ark, J.), entered May 19, 2020 in a CPLR article 78 proceeding and declaratory judgment action. The judgment, among other things, declared invalid, void and unenforceable the "portions of Local Law No. 2 which authorize and empower the Police Accountability Board to conduct disciplinary hearings and discipline officers of the City of Rochester Police Department."

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the fourth decretal paragraph and as modified the judgment is affirmed without costs.

Opinion by NeMoyer, J.:

The Rochester City Charter has been amended to grant **[*2]** virtually all authority for disciplining police officers to a new entity called the "Police Accountability Board" (*see* Local Law No. 2 [2019] of the City of Rochester). The politics swirling around this provision are weighty and fraught, but its legality is not. Local Law No. 2 is invalid insofar as it takes police discipline outside the realm of collective bargaining.

FACTS

In 2019, Local Law No. 2 was adopted by respondent-defendant Council of City of Rochester (City Council) and approved by the voters at a referendum. Local Law No. 2 created the Police Accountability Board (PAB) as a body consisting of nine Rochester residents. Current and former Rochester police officers are permanently barred from serving on PAB, as are all immediate family members of a current or former Rochester police officer. Local Law No. 2 also bars the appointment of more than one PAB member that has, or is related to someone that has, any form of law enforcement experience.

Conversely, four PAB members must be appointed from a list compiled by an "Executive Committee" of 53 groups called the "Alliance." The constituent members of this "Alliance" are mostly unincorporated entities, but they also include certain **[*3]** political parties and

specific religious organizations. Local Law No. 2 specifies no procedure for selecting the individual members of the "Executive Committee" through which the "Alliance" constructs its nominating list, nor is there any specified procedure for updating the constituent members of the "Alliance." Relatedly, Local Law No. 2 prohibits the removal of any PAB member without a majority vote of his or her fellow members.

Local Law No. 2 vests PAB with exclusive authority to conduct disciplinary hearings for police officers accused of misconduct and to decide whether the accused officer is guilty. The complainant, but not the accused officer, is granted a right to appeal certain rulings by a PAB panel to the full board. If PAB convicts an officer of misconduct, it imposes punishment. The Chief of Police (police chief or chief) is explicitly obligated by Local Law No. 2 to execute PAB's decreed discipline without reduction or reprieve. The only discretion retained by the police chief in disciplinary matters is the power to impose *additional* punishment above that imposed by PAB.

There is no dispute that the police-discipline process created by Local Law No. 2 was never subject **[*4]** to collective bargaining and is irreconcilable with the police-discipline process set forth in the governing collective bargaining agreement. Petitioners-plaintiffs (plaintiffs) — the Rochester police union, its president, and an individual Rochester police officer — therefore commenced this hybrid CPLR article 78 proceeding and declaratory judgment action against, among others, respondents-defendants City of Rochester (City), Lovely A. Warren as Mayor of the City of Rochester (Mayor), and the City Council. Insofar as relevant here, the petition (complaint) alleged that, by transferring virtually all disciplinary authority to PAB in the absence of collective bargaining and in contravention of the terms of the governing collective bargaining agreement, Local Law No. 2 violated the Taylor Law (Civil Service Law art 14). The complaint further alleged that Local Law No. 2 violated *Civil Service Law § 75* and McKinney's Unconsolidated Laws of NY § 891 by empowering PAB to hear and adjudicate disciplinary charges against police officers. As a remedy, plaintiffs sought, inter alia, a declaration that Local Law No. 2 was invalid insofar as it transferred disciplinary authority to PAB.

Supreme Court agreed with plaintiffs and held that **[*5]** Local Law No. 2 violated the Taylor Law, *Civil Service Law § 75*, and *Unconsolidated Laws § 891*. The court therefore declared that "those portions of Local Law No. 2 which authorize and empower [PAB] to conduct disciplinary hearings and discipline officers of the City of Rochester Police Department are determined and declared to be invalid, void and unenforceable." The court also sua sponte "referred [Local Law No. 2] back to the Rochester City Council to be reconciled and made compliant with New York State law and the Rochester City Charter."

The City Council now appeals. Neither the Mayor nor the City itself has appealed, however.

DISCUSSION

I

Two preliminary technical issues require some brief discussion.

First, although this case was filed as a hybrid CPLR article 78 proceeding and declaratory judgment action, it is actually proper only as a declaratory judgment action (*see Parker v Town of Alexandria, 138 AD3d 1467, 1467-1468, 31 N.Y.S.3d 717 [4th Dept 2016]*; *Centerville's Concerned Citizens v Town Bd. of Town of Centerville, 56 AD3d 1129, 1129, 867 N.Y.S.2d 626 [4th Dept 2008]*). ***HN1***[↑] The gravamen of plaintiffs' lawsuit is that Local Law No. 2 is invalid in certain key aspects, and "it is well established that an article 78 proceeding is not the proper vehicle to test the validity of a legislative enactment" (*Kamhi v Town of Yorktown, 141 AD2d 607, 608, 529 N.Y.S.2d 528 [2d Dept 1988]*, *affd 74 NY2d 423, 547 N.E.2d 346, 548 N.Y.S.2d 144 [1989]*).

Second, plaintiffs' decision to name the City Council as a party in this action obviates any need to examine whether that legislative **[*6]** body has the capacity to take an appeal for the purpose **[**2]** of defending a law that the executive branch has abandoned (*see generally Virginia House of Delegates v Bethune-Hill, US , 139 S Ct 1945, 1949-1956, 204 L. Ed. 2d 305 [2019]*; *United States v Windsor, 570 US 744, 755-763, 133 S. Ct. 2675, 186 L. Ed. 2d 808 [2013]*; *I.N.S. v Chadha, 462 US 919, 939-940, 103 S. Ct. 2764, 77 L. Ed. 2d 317 [1983]*; *cf. Hernandez v State of New York, 173 AD3d 105, 110, 99 N.Y.S.3d 795 [3d Dept 2019]*). After all, capacity is a waivable objection that does not implicate our subject matter jurisdiction to entertain an appeal, and by naming the City Council as a party to this action, plaintiffs waived any challenge to that body's capacity to appeal from the resulting judgment that now aggrieves it (*see Matter of County of Chautauqua v Shah, 126 AD3d 1317, 1320, 6 N.Y.S.3d 334 [4th Dept 2015]*, *affd 28*

NY3d 244, 44 N.Y.S.3d 326, 66 N.E.3d 1044 [2016]).

We now reach the merits of plaintiffs' challenges to Local Law No. 2.

II

The Legislature re-chartered the City of Rochester in 1907 (*see* L 1907, ch 755). At that time, all municipalities — with the possible exception of the City of Albany — were subject to Dillon's Rule, the well-known common law principle by which, among other things, municipalities could not vary their structure or powers without State approval (*see* 1894 NY Const, art III, §§ 26, 27; art X, § 2; art XII, §§ 1, 2; *see generally* Olesen v Town of Hurley, 2004 SD 136, 691 NW2d 324, 328 n 6 [SD 2004] ["Judge Foster Dillon was a late nineteenth century Iowa jurist and government law scholar. The appellation 'Dillon's Rule' is derived from two cases he authored"]; David C. Hammack, *Reflections on the Creation of the Greater City of New York and Its First Charter, 1898*, 42 NY L Sch L Rev 693, 698-700 [1998])[1]. As a result of an amendment **[*7]** to the State Constitution in 1923 and the Legislature's subsequent adoption of the former City Home Rule Law (L 1924, ch 363), Dillon's Rule was relaxed somewhat to allow cities to amend their own charters in certain respects without State approval (*see generally* Matter of Warden [Police Dept. of City of Newburgh], 300 NY 39, 41-43, 88 N.E.2d 360 [1949]; Johnson v Etkin, 279 NY 1, 4-5, 17 N.E.2d 401 [1938]; Van Orman v Slade, 126 AD2d 282, 284-285, 513 N.Y.S.2d 867 [3d Dept 1987]). And in 1964, the voters amended the State Constitution "to expressly repudiate[] the prevailing . . . Dillon's rule" (City of New York v State of New York, 76 NY2d 479, 491 n 4 [1990]). HN2[↑] Consequently, municipalities may now adopt local laws — including charter revisions — governing "the removal of [their] employees, subject to the requirement of consistency with the Constitution and general laws" (Matter of Gizzo v Town of Mamaroneck, 36 AD3d 162, 165, 824 N.Y.S.2d 366 [2d Dept 2006], lv denied 8 NY3d 806 [2007]; see NY Const, art IX, § 2 [c] [ii] [1]; Municipal Home Rule Law § 10 [1] [ii], [iii] [a] [1]; [c] [1]; *see generally* Municipal Home Rule Law § 2 [5] [defining "general law" as any "state statute which in terms and in effect applies alike to all [municipalities or types thereof]"]).

As enacted by the Legislature, the Rochester City Charter of 1907 granted the Commissioner of Public Safety the sole and exclusive power to discipline police officers and firefighters (*see* L 1907, ch 755, § 330 [entitled "charges and trials of policemen and firemen"]). The Commissioner's power in that regard was "final and conclusive, and not subject to review by any court" (*id.*). Upon the relaxation and eventual **[*8]** abolition of Dillon's Rule in New York, section 330 of the City Charter was altered in several minor respects between 1925 and 1963. Among these alterations was the division of section 330 into separate yet substantively identical provisions for police officers (section 8A-7) and firefighters (section 8B-6).

In 1967, the Legislature ushered in a new era of collective bargaining for public employees by enacting the Taylor Law (Civil Service Law art 14; *see* L 1967, ch 392). In describing the purpose of the Taylor Law, the Legislature declared that "the public policy of the state [was] best effectuated by . . . granting to public employees the right of organization and **[**3]** representation" (Civil Service Law § 200 [a]). Accordingly, subject to certain exceptions not relevant here, municipalities became "required to negotiate collectively with [the various unions] in the determination of, and administration of grievances arising under, the *terms and conditions of employment of the public employees*" (§ 204 [2] [emphasis added]). There is no dispute that section 204 (2) constitutes a "general law" within the meaning of Municipal Home Rule Law § 2 (5).

HN3[↑] The Court of Appeals has repeatedly held that police discipline falls *presumptively* within the broad category of "terms and conditions of [public] employment" for which collective bargaining **[*9]** is mandatory under Civil Service Law § 204 (2) (*see* Matter of City of Schenectady v New York State Pub. Empl. Relations Bd., 30 NY3d 109, 115, 64 N.Y.S.3d 644, 86 N.E.3d 536 [2017] [hereinafter, "*Schenectady*"]; Matter of Patrolmen's Benevolent Assn. of City of N.Y., Inc. v New York State Pub. Empl. Relations Bd., 6 NY3d 563, 571, 574, 848 N.E.2d 448, 815 N.Y.S.2d 1 [2006] [hereinafter, "*PBA*"]; *see also* Matter of Town of Wallkill v Civil Serv. Empls. Assn., Inc. [Local 1000, AFSCME, AFL-CIO, Town of Wallkill Police Dept. Unit, Orange

[1] The City of Albany was perhaps not subject to all facets of Dillon's Rule as of 1907 because, at that time, the capital city still operated under a pre-statehood charter granted in 1686 by His Excellency Governor Thomas Dongan that derived not from modern notions of popular consent but rather from the *dei gratia rex* prerogative of the Lord Proprietor, His Majesty King James II (*see* 1894 NY Const, art I, § 17; Aikin v Western R.R. Corp., 20 NY 370, 374-376 [1859]; *see generally* People ex rel. Howell v Jessup, 160 NY 249, 258-264, 54 N.E. 682 [1899]).

County Local 836], 19 NY3d 1066, 1069, 979 N.E.2d 1147, 955 N.Y.S.2d 821 [2012] [hereinafter, "*Wallkill*"]). The high Court has recognized, however, a certain "kind" of legislation that "overcomes the presumption in favor of collective bargaining where police discipline is concerned" (*PBA, 6 NY3d at 574*), to wit: "preexisting laws that expressly provide for control of police discipline" by local officials without regard to collective bargaining (Schenectady, 30 NY3d at 114, citing *PBA, 6 NY3d at 573*). Such "preexisting laws" are "grandfathered," held the Court of Appeals; consequently, in any municipality with such a "grandfathered" law, the subject of police discipline is exempt from the presumption of collective bargaining that would otherwise prevail by virtue of Civil Service Law § 204 (2) (PBA, 6 NY3d at 573; *see* Schenectady, 30 NY3d at 114; Wallkill, 19 NY3d at 1069). To fashion this exception from section 204 (2) for preexisting police-discipline legislation, the *PBA* court borrowed from a similarly worded exception in section 76 (4), which says that "nothing contained in section seventy-five or seventy-six of [the Civil Service Law, which prescribe detailed default rules for certain public-employee disciplinary hearings] shall be construed to repeal or modify any general, special or local law or charter provision relating to the removal or suspension **[*10]** of officers" (*see* PBA, 6 NY3d at 573).

Importantly, and contrary to the parties' assumptions in this case, the question before the Court of Appeals in PBA, Wallkill, and Schenectady was not whether the respective municipality's refusal to collectively bargain over police discipline violated either Civil Service Law §§ 75 or 76 *in and of themselves*. Rather, the question in *PBA* and its progeny was whether the respective municipality's refusal to collectively bargain over police discipline violated the statutory obligation to collectively bargain over the "terms and conditions of [public] employment" as set forth in section 204 (2). To decide *that* question, the Court of Appeals weighed the "tension between the strong and sweeping policy of the State to support collective bargaining under the Taylor Law . . . and a competing policy . . . favoring strong disciplinary authority for those in charge of police forces" (PBA, 6 NY3d at 571 [internal quotation marks omitted]), and it ultimately crafted a judicial compromise: police discipline would be subject to collective bargaining, except in municipalities with a preexisting law that vested local officials with the sole and exclusive power to discipline police officers (*see* id. at 571-575).

With this compromise, the Court of Appeals **[*11]** gave force to the default-preference for collective bargaining enshrined in the Taylor Law without displacing any preexisting law concerning police discipline that remained in force (*see* Schenectady, 30 NY3d at 117). True, the collective bargaining exemption announced in *PBA* was *inspired* by a similarly-worded limitation in Civil Service Law § 76 (4) that tempered the immediate impact of the default rules specified in sections 75 and 76, but the *PBA* court was not directly *applying* either section 75 or 76 to resolve the parties' dispute concerning the mandatory scope of collective bargaining under section 204 (2). In short, while section 76 (4) was the juridical muse for the section 204 (2) exception created by the Court of Appeals in PBA, it is section 204 (2) — not section 75 or 76 — that demarcates the analytical parameters within which this case must primarily be decided.

III

Here, all parties agree that, when the Taylor Law was adopted in 1967, the 1907 City Charter provision constituted a "preexisting law" on the subject of police discipline in Rochester **[**4]**]within the meaning of *PBA*. Thus, at the time of its adoption, the Taylor Law neither displaced Rochester's then-existing practices for disciplining police officers nor required collective bargaining of that topic going forward.

HN4[↑] That is not the end of the story, however, for **[*12]** there is an important caveat to the preexisting-law exception created by PBA: the preexisting law in question must be " 'in force' " when the municipality refuses to collectively bargain over police discipline (Schenectady, 30 NY3d at 115, quoting PBA, 6 NY3d at 571-572; see Wallkill, 19 NY3d at 1069). The "in force" requirement was satisfied in Schenectady, PBA, and Wallkill, but it is not satisfied here. And *that* is because the 1907 City Charter provision governing police discipline in Rochester was formally *repealed* by the City Council in 1985 — almost 20 years *after* the Taylor Law was adopted and almost 35 years *before* PAB was created (see Local Law No. 2 [1985] of the City of Rochester § 1 [City Charter "is hereby amended by repealing Section 8A-7, Charges and trials of policemen, for the reason that this subject matter is covered by the Civil Service Law"]). Consequently, the 1985 City Council explicitly surrendered its grandfathered prerogative to exempt police discipline from collective bargaining.

Thus, because the 1907 City Charter provision was not "in force" when the voters approved Local Law No. 2 in 2019, we hold that Rochester no longer qualifies for the PBA-created exception to mandatory collective

bargaining over police discipline. And without the PBA **[*13]** exception, the challenged Local Law No. 2 necessarily falls insofar as it takes police discipline out of collective bargaining because, in that respect, it conflicts with the general law mandating collective bargaining over police discipline (*see* Civil Service Law § 204 [2]; see generally Municipal Home Rule Law § 10 [1] [i], [ii] [no local law, including a charter revision, may contravene any "general law"]). HN5[↑] As the Court of Appeals has explained, "a local law is inconsistent [with the general law] where local laws prohibit what would be permissible under State law" (Eric M. Berman, P.C. v City of New York, 25 NY3d 684, 690, 16 N.Y.S.3d 25, 37 N.E.3d 82 [2015] [internal quotation marks omitted]), and by creating a permanent administrative apparatus for disciplining police officers that is impervious to alteration or modification at the bargaining table, Local Law No. 2 necessarily and structurally prohibits something that, ever since the 1985 repeal of the 1907 City Charter provision, is statutorily *mandated* for the City of Rochester: collective bargaining of police discipline. The court therefore properly invalidated Local Law No. 2 insofar as it imbues PAB with disciplinary authority over Rochester police officers without regard to collective bargaining.

IV

We reject the City Council's contrary arguments.

First, the City Council says that **[*14]** police discipline is not *and has never been* a proper subject of collective bargaining in Rochester given the Legislature's decision, in the 1907 City Charter, to effectively exempt police discipline from collective bargaining. As such, the City Council reasons, the 1907 City Charter provision governing police discipline remains "in force" because the 1985 City Council had no power to repeal it. We disagree. By their incremental relaxation and eventual abolition of Dillon's Rule, the voters and the Legislature collectively transferred the power to amend city charters from the Legislature to the cities themselves, subject only (in substantive matters) to the requirement of conformity with the State Constitution and the general laws (*see* NY Const, art IX, § 2 [c] [ii] [1]; Municipal Home Rule Law § 10 [1] [i], [ii]; Gizzo, 36 AD3d at 165). That is precisely what the City Council did in 1985: it exercised its home rule powers to overturn the Legislature's 1907 policy determination. And given the Legislature's 1967 enactment of the Taylor Law and its presumption of collective bargaining for police discipline, it defies reason to suggest — as the City Council does now — that the 1985 repeal of the 1907 provision somehow contravened any general law in effect in 1985. Quite the **[*15]** opposite, the 1985 repeal actually aligned Rochester with the modern-day Legislature's policy favoring collective bargaining of police discipline.

Nothing in the Schenectady, Wallkill, or PBA decisions even remotely suggests that a grandfathered law concerning police discipline must be forever fossilized in the municipal codebooks, never to be abrogated by the municipality in the valid exercise of its home rule powers. To the contrary, the Schenectady decision specifically emphasized that the qualifying preexisting law in that case had *not* been repealed, and it even contrasted the continued **[**5]** effectiveness of Schenectady's local law with the Legislature's repeal of a similar preexisting statute that had limited collective bargaining for State Police officers (*see* 30 NY3d at 116-118, citing L 2001, ch 587)[2]. *Schenectady* thus clearly contemplates the potential repeal of a preexisting law concerning police discipline that would have otherwise qualified for the PBA-created exception to mandatory collective bargaining. Indeed, by insisting on the eternal sanctity of the policy choices of the 1907 Legislature, the City Council embraces the very specter of dead-hand control that its brief repeatedly decries.

[*16] The City Council's reasoning on this point suffers from an additional flaw. If, as the current City Council insists, the Legislature's 1907 policy determination to commit police discipline to the exclusive discretion of the executive branch was so important and fundamental that it barred the 1985 City Council from subjecting police discipline to collective bargaining, then the paramount import of that 1907 policy would also logically bar the current City Council from transferring the executive's latent disciplinary authority to an unelected body like PAB. Simply stated, the 1907 City Charter provision cannot logically preclude collective bargaining of police discipline yet simultaneously permit an independent board to fire police officers over the objection of the executive's appointed police chief. The very rationale that the City Council deploys to invalidate the 1985 repeal would equally doom its own 2019 legislation. Thus, by winning the battle over the validity of the 1985 repeal, the City Council would ineluctably lose the war over the validity of the 2019 local law.

Second, there is absolutely no record support for the current City Council's speculation that its 1985 predecessor **[*17]** unwittingly repealed the 1907 City

[2] Each of the Second Department cases cited by the City Council in footnote 7 of its opening brief, we note, featured a "preexisting law" that remained in force at all relevant times.

Charter provision while laboring under a comprehensive misapprehension of the Taylor Law and its workings. And even if the current City Council has correctly conjured its predecessor's motivations and underlying suppositions back in 1985, they would be irrelevant. What matters is that the 1907 City Charter provision was explicitly and unambiguously repealed in 1985, and "no amount of legislative history can overcome that fact" (*National Labor Relations Bd. v Alaris Health at Castle Hill, 811 Fed Appx 782, 786-787 [3d Cir 2020]*; see *Triple A Intl., Inc. v Democratic Republic of Congo, 721 F3d 415, 418 [6th Cir 2013]*, *cert denied 571 US 1024 [2013]* ["no amount of legislative history can rescue an interpretation that does as much damage to the enacted text as [the plaintiff's] interpretation does here"]).

Third, citing the general proposition that a legislative body that "violently disagrees with its predecessor . . . may modify or abolish its predecessor's acts" (*Farrington v Pinckney, 1 NY2d 74, 82, 133 N.E.2d 817, 150 N.Y.S.2d 585 [1956]* [internal quotation marks omitted]), the City Council insists upon its absolute right to undo the 1985 repeal of the 1907 City Charter provision. As a generic platitude of democratic governance, of course, the City Council's position is unassailable. But the City Council's undisputed right to, in essence, repeal the 1985 repeal does not correspondingly confer that body with unfettered power **[*18]** to enact whatever it wants in place of the now-repealed 1985 provision. To the contrary, in designing a replacement for the 1985 provision, the City Council was barred from enacting anything in contravention of a "general law" (*Municipal Home Rule Law § 10 [1] [i]*, [ii]), and *that* includes the Taylor Law's mandate of collective bargaining for police discipline in the absence of a contrary preexisting law that remains in force (see *Civil Service Law § 204 [2]*). Put simply, the City Council's newfound preference for the 1907 legislative judgment does not allow it to resurrect that policy in defiance of the currently-prevailing legislative judgment.

We recognize that the current City Council is frustrated to have fewer policy options at its disposal than did its predecessor in 1985. That frustration, to some extent, is understandable. But it is also inherent in the nature of grandfathering. *HN6*[↑] By abandoning a grandfathered right or privilege, the abandoner necessarily deprives its successors of the ability to revive or reclaim that right or privilege at some future point. As Maine's highest court aptly explained, once "lost . . . [a] grandfathered status . . . could not be revived" (*Day v Town of Phippsburg, 2015 ME 13, 110 A3d 645, 649 [Me 2015]*). Not every legislative decision can be undone, and the City Council's **[*19]** 1985 decision to repeal the 1907 provision simply cannot be undone in the manner attempted in 2019. If the **[**6]**]City Council wants to turn back the clock on its 1985 decision and grant final authority over police discipline to an entity like PAB without a conforming collective bargaining agreement, then it must go to Albany and persuade either the Court of Appeals to revisit its policy compromise in PBA or the Legislature to recede from its robust preference for collective bargaining. Neither of those options, of course, are within the ken of the Appellate Division.

V

Two final issues require brief discussion.

First, we reject Supreme Court's distinct conclusion that transferring disciplinary power from the police chief to PAB violates an officer's right under *Civil Service Law § 75 (2)* and Unconsolidated Laws § 891 to a hearing before "the officer or body having the power to remove the [officer] . . . or by a deputy" thereof. The court reasoned that, because Local Law No. 2 places the onus upon the police chief to *implement* and *enforce* PAB's disciplinary determinations, the chief technically remains the official "having the power to remove the [charged officer]" such that disciplinary hearings must still be conducted before the chief or **[*20]** a deputy pursuant to *sections 75 (2)* and 891. That reasoning, however, is unduly pedantic. The whole purpose of Local Law No. 2 was to transfer the *power* to remove police officers from the police chief to PAB. Consistent with that goal, the local law requires the police chief to implement PAB's decreed penalty in each and every case without reduction of any kind. That PAB's members are not also tasked with personally escorting a fired officer out of the precinct does not change the fact that the termination decision was made by PAB, not by the police chief. The court's determination on this point is akin to saying that, in a capital case, the jury is not the "body having the power" to impose the death penalty simply because the jurors are not personally tasked with executing the condemned prisoner. Thus, because Local Law No. 2 makes PAB the primary body "having the power to remove the [officer]," PAB's designation as the disciplinary hearing panel does not violate *sections 75 (2)* and 891[3]. We acknowledge, of course, that our

[3] The police chief's theoretical power to fire an officer notwithstanding PAB's imposition of a lesser penalty does not change the fact that, under the administrative scheme established by Local Law No. 2, PAB is the primary "body

holding on this tangential point is of limited practical consequence given Local Law No. 2's fundamental incompatibility with the Taylor Law.

Second, we agree with the City Council that the court **[*21]** erred by referring Local Law No. 2 "back to the Rochester City Council to be reconciled and made compliant with New York State law and the Rochester City Charter." That referral was improper, and plaintiffs do not suggest otherwise. The court's judicial function was limited to determining whether and to what extent Local Law No. 2 was void as inconsistent with the general law. The court did just that, and its role ended at that point. The court had no power to "refer" the challenged law back to the legislative body that enacted it for amendment or correction (*see generally People v LaValle, 3 NY3d 88, 131, 817 N.E.2d 341, 783 N.Y.S.2d 485 [2004]*, citing *People v Gersewitz, 294 NY 163, 169, 61 N.E.2d 427 [1945]*, *cert dismissed 326 US 687 [1945]*; *cf.* Christine Bateup, *Reassessing the Dialogic Possibilities of Weak-Form Bills of Rights*, 32 Hastings Intl & Comp L Rev 529, 543-546 [2009] [discussing the declare-incompatible and refer-back model of statutory judicial review in the United Kingdom]). If the City Council wishes to amend Local Law No. 2 in response to a judicial ruling, it is more than capable of doing so on its own initiative. Accordingly, the judgment appealed from should be modified by vacating the fourth decretal paragraph and, as so modified, affirmed.

Entered: June 11, 2021

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having the power to remove" an officer for purposes of *sections 75 (2)* and 891. At most, *sections 75 (2)* and 891 might entitle an officer to another hearing before the chief or a deputy chief in the event that the chief sought to terminate that officer notwithstanding PAB's imposition of a lesser penalty.

Roemer Wallens Gold & Mineaux LLP
Counsellors at Law

ATTORNEY/CLIENT MEMORANDUM

TO: RWGM Public Employer Partners

FROM: RWGM Labor Team

RE: Newly Enacted or Passed Laws Regarding Police Reform

DATE: June 15, 2020 with 2021 updates

In the wake of the recent death of George Floyd, the New York Legislature passed several bills with the intent of reforming policing. Many of these bills have already been signed into law by the Governor. Given the significant changes to procedures and mandated allowable behavior, RWGM wanted to inform all the clients of these changes. If a client's current policies and training are not in conformance with the provisions of the laws, they should be changed immediately and provided to employees. If there are any specific questions regarding any of the following bills, please reach out to any attorney on the Labor team.

Eric Garner Anti Chokehold Act - A06144/ S6670B (Ch. 94, L. 2020)

This act amends the penal law by adding a section called aggravated strangulation. This law specifically applies to a police officer (as defined in section 1.20 of the *Criminal Procedure Law*) or peace officer (as defined in section 2.10 of the *Criminal Procedure Law*) who obstructs the breathing or blood circulation (as defined in section 121.11 of the *Penal Law*), or who uses a chokehold or similar restraint, thereby causing serious injury or death to another person. Any individual who violates this act will be guilty of a Class C felony.

As this law now makes it a crime for police officers, corrections officers, or any other peace officer, to obstruct the airway of an individual, policies and training should be updated as soon as possible to make employees aware of this new law.

Required Reporting In the Event of Discharging of a Weapon - A00927/S2575B (Ch. 101, L. 2020)

This legislation added a new section to the *Executive Law* that requires any law

enforcement officer or peace officer to make a verbal report to their supervisor and a formal written report within six (6) and forty-eight (48) hours, respectively, when the officer discharges their weapon on or off-duty when a person could have been struck by a bullet from the weapon, including when the officer discharges their weapon in the direction of another person. The law explicitly allows an officer to invoke their Fifth Amendment right against self-incrimination.

The "STAT" Act - A10609/S1830C (Ch. 102, L. 2020)

These bills amend *Executive Law* and *Judiciary Law* to require various data be collected and published. The entities responsible for the collection and dissemination of the data are Law Enforcement Departments and the Chief Administrator of the Courts.

In regards to Law Enforcement Departments, the Chiefs of every Police Department and every Sheriff must "promptly report" certain information to the Division of Criminal Justice Services. The information required to be reported involves any arrest-related death. An arrest-related death is considered any death that occurs while in custody or during an attempt to establish custody. The information required in every report is as follows:

- the number of arrest-related deaths;
- the race, ethnicity, age, and sex of the individual;
- the zip code or location where the death occurred; and
- a brief description of the circumstances surrounding the arrest-related death.

This act will take effect 180 days from the signature of the Governor and is subject to revision during that period. This act requires the first report described above to be submitted within six (6) months of the law being enacted and contain the information for that time period, and annually thereafter and no later than February 1. These reports will thereafter be published for public dissemination.

Private Cause of Action for the Misuse of 911 Caused by Bias - A01531/S8492 (Ch. 93, L. 2020)

This act amended section 79-n of the *Civil Rights Law* to provide for a civil cause of action to anyone in a protected group against an individual who summons the police or a peace officer without reason "suspect a violation of the penal law, any other criminal conduct, or an imminent threat to a person or property." A person is considered to lack reason for suspicion where a reasonable person would not suspect such violation, conduct, or threat.

Codification of the Right of Individual's to Record Police Activity - A01360/S3253A (Ch. 100, L. 2020)

This act codifies the right of individuals not under arrest or in custody to record (on essentially any device) law enforcement activities. The individual also has the right to maintain possession of the device the recording was made on. Furthermore, individuals under arrest or in custody do not forfeit the right to have such recordings, property and equipment maintained and return to him or her. Under this act, no individual may physically interfere with law enforcement activity or obstruct governmental administration (as defined in the *Penal Law*). Under this act, law enforcement officers (peace officers, police officers, security officers, security guard, or similar official engaged in law enforcement activity) may not do any of the following to an

individual attempting to exercise the right to record law enforcement activity and interfere with the right listed above:

- intentionally preventing or attempting to prevent that person from recording law enforcement activity;
- threatening that person for recording a law enforcement activity;
- commanding that the person cease recording law enforcement activity when the person was nevertheless authorized under law to record;
- stopping, seizing, searching, ticketing or arresting that person because that person recorded a law enforcement activity; or
- unlawfully seizing property or instruments used by that person to record a law enforcement activity, unlawfully destroying, or seizing a recorded image or recorded images of a law enforcement activity, or copying such a recording of a law enforcement activity without consent of the person who recorded it or approval from an appropriate court.

The act provides an affirmative defense that the officer had probable cause to arrest the person recording such law enforcement activities.

This act provides civil remedies for an individual whose rights provided for under the act are violated. The remedies would be provided for in addition to those causes of actions defined under 42 *USC* §1983. This cause of action provides for attorney's fees to be provided. As such, policies and training must be amended to inform employees who fit the definition above of these rights.

Amendment of Civil Rights Law by Adding a New Section to Civil Rights Law Affirming the Right of an Individual in Custody to Receive Mental Health and Medical Attention - A08226B/ S6601B (Ch. 103, L. 2020)

This act amends the *Civil Rights Law* to provide that individuals under arrest or in custody of a police officer, peace officer, or other law enforcement representative are entitled to medical or mental health attention when needed. This act accomplishes this by creating a duty of the officer to provide attention to the medical and mental health needs of such person and obtain reasonable treatment for such needs. The standard of review under this act is whether the care requested is reasonable and provided in good faith under the circumstances. Failure to provide reasonable and good faith attention creates a cause of action to an individual who, as a result of said failure, suffers serious physical injury, significant exacerbation of an injury or condition.

Repeal of Civil Rights Law §50-a and Amendment of Public Officers Law - A10611/S8496 (Ch. 96, L. 2020)

This act began by repealing section 50-a of the *Civil Rights Law* ("Section 50-a), which created an exemption of disclosure of personnel records associated with police officers, firefighters, corrections officers, parole officers, and other peace officers under the *Freedom of Information Law* ("*FOIL*"). In addition to the repeal of Section 50-a, the act amended *FOIL* (*Public Officers Law* §§86, *et seq.*). In regards to the specific amendments, although disciplinary records of the types of employees listed above may now be disclosed under *FOIL*, it allows for certain redactions.

First, certain redactions are allowed to law enforcement disciplinary records. These records include the following items created in furtherance of a law enforcement disciplinary proceeding (defined as the commencement of any investigation and any subsequent hearing or disciplinary action conducted by a law enforcement agency):

- the complaints, allegations, and charges against an employee;
- the name of the employee complained of or charged;
- the transcript of any disciplinary trial or hearing, including any exhibits introduced at such trial or hearing;
- the disposition of any disciplinary proceeding; and
- the final written opinion or memorandum supporting the disposition and discipline imposed including the agency's complete factual findings and its analysis of the conduct and appropriate discipline of the covered employee.

The redactions allowed to law enforcement disciplinary records, as defined above, are the following:

- items involving the medical history of a person employed by a law enforcement agency as defined in section eighty-six of this article as a police officer, peace officer, or firefighter or firefighter/paramedic, not including records obtained during the course of an agency's investigation of such person's misconduct that are relevant to the disposition of such investigation;
- the home addresses, personal telephone numbers, personal cell phone numbers, personal e-mail addresses of a person employed by a law enforcement agency as defined in section eighty-six of this article as a police officer, peace officer, or firefighter or firefighter/paramedic, or a family member of such a person, a complainant or any other person named in a law enforcement disciplinary record, except where required pursuant to article fourteen of the civil service law, or in accordance with subdivision four of section two hundred eight of the civil service law, or as otherwise required by law. This paragraph shall not prohibit other provisions of law regarding work-related, publicly available information such as title, salary, and dates of employment;
- any social security numbers; or
- disclosure of the use of an employee assistance program, mental health service, or substance abuse assistance service by a person employed by a law enforcement agency as defined in section eighty-six of this article as a police officer, peace officer, or firefighter or firefighter/paramedic, unless such use is mandated by a law enforcement disciplinary proceeding that may otherwise be disclosed pursuant to this article.

In addition to the above, technical infractions (defined as "a minor rule violation by a person employed by a law enforcement agency as defined in this section as a police officer, peace officer, or firefighter or firefighter/paramedic, solely related to the enforcement of administrative departmental rules that (a) do not involve interactions with members of the public, (b) are not of public concern, and (c) are not otherwise connected to such person's investigative, enforcement, training, supervision, or reporting responsibilities") may also be redacted from law enforcement disciplinary records.

This act was effective immediately upon signature from the governor on June 12, 2020. To adhere with this act, Record Access officers will have to alter their guidelines for disclosure.

Body Cameras for New York State Police - A08674A/S8493 (Ch. 105, L. 2020)

This act requires the New York State Police to wear body cameras during certain interactions with the public. It does not, however, apply to local police departments.

Creation of a Special Investigation Office Within the Office of the State Attorney General - A01601C/S2574C (Ch. 95, L. 2020)

This act, first, created within the Office of the State Attorney General the Office of Special Investigations. The purpose of this office is to investigate and, if warranted, prosecute police officers or peace officers who are involved in the death of an individual, whether or not they are in the officer's custody. This provision applies to deaths that occur while the officer is on or off-duty. To bring charges against the officer, the act requires the Attorney General determine whether an act or omission did, in fact, cause the death of the deceased.

Pursuant to this act, the Attorney General of New York ("the Attorney General") is vested with investigative authority and criminal jurisdiction upon the death of a person referenced above. All jurisdiction over the prosecution of such incidents is vested with the Attorney General and supersedes the jurisdiction of the District Attorney of the county in which the incident occurred. The Attorney General then retains jurisdiction over the matter until such time as the Attorney General determines the matter does not meet the requirements listed within the description of the act. Should the Attorney General make such a determination, it will provide written notice of said determination to the district attorney for the county in which the incident occurred.

Various responsibilities are placed upon the Attorney General in regard to investigations held under the act. Primarily, the Attorney General is required to conduct a full, reasoned, and independent investigation of the matter. This investigation must (1) gather and analyze evidence; (2) conduct witness interviews; (3) commission and review any required scientific reports; and (4) review audio and video recordings. This act also confers subpoena and fact-finding power to the Attorney General while conducting this investigation.

In regard to any incident arising under this act, the Office of Special Investigations is empowered to issue a public report on its website regarding the investigation if the office declines to present evidence to a grand jury or the grand jury declines to return an indictment on any charge. These reports must include the result of the investigation, an explanation as to its decision, and any recommendations for reforms arising from the investigation. Aside from incident specific reports, the Office of Special Investigation must make an annual public report regarding the matters it investigated and handled, as well as any recommendations for any reforms.

The Act became effective on April 1, 2021.

Amendment to Executive Law to Create the Law Enforcement Misconduct Investigation Office - A10002B/S3595C (Ch. 104, L. 2020)

This act begins by conferring jurisdiction over all law enforcement agencies (including any political subdivision) to the Law Enforcement Misconduct Investigation Office ("the

Office"), which was created under this Act within the Department of Law. The purpose of the Office is to review, study, audit, and make recommendations relating to the operations, policies, programs, and practices of state and local law enforcement agencies. The Office functions to do the following in relation to covered law enforcement agencies:

- Receive and investigate allegations of corruption, fraud, use of excessive force, criminal activity, conflicts of interest, or abuse;
- Inform the heads of covered law enforcement agencies of such investigations and their progress, unless confidentiality is required;
- Determine whether disciplinary action, civil or criminal prosecution, or further investigation by federal, state or local agencies is required, and to assist in such further actions;
- Prepare and release to the public written reports, with redactions of information exempt pursuant to the Freedom of Information Law;
- Review and examine periodically the policies and procedures of covered law enforcement agencies with regard to the prevention and detection of corruption, fraud, use of excessive force, criminal activity, conflicts of interest, and abuse in those agencies;
- Recommend remedial actions to prevent or eliminate the issues discussed above;
- Investigate patterns, practices, systemic issues, or trends identified within the investigations above; and
- Submit annual reports that recommend specific changes to state law to further the mission of the law enforcement misconduct investigative office.

This act also confers significant fact-finding powers to the Office to investigate the subject matter listed above. These powers include the right to do the following:

- issue and enforce subpoenas;
- require production of documents deemed relevant to its investigations;
- examine, copy, or remove any document or record of the covered law enforcement agency;
- require any officer or employee employed by a covered law enforcement agency to answer questions related to their official duties, no such statement or document may be used in a subsequent criminal prosecution except for perjury or contempt purposes arising from such testimony. The refusal of any officer or employee to answer questions shall be cause for removal from office or employment or other appropriate penalty;
- monitor the implementation by covered law enforcement agencies of the recommendations made by the Office; and
- perform other necessary or appropriate actions to fulfill its duties.

In addition to the responsibilities of the Office, the act creates various duties required by covered law enforcement agencies and the officers and employees employed by that law enforcement agency. First, employees and officers must "promptly" report to the Office any information concerning the covered topics above, including any misconduct of another officer or employee. Failure of an officer or employee to make a report will be cause for removal or other appropriate penalties. Those officers or employees who make such a report can not be retaliated against for such report. Next, the head of any covered law enforcement agency must refer to the

Office for investigation the complaints against an officer or employee when that individual has received at least five separate complaints from five or more individuals within the past two years. The Office will then investigate the complaints to determine whether the office or employee has engaged in a pattern or practice of misconduct. Finally, the head of any law enforcement agency shall advise the governor, the temporary president of the senate, the speaker of the assembly, the minority leader of the senate and assembly within 90 days of the issuance of a report by the Office as what remedial actions the law enforcement agency has taken in response to any recommendation for such actions contained in the report.

The act will take effect in the first April of the succeeding year of the date the act was enacted.

Executive Order No. 203

In addition to the legislative package above, the Governor of New York also issued Executive Order No. 203 ("EO 203"). EO 203 provides for various requirements associated with local governments that operate a police agency, as defined in section 1.20 of the *Criminal Procedure Law*. Specifically, EO 203 requires such police agencies:

> perform a comprehensive review of current police force deployments, strategies, policies, procedures, and practices, and develop a plan to improve such deployments, strategies, policies, procedures, and practices, for the purposes of addressing the particular needs of the communities served by such police agency and promote community engagement to foster trust, fairness, and legitimacy, and to address any racial bias and disproportionate policing of communities of color.

To accomplish this mandate, each chief executive of the local government must convene the head of the local police agency and any stakeholder in the community to develop a plan to satisfy the findings of the above review. This plan must consider evidence-based policing strategies that involve, amongst other things, the following:

- use of force policies;
- procedural justice;
- any studies addressing systemic racial bias or racial justice in policing; implicit bias awareness training;
- de-escalation training and practices;
- law enforcement assisted diversion programs; restorative justice practices;
- community-based outreach and conflict resolution;
- problem-oriented policing;
- hot spots policing;
- focused deterrence;
- crime prevention through environmental design;
- violence prevention and reduction interventions;
- model policies and guidelines promulgated by the New York State Municipal Police Training Council; and
- standards promulgated by the New York State Law Enforcement Accreditation Program.

In development of this plan, the local government and its police agency must consult with stakeholders, which includes, but is not limited to, members and leaders of the police force, the community (emphasizing those areas with high police interactions), interested non-profits and faith-based community groups, the local district attorney and public defender, and local elected officials. After consultation, the local government is to adopt a plan to implement the recommendations resulting from its review. This plan is to include any "modifications, modernizations, and innovations to its policing deployments, strategies, policies, procedures, and practices, tailored to the specific needs of the community and general promotion of improved police agency and community relationships based on trust, fairness, accountability, and transparency, and which seek to reduce any racial disparities in policing."

After the plan is formulated, it must be offered for public comments. After the public comment period, the plan is to be presented to the local legislative body, which shall adopt or ratify the plan. This must occur no later than April 1, 2021. After the process has completed, the local government must transmit a certification to the Division of Budget to affirm the process has been complied with and that the local law or resolution was adopted. Failure to make such certification could result in the Division of Budget withholding future appropriated state or federal funds.

This initiative will be announced by the Division of Budget through guidance that will be sent to all local governments.

State of New York

Executive Chamber

No. 203

EXECUTIVE ORDER

NEW YORK STATE POLICE REFORM AND REINVENTION COLLABORATIVE

WHEREAS, the Constitution of the State of New York obliges the Governor to take care that the laws of New York are faithfully executed; and

WHEREAS, I have solemnly sworn, pursuant to Article 13, Section 1 of the Constitution, to support the Constitution and faithfully discharge the duties of the Office of Governor; and

WHEREAS, beginning on May 25, 2020, following the police-involved death of George Floyd in Minnesota, protests have taken place daily throughout the nation and in communities across New York State in response to police-involved deaths and racially-biased law enforcement to demand change, action, and accountability; and

WHEREAS, there is a long and painful history in New York State of discrimination and mistreatment of black and African-American citizens dating back to the arrival of the first enslaved Africans in America; and

WHEREAS, this recent history includes a number of incidents involving the police that have resulted in the deaths of unarmed civilians, predominantly black and African-American men, that have undermined the public's confidence and trust in our system of law enforcement and criminal justice, and such condition is ongoing and urgently needs to be rectified; and

WHEREAS, these deaths in New York State include those of Anthony Baez, Amadou Diallo, Ousmane Zango, Sean Bell, Ramarley Graham, Patrick Dorismond, Akai Gurley, and Eric Garner, amongst others, and, in other states, include Oscar Grant, Trayvon Martin, Michael Brown, Tamir Rice, Laquan McDonald, Walter Scott, Freddie Gray, Philando Castile, Antwon Rose Jr., Ahmaud Arbery, Breonna Taylor, and George Floyd, amongst others,

WHEREAS, these needless deaths have led me to sign into law the Say Their Name Agenda which reforms aspects of policing in New York State; and

WHEREAS, government has a responsibility to ensure that all of its citizens are treated equally, fairly, and justly before the law; and

WHEREAS, recent outpouring of protests and demonstrations which have been manifested in every area of the state have illustrated the depth and breadth of the concern; and

WHEREAS, black lives matter; and

WHEREAS, the foregoing compels me to conclude that urgent and immediate action is needed to eliminate racial inequities in policing, to modify and modernize policing strategies, policies, procedures, and practices, and to develop practices to better address the particular needs of communities of color to promote public safety, improve community engagement, and foster trust; and

WHEREAS, the Division of the Budget is empowered to determine the appropriate use of funds in furtherance of the state laws and New York State Constitution; and

WHEREAS, in coordination with the resources of the Division of Criminal Justice Services, the Division of the Budget can increase the effectiveness of the criminal justice system by ensuring that the local police agencies within the state have been actively engaged with stakeholders in the local community and have locally-approved plans for the strategies, policies and procedures of local police agencies; and

NOW, THEREFORE, I, Andrew M. Cuomo, Governor of the State of New York, by virtue of the authority vested in me by the Constitution and the Laws of the State of New York, in particular Article IV, section one, I do hereby order and direct as follows:

The director of the Division of the Budget, in consultation with the Division of Criminal Justice Services, shall promulgate guidance to be sent to all local governments directing that:

Each local government entity which has a police agency operating with police officers as defined under 1.20 of the criminal procedure law must perform a comprehensive review of current police force deployments, strategies, policies, procedures, and practices, and develop a plan to improve such deployments, strategies, policies, procedures, and practices, for the purposes of addressing the particular needs of the communities served by such police agency and promote community engagement to foster trust, fairness, and legitimacy, and to address any racial bias and disproportionate policing of communities of color.

Each chief executive of such local government shall convene the head of the local police agency, and stakeholders in the community to develop such plan, which shall consider evidence-based policing strategies, including but not limited to, use of force policies, procedural justice; any studies addressing systemic racial bias or racial justice in policing; implicit bias awareness training; de-escalation training and practices; law enforcement assisted diversion programs; restorative justice practices; community-based outreach and conflict resolution; problem-oriented policing; hot spots policing; focused deterrence; crime prevention through environmental design; violence prevention and reduction interventions; model policies and guidelines promulgated by the New York State Municipal Police Training Council; and standards promulgated by the New York State Law Enforcement Accreditation Program.

The political subdivision, in coordination with its police agency, must consult with stakeholders, including but not limited to membership and leadership of the local police force; members of the community, with emphasis in areas with high numbers of police and community interactions; interested non-profit and faith-based community groups; the local office of the district attorney; the local public defender; and local elected officials, and create a plan to adopt and implement the recommendations resulting from its review and consultation, including any modifications, modernizations, and innovations to its policing deployments, strategies, policies, procedures, and practices, tailored to the specific needs of the community and general promotion of improved police agency and community relationships based on trust, fairness, accountability, and transparency, and which seek to reduce any racial disparities in policing.

Such plan shall be offered for public comment to all citizens in the locality, and after consideration of such comments, shall be presented to the local legislative body in such political subdivision, which shall ratify or adopt such plan by local law or resolution, as appropriate, no later than April 1, 2021; and

Such local government shall transmit a certification to the Director of the Division of the Budget to affirm that such process has been complied with and such local law or resolution has been adopted; and

The Director of the Division of the Budget shall be authorized to condition receipt of future appropriated state or federal funds upon filing of such certification for which such local government would otherwise be eligible; and

The Director is authorized to seek the support and assistance of any state agency in order to effectuate these purposes.

GIVEN under my hand and the Privy Seal of the State in the City of Albany this twelfth day of June in the year two thousand twenty.

BY THE GOVERNOR

Secretary to the Governor

A05470 Summary:

BILL NO A05470

SAME AS SAME AS

SPONSOR Englebright

COSPNSR Glick, Galef, Peoples-Stokes, Rosenthal L, Abinanti, Seawright, Reyes, Lupardo, Vanel, Barron

MLTSPNSR Perry

Amd §§87 & 89, Pub Off L; amd §50-b, Civ Rts L

Requires a particularized and specific justification for denial of access to records under the freedom of information law; relates to exemption from disclosure under the freedom of information law of certain law enforcement related records and records identifying victims.

A05470 Actions:

BILL NO A05470

02/18/2021 referred to governmental operations
02/23/2021 reported referred to codes
03/01/2021 reported
03/04/2021 advanced to third reading cal.148
03/18/2021 passed assembly
03/18/2021 delivered to senate
03/18/2021 REFERRED TO INVESTIGATIONS AND GOVERNMENT OPERATIONS
06/08/2021 SUBSTITUTED FOR S6017
06/08/2021 3RD READING CAL.679
06/08/2021 PASSED SENATE
06/08/2021 RETURNED TO ASSEMBLY

A05470 Memo:

NEW YORK STATE ASSEMBLY

MEMORANDUM IN SUPPORT OF LEGISLATION

submitted in accordance with Assembly Rule III, Sec 1(f)

BILL NUMBER: A5470

SPONSOR: Englebright

TITLE OF BILL:

An act to amend the public officers law, in relation to requiring a particularized and specific justification for denial of access to records under the freedom of information law and exemption from disclosure under the freedom of information law of certain law enforcement related records; and to amend the civil rights law, in relation to records identifying victims

PURPOSE OR GENERAL IDEA OF BILL:

The purpose of this legislation is to clarify certain provisions of FOIL and other disclosure laws to make sure that people are not wrongfully denied access to public records.

SUMMARY OF PROVISIONS:

This bill would make changes to the Freedom of Information Law (FOIL) and to section 50-b of the civil rights law. This bill would provide that when an agency is considering denying access to records under the law enforcement exception to FOIL on the grounds that disclosure would interfere with a judicial proceeding, then the decision of whether to grant access would be made by the judge presiding over that judicial proceeding. This bill would clarify that a denial of access to records under FOIL does not prevent a person from obtaining records under any other law. In addition, the bill would clarify that parties to any civil or criminal action or proceeding can use FOIL to obtain records concerning the action or proceeding. Furthermore, this bill clarifies that access to a record cannot be withheld due to the type or category of record. This bill would also amend the law enforcement exception to FOIL to make clear that records cannot be withheld solely because they relate in some manner to an investigation or criminal proceeding. This bill would also amend section 50-b of the civil rights law to clarify that only the portions of a report that would identify a victim of a sexual offense are exempt from disclosure.

DIFFERENCE BETWEEN ORIGINAL AND AMENDED VERSION (IF APPLICABLE):

JUSTIFICATION:

FOIL provides individuals with greater access to their government which helps achieve the goal of an open and transparent government. To that end, there is a strong presumption under FOIL that government records are accessible to the public and there are several defined exceptions of access to records. Under current law, access to records or to portions of records is sometimes withheld when they should not be. Too often

records that were prepared in the ordinary course of business, which should be accessible to the public, have been withheld. This bill would clarify certain provisions of FOIL and section 50-b of the civil rights law to make sure that people are not wrongfully denied access to public records.

PRIOR LEGISLATIVE HISTORY:

2011-12 A9460 referred to investigations and government operations

2013-14 A5170 referred to investigations and government operations

2015-16 A4468 referred to investigations and government operations

2017-18 A3463 referred to investigations and government operations

2019-20 A3939 vetoed memo. 252 of 2019

FISCAL IMPLICATIONS FOR STATE AND LOCAL GOVERNMENTS:

None to the State

EFFECTIVE DATE:

This act shall take effect immediately.

A04331 Summary:

BILL NO A04331

SAME AS SAME AS

SPONSOR Hunter

COSPNSR Gottfried, Reyes, Simon, Epstein, Clark, Mitaynes, Gonzalez-Rojas, Zinerman, Mamdani, Fernandez, Burgos, Ramos, Forrest, Kelles, Quart, Seawright, Barron, De La Rosa, Jackson, Bichotte Hermelyn, Jean-Pierre, Davila, Dinowitz, Anderson, Rosenthal L, Meeks, Gallagher, Kim, Niou, Walker, Cruz

MLTSPNSR Pretlow

Add §79-q, Civ Rts L

Provides a civil action for deprivation of rights which is caused by any person or public entity.

A04331 Actions:

BILL NO A04331

02/01/2021 referred to governmental operations

06/01/2021 reference changed to judiciary

A04331 Memo:

NEW YORK STATE ASSEMBLY

MEMORANDUM IN SUPPORT OF LEGISLATION

submitted in accordance with Assembly Rule III, Sec 1(f)

BILL NUMBER: A4331

SPONSOR: Hunter

TITLE OF BILL:

An act to amend the civil rights law, in relation to providing a civil action for deprivation of rights

PURPOSE:

The purpose of this legislation is to end the defense of qualified immunity for law enforcement when they deprive the rights of New Yorkers as well as provide a state cause of action that may be brought by injured individuals and the Attorney General.

SUMMARY OF PROVISIONS:

Section 1 adds a new section 79-Q of the Civil Rights Law to end the defense of qualified immunity for certain defendants acting under color of law. This section also provides a state cause of action for the deprivation of rights, privileges, or immunities secured by the federal or state Constitution or laws. The court shall award reasonable attorney fees and costs to the prevailing plaintiff, and may award reasonable costs and attorney fees for a prevailing defendant but only for defending any claims the court finds frivolous. Additionally, the Attorney General may bring a civil action for relief on behalf of the state and the injured party but an action brought by the Attorney General does not foreclose an injured party from bringing an action. If the Attorney General prevails, the court shall order any award of damages to the injured party. Qualified immunity or a defendant's good faith but erroneous belief in the lawfulness of their conduct shall not be a defense. A civil action under this section must commence within three years of the cause of action. Lastly, a public entity shall indemnify its public employees for any liability incurred by the employee and for any judgment entered against the employee for claims arising under this section. A public entity shall not indemnify a public employee if the person was convicted of a criminal violation for the conduct from which the claim arises. A "public entity" is the state, any county, city and county, municipality, and every other political subdivision of the state; and any private entity that engages in state action. Immunity for corrections officers under Section 24 of the Correction Law shall not apply to actions brought pursuant to this section. Actions brought pursuant to this section may be brought in any court of competent jurisdiction.

Section 2 is the severability clause.

Section 3 is the effective date.

JUSTIFICATION:

For more than five decades, police officers have had extraordinary leeway in how they performed their jobs. As we see across America today, qualified immunity has far too often given the police the ability to brutalize and harm our communities, particularly communities of color, even during the most routine encounters. From George Floyd's alleged counterfeit $20 bill to Eric Garner's loose cigarettes to Rayshard Brook sleeping in his car, issues that should have been calmly addressed have

turned into national symbols of police brutality and institutional racism.

Qualified immunity was granted to law enforcement by the U.S. Supreme Court and then further strengthened.(1) As New York State is a leader in criminal justice reform, we must continue this progress as our streets have been filled with massive protests against police power and brutality. It is time to untangle the web of police misconduct that has been protected by this extraordinary protection given to the police.

In a recent New York Times article, a report was cited by the Mapping Police Violence organization.(2) Based on their study of data, "of the 1,147 people killed by the police in 2017, officers were charged with a crime in 13 of those cases, or about one percent." This startling statistic points to the protection that has given police, even in the most suspect of cases, where officers have acted with impunity.

We must be part of the national movement to stop these killings and erase this stain on society's record. Let us join our colleagues in Colorado, who became the first state to eliminate qualified immunity this month. Our communities are calling out for action - we must act.

LEGISLATIVE HISTORY:

2020: A.10978

STATE AND LOCAL FISCAL IMPLICATIONS:

To be determined.

EFFECTIVE DATE:
This act shall take effect on the 30th day after it shall have become a law

(1) Harlow v. Fitzgerald, 457 U.S. (1982); Malley v. Briggs, 457 U.S. 335 (1986); Anderson v. Creighton, 483 U.S. 635 (1987); Saucier v. Katz, 533 U.S. 194 (2001); Pearson v. Callahan, 555 U.S. 223 (2009); Safford v. Redding, 557 U.S. 364 (2009).
(2) https://www.nytimes.com/2020/06/23/us/politics/qualifiedimmunity.html.

A07835 Summary:

BILL NO A07835

SAME AS SAME AS

SPONSOR Perry

COSPNSR Fernandez, Cruz, Meeks, Ramos, Reyes

MLTSPNSR

Amd §35.30, add §§120.75, 120.76 & 120.77, Pen L

Relates to justifying the use of force by police officers and peace officers and to the excessive use of police force.

A07835 Memo:

NEW YORK STATE ASSEMBLY

MEMORANDUM IN SUPPORT OF LEGISLATION

submitted in accordance with Assembly Rule III, Sec 1(f)

BILL NUMBER: A7835

SPONSOR: Perry

TITLE OF BILL:

An act to amend the penal law, in relation to justifying the use of force by police officers and peace officers and to the excessive use of police force

PURPOSE:

To improve law enforcement practices and increase accountability concerning civilian deaths caused by police officers or peace officers, this legislation amends the law that justifies use of force by police officers and peace officers in order to ensure that alternatives to force or lower levels of force are used before officers use significant physical force or lethal force on civilians; and it ensures that prosecutors have increased options to identify a just outcome where law enforcement causes harm to individuals.

SUMMARY OF SPECIFIC PROVISIONS:

Section 1 of the bill amends section 35.30 of the Penal Law. The amendments would:

* withdraw the authority for police officers and peace officers to use lethal force on individuals where they reasonably believe that the offense committed by such person was a felony or an attempt to commit a felony involving the use or attempted use or threatened imminent use of physical force against a person; or where the person engaged in kidnapping, arson, escape in the first degree, burglary in the first degree or any attempt to commit those crimes.

* withdraw the authority for police officers and peace officers to use lethal force on individuals where they reasonably believe the offense committed or attempted by such person was a felony and that, in the course of resisting arrest therefor or attempting to escape from custody, such person is armed with a firearm or deadly weapon.

* Authorize the use of lethal force by a police officer or peace officer where (a) there is probable cause to believe that the person has committed a felony involving death or serious bodily injury, and the officer reasonably believes: (i) such person is armed with a firearm or other deadly weapon; (ii) the individual would cause death or serious bodily injury to another if not immediately apprehended (iii) that no less-lethal force alternatives or non-force tactics or techniques are sufficient to subdue the person, and (iv) that the officer's use of deadly force does not-create a substantial risk of serious bodily injury to any persons other than the person against whom the deadly force is directed.

New York State Assembly Memorandum in Support of Legislation Submitted

in accordance with Assembly Rule III (1)(f)

* State that for purposes of section 35.30 of the Penal Law, a person reasonably believes a use of force is necessary when (i) he or she actually holds that belief; and (ii) a reasonable person under the same circumstances would hold that belief.

* State that for purposes of section 35.30 of the Penal Law, physical force is "necessary" when there are no reasonable alternative means to effect the lawful objective and avoid the use of force or reduce the severity of the force used.

* State that for purposes of section 35.30 of the Penal Law, a threat is "imminent" when the person reasonably appears to have the present ability, opportunity, and apparent intent to immediately inflict injury.

* Establish that any level of force by a police officer or peace officer may be deemed not justified pursuant to subdivision one of section 35.30 of the Penal Law if such officer engaged in conduct that created a substantial and unjustifiable risk that force would become necessary.

* Establish that any level of force by a police officer or peace officer shall be presumptively not justified pursuant to subdivision one of this section if applied to a person who has been rendered incapable of resisting arrest.

* Withdraw the authority of a private citizen to use deadly physical force when he or she reasonably believes it is to be necessary to effect the arrest of a person who has committed murder, manslaughter in the first degree, robbery, forcible rape or forcible criminal sexual act and who is in immediate flight therefrom.

Section 2 of the bill adds three new sections to the Penal Law, section 120.75, 120.76, and 120.77. Those sections would:

* Establish the crime of excessive use of force by a police officer or peace officer in the third degree.

* Establish the crime of excessive use of force by a police officer or peace officer in the second degree.

* Establish the crime of excessive use of force by a police officer or peace officer in the first degree.

Section 3 of the bill sets forth the effective date.

JUSTIFICATION:.

The current law that justifies use of force, including lethal force, by police officers and peace officers fails to prioritize the preservation of the lives of civilians. It authorizes law enforcement to use lethal force even where an individual does not present an imminent threat of harm to the officer or another person and fails to require law enforcement to avoid the use of force through tactics including de-escalation

or verbal warnings or use lower levels of force where those alternative means of intervention are reasonable.

PRIOR LEGISLATIVE HISTORY:

None.

FISCAL IMPACT ON THE STATE:

None.

FISCAL IMPACT ON LOCALITIES:

None.

IMPACT ON THE REGULATION OF BUSINESSES AND INDIVIDUALS:

None.

IMPACT ON FINES, IMPRISONMENT, FORFEITURE OF RIGHTS OR OTHER PENAL SANCTIONS:

Establishes criminal penalties for Excessive Use of Force by a Police Office or Peace Officer in the first, second and third degrees.

EFFECTIVE DATE:

This act shall take effect immediately.

S06615 Summary:

BILL NO S06615

SAME AS SAME AS

SPONSOR PARKER

COSPNSR GIANARIS, HOYLMAN

MLTSPNSR

Amd §35.30, add §§120.75, 120.76 & 120.77, Pen L

Relates to justifying the use of force by police officers and peace officers and to the excessive use of police force.

S06615 Actions:

BILL NO S06615

05/10/2021 REFERRED TO CODES

FOP, Metro. Police Dep't Labor Comm., D.C. Police Union v. District of Columbia

United States District Court for the District of Columbia

November 4, 2020, Decided; November 4, 2020, Filed

Civil Action No. 20-2130 (JEB)

Reporter

502 F. Supp. 3d 45 *; 2020 U.S. Dist. LEXIS 206324 **; 2020 WL 6484312

FRATERNAL ORDER OF POLICE, METROPOLITAN POLICE DEPARTMENT LABOR COMMITTEE, D.C. POLICE UNION, Plaintiff, v. DISTRICT OF COLUMBIA, et al., Defendants.

Core Terms

impairment, discipline, deprivation, bargaining, contracts, rights, disciplinary procedure, contends, sworn, rational basis, pre-existing, contractual, violates, matters, courts, substantive due process, Declaration, nonpunitive, protections, Emergency, Policing, summary judgment, equal-protection, negotiation, punish, Home Rule Act, employees, personnel, punitive, alleges

Case Summary

Overview

HOLDINGS: [1]-Section 116 of the District of Columbia's Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020 did not violate the *Equal Protection Clause* because the police union's claims that the Act discriminated against sworn law enforcement personnel did not negate the plausible reason, namely accountability, for enacting § 116; [2]-The Act did not violate the *Bill of Attainder Clause, U.S. Const. art. I, § 9, cl. 3*, because the Act did not impose punishment; [3]-The Act did not violate the *Contract Clause, U.S. Const. art. I, § 10, cl. 1*, because the union had not adequately pled that any impairment of the pre-existing collective bargaining agreement was substantial.

Outcome

Motion to dismiss granted.

LexisNexis® Headnotes

Governments > Local
Governments > Employees & Officials

HN1[] **Local Governments, Employees & Officials**

Section 116 of the Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020 reserves to the city all matters pertaining to the discipline of sworn law-enforcement personnel, thereby excluding such matters from negotiation in future collective-bargaining agreements.

Governments > Local
Governments > Police Power

Labor & Employment Law > Collective Bargaining & Labor

Relations > Enforcement of Bargaining Agreements

HN2[] **Local Governments, Police Power**

Among the Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020's wide-ranging reforms — from the prohibition on the use of neck restraints by law enforcement to the establishment of a ***Police Reform*** Commission, Act at 2-3, 16-17 — is § 116, which amends the Management rights; matters subject to collective bargaining section of the District's Comprehensive Merit Personnel Act, *D.C. Code § 1-617.08*, by adding the following: (c)(1) All matters pertaining to the discipline of sworn law enforcement personnel shall be retained by management and not be negotiable. (2) This subsection shall apply to any collective bargaining agreements entered into with the Fraternal Order of Police/Metropolitan Police Department Labor Committee after September 30, 2020. Act at 12.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN3[] **Motions to Dismiss, Failure to State Claim**

Fed. R. Civ. P. 12(b)(6) provides for the dismissal of an action where a complaint fails to state a claim upon which relief can be granted. In evaluating defendants' motion to dismiss, the court must treat the complaint's factual allegations as true and must grant plaintiff the benefit of all inferences that can be derived from the facts alleged.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN4[] **Motions to Dismiss, Failure to State Claim**

Although detailed factual allegations are not necessary to withstand a *Fed. R. Civ. P. 12(b)(6)* motion, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A court need not accept as true, then, a legal conclusion couched as a factual allegation, nor inferences unsupported by the facts set out in the complaint. For a plaintiff to survive a *Rule 12(b)(6)* motion even if recovery is very remote and unlikely, the facts alleged in the complaint must be enough to raise a right to relief above the speculative level. The court may consider the facts alleged in the complaint, any documents either attached to or incorporated in the complaint, and matters of which courts may take judicial notice.

Constitutional Law > Equal Protection > Nature & Scope of Protection

HN5[] **Equal Protection, Nature & Scope of Protection**

As set out in the *Fourteenth Amendment*, the Equal-Protection Clause provides that no state shall deny to any person within its jurisdiction equal protection of the laws, and it applies to the District of Columbia via the *Fifth Amendment*. *42 U.S.C.S. § 1983* allows equal-protection claims against District. To prevail on an equal-protection claim, the plaintiff must show that the government has treated it

differently from a similarly situated party and that the government's explanation for the differing treatment does not satisfy the relevant level of scrutiny.

Constitutional Law > Equal Protection > Nature & Scope of Protection

Evidence > Burdens of Proof > Allocation

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

HN6[] **Equal Protection, Nature & Scope of Protection**

For purposes of an equal protection claim, under the highly deferential standard of rational-basis review, courts afford legislative actions a strong presumption of validity. An Act thus must be upheld if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. The plaintiff bears the burden of showing that the Act was not a rational means of advancing a legitimate government purpose.

Constitutional Law > Equal Protection > Nature & Scope of Protection

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

HN7[] **Equal Protection, Nature & Scope of Protection**

For purposes of an equal protection claim, under rational-basis review, legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data, and classifications can be, to some extent, both underinclusive and overinclusive as perfection is by no means required. Those attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it.

Constitutional Law > Equal Protection > Nature & Scope of Protection

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

HN8[] **Equal Protection, Nature & Scope of Protection**

For purposes of an equal protection claim, rational-basis review does not allow a court to second-guess the government's legislative judgments.

Constitutional Law > Congressional Duties & Powers > Bills of Attainder & Ex Post Facto Clause > Bills of Attainder

Constitutional Law > Congressional Duties & Powers > Copyright & Patent Clause

Constitutional Law > Congressional Duties & Powers > Presentment & Veto

HN9[] **Bills of Attainder & Ex Post Facto Clause, Bills of Attainder**

U.S. Const. art. I, § 9, cl. 3 states that no bill of attainder shall be passed. This rarely litigated provision prohibits Congress from enacting a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections

of a judicial trial. A law violates the clause if it (1) applies with specificity, and (2) imposes punishment.

Constitutional Law > Congressional Duties & Powers > Bills of Attainder & Ex Post Facto Clause > Bills of Attainder

HN10[] **Bills of Attainder & Ex Post Facto Clause, Bills of Attainder**

Although the traditional conception of the *Bill of Attainder Clause, U.S. Const. art. I, § 9, cl. 3*, suggests that it applies only to criminal matters, courts have not interpreted the clause so narrowly. Instead, through the second element of the test, the Constitution concerns itself with punishment more broadly defined. At that second element, the sole inquiry is whether the legislation is impermissibly punitive or permissibly burdensome, and courts weigh three factors to make that determination: (1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes; and (3) whether the legislative record evinces a congressional intent to punish. Each factor is an independent — though not necessarily decisive — indicator of punitiveness.

Constitutional Law > Congressional Duties & Powers > Bills of Attainder & Ex Post Facto Clause > Bills of Attainder

Constitutional Law > Equal Protection > Nature & Scope of Protection

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

HN11[] **Bills of Attainder & Ex Post Facto Clause, Bills of Attainder**

The second factor of the test for punishment under the *Bill of Attainder Clause, U.S. Const. art. I, § 9, cl. 3* — the so-called functional test — invariably appears to be the most important of the three, and asks the court to consider whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes. The court's task is to identify the purpose, ascertain the burden, and assess the balance between the two. Much like equal-protection analysis, the inquiry begins with the Act's purpose. Notably, however, the bill-of-attainder standard is somewhat more exacting than equal protection's rational-basis scrutiny because it demands purposes that are not merely reasonable but also nonpunitive. Punitive purposes, however rational, don't count.

Constitutional Law > Congressional Duties & Powers > Bills of Attainder & Ex Post Facto Clause > Bills of Attainder

Constitutional Law > Congressional Duties & Powers > Elections > Time, Place & Manner Restrictions

HN12[] **Bills of Attainder & Ex Post Facto Clause, Bills of Attainder**

The functional-test inquiry for punishment under the *Bill of Attainder Clause, U.S. Const. art. I, § 9, cl. 3*, examines the burden of an Act, which is balanced against the purpose. The U.S. Court of Appeals for the District of Columbia Circuit has declared that the question is not whether a burden is proportionate to the

objective, but rather whether the burden is so disproportionate that it belies any purported nonpunitive goals.

Constitutional Law > Congressional Duties & Powers > Bills of Attainder & Ex Post Facto Clause > Bills of Attainder

HN13[] **Bills of Attainder & Ex Post Facto Clause, Bills of Attainder**

In determining punishment for purposes of the *Bill of Attainder Clause, U.S. Const. art. I, § 9, cl. 3*, the court must consider whether the challenged statute falls within the historical meaning of legislative punishment. This inquiry is somewhat redundant to the functional test. The court thus double-checks its functional-test work by comparing the plaintiff's deprivation with the ready checklist of deprivations and disabilities so disproportionately severe and so inappropriate to nonpunitive ends that they unquestionably have been held to fall within the proscription of the *Bill of Attainder Clause*. This checklist includes sentences of death, bills of pains and penalties, and legislative bars to participation in specified employments or professions.

Labor & Employment Law > Collective Bargaining & Labor Relations > Labor Arbitration > Discipline, Layoffs & Terminations

HN14[] **Labor Arbitration, Discipline, Layoffs & Terminations**

Section 116 of the Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020 does not prohibit any union member from employment; it addresses only the management of disciplinary procedures in the collective bargaining agreement.

Constitutional Law > Congressional Duties & Powers > Bills of Attainder & Ex Post Facto Clause > Bills of Attainder

HN15[] **Bills of Attainder & Ex Post Facto Clause, Bills of Attainder**

In determining punishment for purposes of the *Bill of Attainder Clause, U.S. Const. art. I, § 9, cl. 3*, the court inquires whether the legislative record evinces a legislative intent to punish. This test relies upon the legislative history, context or timing of the legislation, or specific aspects of the text or structure of the disputed legislation, to check whether the purpose was to encroach on the judicial function of punishing an individual for blameworthy offenses. Given the obvious constraints on the usefulness of legislative history as an indicator of the legislative body's collective purpose, this prong by itself is not determinative in the absence of unmistakable evidence of punitive intent.

Constitutional Law > Congressional Duties & Powers > Contracts Clause > Application & Interpretation

Constitutional Law > Congressional Duties & Powers > Contracts Clause > Scope

HN16[] **Contracts Clause, Application & Interpretation**

The *Contract Clause* restricts the power of States to disrupt contractual arrangements. It provides that no state shall pass any law impairing the obligation of contracts, *U.S. Const. art. I, § 10, cl. 1*, and it applies to the District of Columbia.

Constitutional Law > Congressional Duties & Powers > Contracts Clause > Application & Interpretation

Constitutional Law > Congressional Duties & Powers > Contracts Clause > Scope

HN17[] **Contracts Clause, Application & Interpretation**

Despite the firm language of the *Contract Clause, U.S. Const. art. I, § 10, cl. 1*, not all laws affecting existing contracts fall within its scope. Indeed, the Clause must leave room for the essential attributes of sovereign power, necessarily reserved by the States to safeguard the welfare of their citizens. To determine what interference is permissible, courts employ a two-step test. The first inquiry asks whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. At this stage, courts consider three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial. The substantiality of any impairment turns on the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights. If substantiality is found, the second inquiry asks whether the state law is drawn in an appropriate and reasonable way to advance a significant and legitimate public purpose. If no such impairment is found, courts need not proceed to the second step.

Constitutional Law > Congressional Duties & Powers > Contracts Clause > Application & Interpretation

Governments > Legislation > Effect & Operation > Retrospective Operation

Constitutional Law > Congressional Duties & Powers > Contracts Clause > Scope

HN18[] **Contracts Clause, Application & Interpretation**

As to any future contracts, it is well established that the *Contract Clause, U.S. Const. art. I, § 10, cl. 1*, only concerns itself with laws that retroactively impair current contract rights. The *Contract Clause* applies only to substantial impairment of existing contracts and not prospective interference with a generalized right to enter into future contracts. The *Contract Clause* does not prohibit legislation that operates prospectively.

Constitutional Law > Substantive Due Process > Scope

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN19[] **Constitutional Law, Substantive Due Process**

The threshold question in a substantive-due-process analysis is whether the government's action deprives the plaintiff of a constitutionally protected interest — namely, life, liberty, or property. *U.S. Const. amend. V*. Substantive due process protects a narrow class of interests: those implicit in the concept of ordered liberty, and so rooted in the traditions and conscience of our people as to be ranked as fundamental. Even if a plaintiff pleads that a government action affects a protected interest, substantive due process merely guards against government power arbitrarily and oppressively exercised, and only the most egregious official

conduct can be said to be arbitrary in the constitutional sense. Indeed, a plaintiff must establish that the defendant's conduct shocks the contemporary conscience. Given this narrow scope of the doctrine, courts are generally reluctant to expand the concept of substantive due process, as there are few clear guideposts for responsible decisionmaking.

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For DISTRICT OF COLUMBIA, MURIEL BOWSER, in her official capacity as Mayor of the District of Columbia, Defendant: Pamela A. Disney, LEAD ATTORNEY, Gavin Noyes Palmer, OFFICE OF THE ATTORNEY GENERAL FOR THE DISTRICT OF COLUMBIA, Washington, DC.

Judges: JAMES E. BOASBERG, United States District Judge.

Opinion by: JAMES E. BOASBERG

Opinion

[*50] **MEMORANDUM OPINION**

The death of George Floyd in Minneapolis this past summer galvanized nationwide protests regarding police misconduct. It also precipitated debate in different cities about police accountability and potential avenues of reform. As part of this wave, the District of Columbia in July enacted the Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020. [*51] *HN1*[↑] Section 116 of the Act reserves to the city all matters pertaining to the discipline of sworn law-enforcement personnel, thereby excluding such matters from negotiation in future collective-bargaining agreements. The Union that represents Metropolitan Police Department officers then filed [**2] this suit against the District of Columbia and Mayor Muriel Bowser, alleging that Section 116 violates the *Equal Protection*, Bill of Attainder, *Contract*, and *Due Process Clauses of the Constitution* as well as D.C.'s Home Rule Act. The Union now asks this Court for summary judgment on all claims, while the District cross-moves for dismissal or, in the alternative, for summary judgment. Believing that the city has the better position here, the Court will dismiss the case.

I. Background

The Council of the District of Columbia passed the Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020 on an emergency basis, see ECF No. 3-4 (Act), in response to this summer's protests of "injustice, racism, and police brutality against Black people and other people of color." ECF No. 1 (Compl.), ¶ 8 (quoting Act at 2); see also ECF No. 9-1 (Def. MTD) at 34. Mayor Bowser signed the Act into law on July 22, 2020. See Compl., ¶ 7; Act at 1. *HN2*[↑] Among the Act's wide-ranging reforms — from the prohibition on the use of neck restraints by law enforcement to the establishment of a ***Police Reform*** Commission, see Act at 2-3, 16-17 — is Section 116, which amends the "Management rights; matters subject to collective bargaining" section of the District's Comprehensive Merit Personnel [**3] Act, see *D.C. Code § 1-617.08*, by adding the following:

(c)(1) All matters pertaining to the

discipline of sworn law enforcement personnel shall be retained by management and not be negotiable.

(2) This subsection shall apply to any collective bargaining agreements entered into with the Fraternal Order of Police/Metropolitan Police Department Labor Committee after September 30, 2020.

Act at 12.

Prior to the enactment of Section 116, and since the passage of the CMPA in 1979, the Union had negotiated with the city collective-bargaining agreements governing, *inter alia*, the disciplinary procedures that apply to members of the Union. See Compl., ¶¶ 11, 14. Under the most recent CBA, effective through September 30, 2020, and automatically renewed for oneyear periods thereafter, Article 12 covers issues of Discipline. See ECF No. 3-5 (CBA) at 1, 13, 41.

Plaintiff Fraternal Order of Police, Metropolitan Police Department Labor Committee, D.C. Police Union filed its Complaint on August 5, 2020, alleging that Section 116 deprives its members of their rights under the *Equal Protection*, Bill of Attainder, *Contract*, and *Due Process Clauses of the Constitution* and violates *D.C.'s Home Rule Act*. See Compl. at 1; *D.C. Code § 1-203.02*. Bringing its constitutional claims via *42 U.S.C. § 1983*, the Union seeks declaratory and injunctive relief **[**4]** "[p]ermanently enjoining the approval, enactment and enforcement of Section 116 of the Act," id. at 9-12, 14-16, and has moved for summary judgment on all claims. See ECF No. 3-1 (Pl. MSJ). Opposing that Motion, the District filed a Cross-Motion to Dismiss or for Summary Judgment. The parties' Motions are now ripe for resolution.

II. Legal Standard

Because the Court dismisses all claims, it need only set forth that standard. *HN3*[↑] *Federal Rule of Civil Procedure 12(b)(6)* **[*52]** provides for the dismissal of an action where a complaint fails to "state a claim upon which relief can be granted." In evaluating Defendants' Motion to Dismiss, the Court must "treat the complaint's factual allegations as true . . . and must grant plaintiff 'the benefit of all inferences that can be derived from the facts alleged.'" *Sparrow v. United Air Lines, Inc., 216 F.3d 1111, 1113, 342 U.S. App. D.C. 268 (D.C. Cir. 2000)* (quoting *Schuler v. United States, 617 F.2d 605, 608, 199 U.S. App. D.C. 23 (D.C. Cir. 1979)*).

HN4[↑] Although "detailed factual allegations" are not necessary to withstand a *Rule 12(b)(6)* motion, *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Twombly, 550 U.S. at 570*). A court need not accept as true, then, "a legal conclusion couched as a factual allegation," *Trudeau v. FTC, 456 F.3d 178, 193, 372 U.S. App. D.C. 335 (D.C. Cir. 2006)* (quoting *Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986)*), nor "inferences . . . unsupported by the facts set out in the complaint." Id. (quoting *Kowal v. MCI Commc'ns Corp., 16 F.3d 1271, 1276, 305 U.S. App. D.C. 60 (D.C. Cir. 1994)*). For a plaintiff to survive a 12(b)(6) **[**5]** motion even if "recovery is very remote and unlikely," *Twombly, 550 U.S. at 556* (quoting *Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)*), the facts alleged in the

complaint "must be enough to raise a right to relief above the speculative level." *Id. at 555*. The Court may consider "the facts alleged in the complaint, any documents either attached to or incorporated in the complaint[,] and matters of which [courts] may take judicial notice." *Equal Emp't Opportunity Comm'n v. St. Francis Xavier Parochial Sch., 117 F.3d 621, 624, 326 U.S. App. D.C. 67 (D.C. Cir. 1997)*. Among other matters of public record, the Court here takes notice of the CBA and the Act, even though they are attached to Plaintiff's Motion rather than to its Complaint, as neither party questions their authenticity or admissibility.

III. Analysis

The Union alleges that Section 116's violations of the Constitution are actionable via *42 U.S.C. § 1983*, which provides a remedy for the deprivation of such rights. *DuBerry v. District of Columbia, 824 F.3d 1046, 1051, 423 U.S. App. D.C. 35 (D.C. Cir. 2016)*. It further contends that those same deprivations violate D.C.'s Home Rule Act. The Court thus considers each constitutional claim in turn and concludes with the Home Rule Act challenge.

A. Equal Protection

According to the Union, the Act violates the *Equal Protection Clause of the Fifth* and *Fourteenth Amendments* because it discriminatorily restricts the bargaining rights of sworn lawenforcement officers, but no other District employee or labor union, and lacks any rational connection to a legitimate government **[**6]** objective. See Compl., ¶¶ 17-24. The District, of course, contends otherwise. See Def. MTD at 11.

HN5[↑] As set out in the *Fourteenth Amendment*, the equal-protection clause provides that "no state shall deny to any person within its jurisdiction equal protection of the laws," and it applies to the District via the *Fifth Amendment*. *Women Prisoners of D.C. Dep't of Corr. v. D.C., 93 F.3d 910, 924, 320 U.S. App. D.C. 247 (D.C. Cir. 1996)*; see also *Jo v. District of Columbia, 582 F. Supp. 2d 51, 60 (D.D.C. 2008)* (*42 U.S.C. § 1983* allows equal-protection claims against District). **[*53]** "To prevail on an equal-protection claim, the plaintiff must show that the government has treated it differently from a similarly situated party and that the government's explanation for the differing treatment 'does not satisfy the relevant level of scrutiny.'" *Muwekma Ohlone Tribe v. Salazar, 708 F.3d 209, 215, 404 U.S. App. D.C. 131 (D.C. Cir. 2013)* (quoting *Settles v. U.S. Parole Comm'n, 429 F.3d 1098, 1102, 368 U.S. App. D.C. 297 (D.C. Cir. 2005)*). Here, the parties agree that rational-basis review applies. See Compl., ¶ 23; Def. MTD at 14-20. *HN6*[↑] Under that "highly deferential" standard, *Dixon v. District of Columbia, 666 F.3d 1337, 1342, 399 U.S. App. D.C. 70 (D.C. Cir. 2011)*, courts afford legislative actions a "strong presumption of validity." *Hedgepeth v. Wash. Metro. Area Transit Auth., 386 F.3d 1148, 1153, 1156, 363 U.S. App. D.C. 260 (D.C. Cir. 2004)*. The Act thus "must be upheld . . . if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Cannon v. District of Columbia, 717 F.3d 200, 207, 405 U.S. App. D.C. 141 (D.C. Cir. 2013)* (quoting *Hettinga v. United States, 677 F.3d 471, 478-79, 400 U.S. App. D.C. 218 (D.C. Cir. 2012)*). The Union "bear[s] the burden of showing that the [Act] [was] 'not a rational means of advancing a legitimate government purpose.'" Id. (quoting *Hettinga, 677 F.3d at 478-79*).

The District explains that the Act aims to address **[**7]** "police misconduct" and to "enhance the police accountability and transparency through the implementation of numerous reforms and best practices," including Section 116. See Def. MTD at 16-17 (citing Comprehensive Policing and Justice Reform Second Emergency Declaration Resolution of 2020, PR 23-0872, § 2(b) (D.C. July 7, 2020)); see also Comprehensive Policing and Justice Reform Emergency Declaration Resolution of 2020, PR 23-0826, § 2(j) (D.C. June 6, 2020). Ensuring accountability of public employees — and particularly of police officers given their wide-ranging powers — is certainly a legitimate goal, and the Union does not contend otherwise.

Instead, the Union alleges that, "for the sole purpose of discriminating against a disfavored class," the Act "distinguished and separated sworn law enforcement personnel into a new, distinct class, separating them from every other District government employee." Compl., ¶ 22. The Act lacks a rational basis, according to the Union, because it "serves the illegitimate objective of punishing and discriminating against a class of people that are presently disfavored politically," id. ¶ 23, and "does nothing more than give legal effect to the [private] biases and anti-police **[**8]** rhetoric currently being expressed by citizens." Pl. MSJ at 9-10 (citing *City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 449, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985)*). The lack of "findings, data, studies or research" to support Section 116, the Act's passage on an emergency basis in response to protests, and the Council's references to police misconduct in other jurisdictions (both in the Act and its meetings) show, the Union maintains, the lack of a legitimate interest. Id. at 9-10; ECF No. 11 (Pl. Reply) at 6-8.

HN7[↑] Under rational-basis review, however, "legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data," *FCC v. Beach Commc'n., Inc., 508 U.S. 307, 315, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993)*, and classifications can be, "to some extent[,] both underinclusive and overinclusive" as "perfect[ion] is by no means required." *Vance v. Bradley, 440 U.S. 93, 108, 99 S. Ct. 939, 59 L. Ed. 2d 171 (1979)* (citation omitted); see also *Beach Commc'n, Inc., 508 U.S. at 316*. The Union's contentions thus do not negate that "plausible reason[]" — namely, accountability — for **[*54]** enacting Section 116. *Beach Commc'n, Inc., 508 U.S. at 313-14* (quoting *U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179, 101 S. Ct. 453, 66 L. Ed. 2d 368 (1980)*); *id. at 315* ("[T]hose attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it.") (internal quotation marks and citation omitted); *Hedgepeth, 386 F.3d at 1156*. This case is thus unlike *City of Cleburne*, on which the Union relies to argue that Section 116 merely codifies private biases, as there, **[**9]** "the record [did] not reveal any rational basis" for the government's action. See *473 U.S. at 448* (emphasis added). To the extent that the Union asks this Court to find that the Council embraced protesters' anti-police rhetoric, the legislative history that the Union cites provides no basis for the Court to do so. See Pl. Reply at 6-7.

The Union raises a new argument in its Reply, but even were the Court to consider this late-breaking contention, it would not be viable. Plaintiff there maintains that the District lacks a rational basis for the Act's differential treatment of the Union from "other public employees and

unions that engage in the same police-related activity" — namely, the Fraternal Order of Police unions that represent the public employees of the District's Department of Corrections, Housing Authority, Department of General Services' Protective Services Division, and Department of Youth Rehabilitation Services. Id. at 3. According to the Union, there is no rational basis to treat the members of these four correctional- and law-enforcement-officer unions differently, as they are "equally responsible for public safety and given extraordinary powers to do their job," id. at 4, and can, like MPD officers, **[**10]** "make arrests, . . . carry non-lethal and lethal weapons, and . . . use physical force on the District's citizens." Id. at 3.

As the District explains, however, the members of those other unions "do not have the same accountability to the general public, or the same broad jurisdiction, as MPD officers do." ECF No. 14 (Def. Reply) at 4. For example, the Department of Corrections is responsible only for the "safekeeping, care, protection, instruction, and discipline of all persons" detained at specific District facilities, see *D.C. Code § 24-211.02(a)*, and the Protective Services Division's special police provide security in a limited area, at District-owned and leased properties. See Dep't of Gen. Servs., DGS Protective Services Division, https://bit.ly/3oT5htV (last visited Nov. 2, 2020). MPD officers' unique accountability, scope of powers, and jurisdiction thus support the position that there is a rational basis for the line that Section 116 draws between them and members of those other unions.

The only remaining question, then, is whether Section 116's means — *viz.*, making all matters pertaining to the discipline of sworn law-enforcement personnel non-negotiable in future collective-bargaining agreements — is rationally connected to **[**11]** accountability. The District explains that, "[b]y ensuring that management's right to discipline sworn officers is unencumbered by the CBA negotiations, the District can improve police accountability." Def. MTD at 17; see also id. at 8 ("Collective bargaining agreements are an essential tool for workers to negotiate and receive fair compensation, benefits, and workplace accommodations, but they should not be used to shield employees from accountability, particularly those employees who have as much power as police officers.") (emphasis removed) (quoting Mendelson Amendment to Comprehensive Policing and Justice Reform Emergency Amendment Act of 2020, B. 23-774, at 2, **[*55]** https://bit.ly/3jQXd9r (last visited Nov. 2, 2020)). Further explanation is not required. See *Hedgepeth, 386 F.3d at 1156* (upholding government action "if there is any reasonably conceivable state of facts that could provide a rational basis") (citation omitted).

The Union again disputes this conclusion. See Pl. MSJ at 11-13. Beyond recycling its arguments for why the District lacks a legitimate interest, see Pl. Reply at 6-8 (taking issue with lack of studies and Council's discussion of out-of-District police misconduct and deaths), the Union primarily posits **[**12]** that the current disciplinary procedures are more effective than Section 116 will be at ensuring accountability. Id. at 8. The Union argues, for example, that the present disciplinary procedures better comport with due process and decrease the likelihood that an officer's discipline will be "overturned based on an error or a due process violation." Id. *HN8*[ ] Rational-basis review does not, however, allow this Court to "second-guess [the District's] legislative judgments." *Hedgepeth, 386 F.3d at 1157*. Even if the judiciary were

authorized to scrutinize "the wisdom of [the District's] policy choice," id., the Court does not have the factual basis here to do so. In other words, since the city has not yet promulgated new disciplinary procedures pursuant to Section 116 and neither party has explained how discipline will be addressed going forward, the Court has no way of making an informed comparison.

It will thus dismiss the equal-protection claim.

B. Bill of Attainder

HN9[↑] The Union next alleges that the Act violates *Article I, section 9, clause 3 of the Constitution*, which states, "No Bill of Attainder . . . shall be passed." This rarely litigated provision "prohibits Congress from enacting 'a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision **[**13]** of the protections of a judicial trial.'" *Foretich v. United States, 351 F.3d 1198, 1216, 359 U.S. App. D.C. 54 (D.C. Cir. 2003)* (quoting *Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 468, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977)*). The Court assumes, as the parties do, that the clause applies to the District of Columbia. A law violates the clause "if it (1) applies with specificity, and (2) imposes punishment." *Kaspersky Lab, Inc. v. U.S. Dep't of Homeland Sec., 909 F.3d 446, 454, 439 U.S. App. D.C. 20 (D.C. Cir. 2018)* (quoting *Foretich, 351 F.3d at 1217*). The Union asserts that the Act does so "because it specifically targets one group — sworn law enforcement — and it imposes punishment on that group," Pl. MSJ at 13, by "depriv[ing] [it] of a right previously enjoyed, namely the right to collectively bargain with management over discipline." Id. at 15; see also Compl., ¶ 27, 29. Because the District argues only that the Union's claim fails at the second element, see Def. MTD at 21-22, the Court narrows its attention to whether the Act imposes punishment and concludes that it does not.

HN10[↑] Although the traditional conception of this constitutional provision suggests that it applies only to criminal matters, courts have not interpreted the clause so narrowly. *Kaspersky Lab, Inc., 909 F.3d at 454*. Instead, through the second element of the test, the Constitution concerns itself with punishment more broadly defined. Id. At that second element, the sole inquiry is whether the legislation is impermissibly punitive or permissibly burdensome, and **[**14]** courts weigh three factors to make that determination: "(1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, 'viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes'; and (3) whether the legislative record 'evinces a congressional intent to punish.'" *Selective Serv. Sys. v. Minn. Pub. Interest Rsch. Group, 468 U.S. 841, 852, 104 S. Ct. 3348, 82 L. Ed. 2d 632 (1984)* (quoting *Nixon, 433 U.S. at 473, 475-76, 478)*; see also *Kaspersky Lab, Inc., 909 F.3d at 455*. Each factor is an "independent — though not necessarily decisive — indicator of punitiveness." *Foretich, 351 F.3d at 1218*.

The Union contends that "[t]hrough the Act, the D.C. Council has effectively declared that sworn law enforcement officers in the District are guilty of racism and police brutality, and has stripped away their collective bargaining rights over discipline as punishment." Pl. MSJ at 13-14. While rhetorically stirring, neither that language nor the rest of the Union's Motion explains how the Bill of Attainder tests apply to its claim. Even if this Court considers the new

arguments that Plaintiff raises for the first time in its Reply, see Pl. Reply at 9-14, dismissal remains appropriate. Because the Union focuses on the second factor and because "compelling proof on this [factor] may **[**15]** be determinative," *Foretich, 351 F.3d at 1218*, the Court begins its analysis there before turning to the historical and motivational inquiries.

1. The Functional Test

HN11[↑] The second factor — "the so-called 'functional test' — invariably appears to be the most important of the three," id. (quoting *BellSouth Corp. v. FCC, 162 F.3d 678, 683, 333 U.S. App. D.C. 253 (D.C. Cir. 1998)* (BellSouth II)) (cleaned up), and asks the Court to consider "whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive **[*56]** legislative purposes." Id. (quoting *Nixon, 433 U.S. at 475-76*). The Court's task is to "identify the purpose, ascertain the burden, and assess the balance between the two." *Kaspersky Lab, Inc., 909 F.3d at 455*.

Much like equal-protection analysis, the inquiry begins with the Act's purpose. Notably, however, the bill-of-attainder standard is somewhat "more exacting" than equal protection's rational-basis scrutiny "because it demands purposes that are not merely reasonable but [also] nonpunitive." *BellSouth Corp. v. FCC, 144 F.3d 58, 67, 330 U.S. App. D.C. 109 (D.C. Cir. 1998)* (BellSouth I) ("Punitive purposes, however rational, don't count."). The non-punitive purpose, according to the District, is "enhanc[ing] police accountability." Comprehensive Policing and Justice Reform Emergency Declaration Resolution of 2020, PR 23-0826, § 2(j) (D.C. June 6, 2020); see also Second **[**16]** Emergency Declaration Resolution, PR 23-0872, § 2(b) (incorporating intent of first resolution); Def. MTD at 34 n.5. In response, beyond reviving arguments that this Court has already addressed about the lack of hearings and evidence, the Act's purpose being "rooted in the demands of protestors," and the Act's exclusion of similarly situated unions, see Pl. MSJ at 15- 16; Pl. Reply at 10-12; *supra* at 6-7, Plaintiff raises two others. First, it contends that the "Council's intent is to deprive the D.C. Police Union of due process so that police officers can be fired summarily and without any procedural safeguards." Pl. MSJ at 16. But Plaintiff cites nothing to support this claim, and the procedural protections that the District cites and that remain in the D.C. Code indicate otherwise. See, e.g., *D.C. Code § 5-1031(a-1)(1)* (90-day time limit on commencement of discipline for MPD officers); id. *§ 1-616.54(c)-(d)(4)* (requiring "written notice" that informs employee of "right to respond, orally or in writing, or both" when placed on administrative leave); id. *§ 1-616.51* (requiring issuance of rules to guarantee "[p]rior written notice of grounds" **[*57]** for discipline and "opportunity to be heard").

Separately, the Union attempts to reframe the Act's purpose as solely **[**17]** addressing "use of force" incidents. See Pl. Reply at 10-12. It maintains that Section 116 is both underinclusive (in that it addresses disciplinary procedures in the CBA but no other disciplinary procedures required of MPD) and overinclusive (in that it eliminates all disciplinary protections in the CBA when a more tailored approach could address use-of-force incidents alone). Id. The Court sees no basis to conclude that use-of-force incidents were the sole concern of Section 116. The Act

does reference such incidents outside the District, see Act at 2 ("On May 25, 2020, Minneapolis Police Department officer Derek Chauvin murdered George Floyd by applying a neck restraint to Floyd with his knee for 8 minutes and 46 seconds."), but it does so in the subsection that declares neck restraints to be "lethal and excessive force." Id. While the emergency declaration does acknowledge the "national movement around racism in policing [and the] use of force," moreover, it also discusses more generally the "lack of police accountability and transparency" and the "troubling relationship" many District residents have with law enforcement. See Def. MTD at 7 (citing Emergency Declaration Resolution, PR23-0826, § 2(j)). The Union's **[**18]** cherry-picked quotes thus do not support narrowing the purpose of the Act to addressing use-of-force incidents alone.

HN12[↑] Next, the functional-test inquiry examines the burden of the Act, which is balanced against the purpose. The Circuit has declared that "the question is not whether a burden is proportionate to the objective, but rather whether the burden is so disproportionate that it 'belies any purported nonpunitive goals.'" *Kaspersky Lab, Inc., 909 F.3d at 455* (emphasis added) (quoting *Foretich, 351 F.3d at 1222*). The Union never states the weight of the burden that Section 116 imposes, but given its contentions that the "burden . . . is grossly disproportionate to [the Act's] purported nonpunitive purpose," Pl. Reply at 12, the Court assumes that the Union believes the burden to be great. The Court cannot agree, however, as the Act prohibits only the Union's negotiation of procedures related to disciplinary decisions in future CBAs, which are agreements that may never even come to fruition. See Def. Reply at 11-12; see Pl. Reply at 17 (acknowledging that future CBAs are not guaranteed). Even if the burden is somewhat significant, the Court sees no basis to conclude that it is "so disproportionate" to the District's stated goal of enhancing police accountability **[**19]** that the Act itself is punishment. *Kaspersky Lab, Inc., 909 F.3d at 455*.

2. The Historical Test

HN13[↑] The Court must next consider "whether the challenged statute falls within the historical meaning of legislative punishment." *Selective Serv. Sys., 468 U.S. at 852*. As the Circuit has acknowledged, this inquiry is somewhat redundant to the functional test. *Kaspersky Lab, Inc., 909 F.3d at 460*. The Court thus "double-check[s] [its] functional-test work by comparing" the Union's deprivation with the "ready checklist of deprivations and disabilities so disproportionately severe and so inappropriate to nonpunitive ends that they unquestionably have been held to fall within the proscription of [the *Bill of Attainder Clause*]." Id. (citing *Nixon, 433 U.S. at 473*). "This checklist includes sentences of death, bills of pains and penalties, and legislative bars to participation in specified employments or professions." *Foretich, 351 F.3d at 1218*.

The Union acknowledges that its claimed deprivation is not on that list. See **[*58]** Pl. Reply at 12-13. Rather, it argues that the *Bill of Attainder Clause* is concerned with "prevent[ing] [the government] from circumventing the clause by cooking up newfangled ways to punish disfavored individuals or groups." *Id. at 12-13* (quoting *Kaspersky, 909 F.3d at 454*). To the extent that those "newfangled" manners of punishment are the concern of the historical inquiry, rather than the functional or motivational tests, **[**20]** the

Union's argument is not persuasive. Relying on *United States v. Brown, 381 U.S. 437, 85 S. Ct. 1707, 14 L. Ed. 2d 484 (1965)*, in which the Supreme Court invalidated legislation that prohibited any Communist Party member from serving as an officer of any labor union, the Union argues that the *Bill of Attainder Clause* concerns itself with "laws that infringe upon a person's employment." Pl. Reply at 13. ***HN14***[↑] But Section 116 does not prohibit any Union member from employment; it addresses only the management of disciplinary procedures in the CBA. The Court finds no basis to conclude that the historical inquiry sees those great differences as analogous.

3. The Motivational Test

HN15[↑] Finally, the Court "inquire[s] whether the legislative record evinces a [legislative] intent to punish." *Foretich, 351 F.3d at 1225* (quoting *Nixon, 433 U.S. at 478*). This test relies upon the "legislative history, context or timing of the legislation, or specific aspects of the text or structure of the disputed legislation," to check whether the purpose was "to 'encroach[] on the judicial function of punishing an individual for blameworthy offenses.'" Id. (quoting *Nixon, 433 U.S. at 478*) (alteration in original). "Given the obvious constraints on the usefulness of legislative history as an indicator of [the legislative body's] collective purpose, this prong by itself is not determinative in the **[**21]** absence of 'unmistakable evidence of punitive intent.'" Id. (quoting *Selective Serv. Sys., 468 U.S. at 856 n.15*).

The Union points to no such "unmistakable evidence." Rather, it contends that the Act's passage on an "emergency" basis "without regard to data-supported evidence, independent inquiry, or clear-headed investigation," Pl. Reply at 14, and merely to appease "protestors espousing anti-police rhetoric," id. at 6, shows an intent to punish members of the Union. The Union points to statements of various Councilmembers, in which they acknowledged that "issues of brutality" were not prevalent in the District, id. at 7 (citing statement of Councilmember Anita Bonds), and explained that they felt a need to respond to "the outpouring of community demands for fundamental changes to the police." Id. (citing statement of Councilmember David Grosso). The cited history also indicates that the Act was passed on an emergency basis, given both an outpouring of communications from District residents and the need for "bold action" to "pare . . . back" "violence and racism" in policing. Id. (citing statement of Councilmember David Grosso). Standing on their own, these statements do not "evince punitive intent," *Foretich, 351 F.3d at 1225* (quoting *BellSouth II, 162 F.3d at 690*), or hint at the District's **[**22]** concerns of accountability being a "smoke screen for some invidious purpose." *Kaspersky Lab, Inc., 909 F.3d at 459* (quoting *BellSouth II, 162 F.3d at 689*).

Plaintiff's bill-of-attainder challenge, consequently, does not get off the ground.

C. *Contract Clause*

HN16[↑] The *Contract Clause* "restricts the power of States to disrupt contractual arrangements." *Sveen v. Melin, 138 S. Ct. 1815, 1821, 201 L. Ed. 2d 180 [*59] (2018)*. It provides that "[n]o state shall . . . pass any . . . Law impairing the Obligation of Contracts," *U.S. Const. Art. I, § 10, cl. 1*, and it applies to the District. *Washington Teachers' Union Local No. 6, Am. Fed. of Teachers, AFL-CIO v. Bd. of*

Educ. of D.C., 109 F.3d 774, 778, 324 U.S. App. D.C. 1 (D.C. Cir. 1997).

HN17[↑] Despite the firm language of the constitutional provision, not all laws affecting existing contracts fall within its scope. Indeed, the Clause must leave room for the "'essential attributes of sovereign power,' . . . necessarily reserved by the States to safeguard the welfare of their citizens." *U.S. Trust Co. v. New Jersey, 431 U.S. 1, 21, 97 S. Ct. 1505, 52 L. Ed. 2d 92 (1977)* (quoting *Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 435, 54 S. Ct. 231, 78 L. Ed. 413 (1934)*). To determine what interference is permissible, courts employ a two-step test. *Sveen, 138 S. Ct. at 1821-22*. The first inquiry asks "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." *Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244, 98 S. Ct. 2716, 57 L. Ed. 2d 727 (1978)*. At this stage, courts consider "three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." *Gen. Motors Corp. v. Romein, 503 U.S. 181, 186, 112 S. Ct. 1105, 117 L. Ed. 2d 328 (1992)*. The substantiality of any impairment turns on "[t]he extent to **[**23]** which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights." *Sveen, 138 S. Ct. at 1822*. If substantiality is found, the second inquiry asks "whether the state law is drawn in an 'appropriate' and 'reasonable' way to advance 'a significant and legitimate public purpose." Id. (quoting *Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 411-12, 103 S. Ct. 697, 74 L. Ed. 2d 569 (1983)*). If, as here, no such impairment is found, courts need not proceed to the second step. *Sveen, 138 S. Ct. at 1822*. Because the parties have a pre-existing relationship — namely, the CBA that was in effect when the Mayor signed the Act, see Compl., ¶ 34; see also *Sveen, 138 S. Ct. at 1822* (considering only "pre-existing contracts" and "pre-existing contractual arrangements") — their disagreements center around the second and third components of the first inquiry.

In looking at whether the Act impairs the contractual relationship (component two), the Court notes that Section 116 is prospective, applying only to CBAs entered into after the one at issue expired on September 30, 2020. The District thus asks for dismissal, explaining that the "*Contract Clause*'s restriction on impairments of the obligations in contracts only applies to impairments of the obligations in existing contracts, not impairments **[**24]** of the obligations in any future contract." Def. MTD at 28 (citing *McCracken v. Hayward, 43 U.S. (2 How.) 608, 612, 11 L. Ed. 397 (1844)*, and *Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 262, 6 L. Ed. 606 (1827)*). That line between existing and prospective contracts is somewhat blurred in this case, however, because the preexisting CBA makes promises about future CBAs. See Pl. MSJ at 18-19. Specifically, that CBA guarantees that "[t]he current Article 12" — which covers "Discipline" — "shall be incorporated into any successor [CBA]." CBA at 14. Relying on this provision, the Union asks this Court to conclude that Section 116 "substantially impair[s] the current CBA and all future collective bargaining agreements entered into between the parties." Pl. MSJ at 18-19.

HN18[↑] As to any future contracts, it is well established that that *Contract Clause* **[*60]** only concerns itself with laws that retroactively impair current contract rights. See, e.g., *U.S. Trust Co., 431 U.S. at 18 n.15* (finding "States

undoubtedly had the power to repeal the covenant prospectively") (citing *Ogden, 25 U.S. (12 Wheat) 213, 6 L. Ed. 606*); *Powers v. New Orleans City, No. 13-5993, 2014 U.S. Dist. LEXIS 47772, 2014 WL 1366023, at *4 (E.D. La. Apr. 7, 2014)* ("[T]he *Contract Clause* applies only to substantial impairment of existing contracts and not prospective interference with a generalized right to enter into future contracts."), aff'd sub nom. *Powers v. United States, 783 F.3d 570 (5th Cir. 2015)*; *Robertson v. Kulongoski, 359 F. Supp. 2d 1094, 1100 (D. Or. 2004)* ("The *Contract Clause* does not prohibit legislation that operates prospectively."), aff'd, *466 F.3d 1114 (9th Cir. 2006)*. The Court thus does not consider the **[**25]** Act's relationship to future CBAs.

The harder question is whether, as the Union contends, the Act impairs the pre-existing CBA. As the District points out, at least one court has been skeptical of and rejected claims that laws with prospective effect impair the perpetual promises of pre-existing contracts. See Def. MTD at 30; *Local Div. 589, Amalgamated Transit Union, AFL-CIO, CLC v. Massachusetts, 666 F.2d 618, 637-38 (1st Cir. 1981))* (finding no *Contract Clause* problem where state legislation eliminated "provisions of contract that provide for indefinite (or perpetual) extension (or renewal) of the contract's terms"). Notably, the Union cites no caselaw holding that the *Contract Clause* constitutionalizes pre-existing contracts' promises about future contracts. This Court is thus similarly hesitant to conclude that Section 116 infringes the CBA.

In any event, the Court agrees with the District that the Union has not adequately pled that any impairment of the pre-existing CBA is substantial (component three). The Union contends that the removal of the disciplinary protections from Article 12 meets this requirement, see Pl. MSJ at 18; see also Compl., ¶ 37, but it has not explained how the new disciplinary procedures differ from what Article 12 had guaranteed. Nor is the clear that the Union could, given that the District has not yet **[**26]** implemented new procedures or indicated whether any beyond those in the CMPA will be forthcoming. Nor has the Union pled facts to show that the inclusion of Article 12 in future CBAs "substantially induced" it "to enter the contract," *City of El Paso v. Simmons, 379 U.S. 497, 514, 85 S. Ct. 577, 13 L. Ed. 2d 446 (1965)*, that Article 12's removal constitutes a "serious disruption" of its expectations, *U.S. Trust Co., 431 U.S. at 19 n.17*, or that the change is to "an area where the element of reliance [is] vital." *Allied Structural Steel Co., 438 U.S. at 246* (finding legislative changes to pension-plan funding substantial).

The Court thus dismisses this claim, too.

D. Substantive Due Process

Deploying the final arrow in its constitutional quiver, the Union takes aim at Section 116 as a deprivation of substantive due process. But dismissal is again appropriate because, as the District notes, that doctrine does not recognize the Union's claimed interests; moreover, any deprivation of those interests is not unconstitutionally arbitrary. See Def. MTD at 38-41.

HN19[↑] The threshold question in a substantive-due-process analysis is whether the government's action deprives the plaintiff of a constitutionally protected interest — namely, "life, liberty, or property." *U.S. Const. amend. V*. Substantive due process protects a narrow class of interests: those "implicit in the concept of ordered liberty," **[**27]** *Palko v.*

Connecticut, 302 U.S. 319, 325, 58 S. Ct. 149, 82 L. Ed. 288 (1937), and "so rooted in the traditions and **[*61]** conscience of our people as to be ranked as fundamental." *Reno v. Flores, 507 U.S. 292, 303, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993)* (quoting *United States v. Salerno, 481 U.S. 739, 751, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987)*). Even if a plaintiff pleads that a government action affects a protected interest, substantive due process merely guards against "government power arbitrarily and oppressively exercised," *Jefferson v. Harris, 285 F. Supp. 3d 173, 184 (D.D.C. 2018)* (quoting *County of Sacramento v. Lewis, 523 U.S. 833, 846, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998)*), and "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'" *County of Sacramento, 523 U.S. at 846* (quoting *Collins v. City of Harker Heights, 503 U.S. 115, 129, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992)*). Indeed, a plaintiff must establish that the defendant's conduct "shock[s] the contemporary conscience." *Harvey v. District of Columbia, 798 F.3d 1042, 1049, 418 U.S. App. D.C. 321 (D.C. Cir. 2015)* (quoting *Estate of Phillips v. District of Columbia, 455 F.3d 397, 403, 372 U.S. App. D.C. 312 (D.C. Cir. 2006)*). Given this narrow scope of the doctrine, courts are generally "reluctant to expand the concept of substantive due process," as there are few clear "guideposts for responsible decisionmaking." *Collins, 503 U.S. at 125*. The Court is similarly unwilling to do so in this case.

The Union contends that Section 116 "violates the substantive due process rights of the D.C. Police Union and its members to bargain for terms inextricably linked to their employment . . . as well as their property right to employment . . . ." Pl. MSJ at 19; see also Compl., ¶¶ 42, 44. In briefing, it clarifies its "right to bargain" claim: the CMPA "creates a property interest" that Section 116 infringes by removing the collectively-bargained-for **[**28]** procedural safeguards. See Pl. MSJ at 20 (citing *Fonville v. District of Columbia, 448 F. Supp. 2d 21, 26-27 (D.D.C. 2006)*) (discussing procedural due process). Plaintiff cites no caselaw to show that this right to collectively-bargained-for disciplinary procedures is "so rooted in the traditions and conscience of our people as to be ranked as fundamental" for substantive-due-process purposes. Cf. *Range v. Douglas, 763 F.3d 573, 588 n.6 (6th Cir. 2014)* (explaining that substantive due process protects "narrower" class of interests than procedural, and "[m]ost state-created rights that qualify for procedural due process protections do not rise to the level of substantive due process protection"); *Local 342, Long Island Pub. Serv. Employees, UMD, ILA, AFL-CIO v. Town Bd. of Huntington, 31 F.3d 1191, 1196 (2d Cir. 1994)* (finding "simple, state-law contractual rights, without more, [not] worthy of substantive due process protection" because they are "not the type of important interests" that have been recognized) (internal citation and quotation marks omitted). Even assuming substantive due process recognizes the right to government employment and continued employment as fundamental interests, Section 116 does not affect Union members' employment status. See Def. MTD at 38. Rather, it simply removes "matters pertaining to the discipline of sworn law enforcement personnel" from the pile of bargaining chips. See Act at 12.

To the extent that the Union argues **[**29]** that there is "no rational connection" between the District's action and its asserted government interest, the Union has "fallen far short of meeting its burden of demonstrating" as much. *Wash. Teachers' Union Local No. 6, American*

Fed. of Teachers, AFL-CIO v. Bd. of Educ. of the D.C., 109 F.3d 774, 781, 324 U.S. App. D.C. 1 (D.C. Cir. 1997) (quoting *Harrah Indep. Sch. Dist. v. Martin, 440 U.S. 194, 198, 99 S. Ct. 1062, 59 L. Ed. 2d 248 (1979)*). As this Court explained in considering the Union's equal-protection **[*62]** challenge, its claim that Section 116 lacks a rational basis in untenable. See *supra* at 5-9. Dismissal is thus warranted.

E. Home Rule Act

Finally, while the Union's Complaint lists just four counts, it can liberally be read to also state a violation of the District's Home Rule Act. See Compl., ¶¶ 20, 28, 33, 41. *Section 1-203.02* of that Act provides that "the legislative power of the District shall extend to all rightful subjects of legislation within the District consistent with the Constitution . . . ." The Court dismisses this claim because the Union's Home Rule Act contentions rise and fall with its constitutional claims. See Pl. MSJ at 21 (contending that "the constitutional violations" "also constitute violations of the D.C. Home Rule Act").

IV. Conclusion

For the foregoing reasons, the Court dismisses the case without prejudice. It also denies the Union's Motion for Summary Judgment. A contemporaneous Order to that effect will **[**30]** issue this day.

/s/ *James E. Boasberg*

JAMES E. BOASBERG

United States District Judge

Date: November 4, 2020

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, the Court ORDERS that:

1. Defendants' Motion to Dismiss is GRANTED;

2. Plaintiff's Motion for Summary Judgment is DENIED; and

3. The case is DISMISSED WITHOUT PREJUDICE.

/s/ *James E. Boasberg*

JAMES E. BOASBERG

United States District Judge

Date: November 4, 2020

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NEW YORK STATE | Division of Criminal Justice Services

MEMORANDUM

TO: New York State Criminal Justice Executives

FROM: Michael C. Green
Executive Deputy Commissioner

DATE: October 17, 2016

SUBJECT: Police and Peace Officer Decertification

Historically, when a police or peace officer separated from a department after a disciplinary hearing, or resigned/retired while disciplinary proceedings were pending, there was no regulatory reporting mechanism in place to ensure the invalidation of the officer's basic training certificate pursuant to General Municipal Law §209-q and Criminal Procedure Law §2.30. While Executive Law §845 requires employers of Police Officers and Peace Officers to report to the Division when an officer "ceases to serve", the absence of regulations that would create a reporting structure allowed these "certified" officers – who were attractive candidates to other departments for a variety of reasons – to be hired in relative anonymity with respect to the misconduct that led to their prior separation, thereby exposing the public and future departments to significant risk and liability.

Recent changes to Part 6056 of Title 9 of the Compilation of Codes, Rules, and Regulations of the State of New York (NYCRR), that will go into effect on October 26, 2016, will prevent these occurrences by defining "removal for cause" and "removal during probationary period"; clarifying the requirement that departments must report to the Division officers who cease to serve in their departments and the reasons for such separation; thereby immediately invalidating the basic training certificate when an officer is removed for cause or removed during a probationary period.

The substantive change for departments is the amended reporting requirements which require departments to immediately notify DCJS of an officer's separation from service and the regulatory reasons for such separation which include: 1) leave of absence, 2) resignation, 3) removal, 4) removal for cause, and 5) removal during a probationary period. The employer will not provide DCJS with the details underlying the separation. When a subsequent department attempts to hire and register an officer with DCJS, that prospective employer will be notified by DCJS of the reported regulatory reasons for prior separation and the status of the officer's training certificate. The officer will be similarly notified.

The regulatory amendments are as follows:

- Amends and clarifies the reporting requirements with new language (9 NYCRR Part §6056);

- Defines 'Removal for cause' and 'Removal during probationary period' using Section 75 of the Civil Service Law as a guide (9 NYCRR Part §6056);
- Requires an officer removed for cause or removed during a probationary period to successfully complete the Basic Course for Police/Peace Officers again if hired by another department;
- Refers to both peace and police officers throughout (9 NYCRR Part §6056) to conform to the 2011 statutory amendments; and
- Allows for reporting to the National Decertification Index upon a removal for cause (9 NYCRR Part §6056).

The Police Officer Registry Update Form and Peace Officer Registry Update Form have been revised to comply with the aforementioned regulatory amendments. Both revised forms are available for download at the following URLs:

http://www.criminaljustice.ny.gov/ops/docs/registry/policeofficerregistryupdateform.pdf
http://www.criminaljustice.ny.gov/ops/docs/registry/peaceofficerregistryupdateform.pdf

Please note all departments reporting the removal of an officer who ceases to serve, must provide the regulatory reason for such removal. Failure to provide a reason will result in the form being returned to the department without being processed.

Questions regarding compliance to the amended regulations and completion of the registry update forms should be directed to Dave Mahany at (518) 485-7644 or via e-mail at davej.mahany@dcjs.ny.gov.

New York State Division of Criminal Justice Services

POLICE OFFICER REGISTRY UPDATE FORM

(Executive Law § 845)

1. Agency Name:	2. Agency Address:	3. City/State/ZIP	4. Agency Code:

5. Form Prepared By:	6. Title:	7. Telephone:	8. Email Address:

Form Instructions: This form must be typed or printed in ink and be signed by the Chief Law Enforcement Officer. It is used to delete or modify existing registry information. To add new personnel, please use the **Police Registry Entry Form / Certification of Initial Employment (DCJS 2214-A).**

EFFECTIVE OCTOBER 26, 2016, TO DELETE AN OFFICER NO LONGER APPOINTED BY YOUR AGENCY YOU MUST PROVIDE THE REASON FOR DELETION. ANY OFFICER DELETED DUE TO (4) REMOVAL FOR CAUSE AS DEFINED IN 9 NYCRR PART 6056.2(g) OR (5) REMOVAL FOR CAUSE AS DEFINED IN 9 NYCRR PART 6056.2(h) SHALL IMMEDIATELY HAVE THEIR BASIC TRAINING CERTIFICATE INVALIDATED PURSUANT TO GENERAL MUNICIPAL LAW §209-q. ANY FORM THAT DOES NOT INCLUDE THE REASON FOR DELETION SHALL BE RETURNED TO THE REPORTING AGENCY WITHOUT BEING PROCESSED.

Mail completed forms to: **NYS Division of Criminal Justice Services**
Office of Public Safety – Records Unit
80 South Swan St., 3rd Floor
Albany, NY 12210

9. Transaction Code	Enter "D" to delete an officer no longer appointed, "M" to modify the information of existing personnel. Circle the information to be modified.
10. Reason for Deletion	**Enter one of the following: (1) Leave of Absence** (2) Resignation (3) Removal (4) Removal for Cause as defined in 9 NYCRR Part 6056.2(g) (5) Removal for Cause as defined in 9 NYCRR Part 6056.2(h)**
12. Social Security Number	Enter the officer's Social Security Number. The identifier is not mandatory; however the accuracy of training records cannot be assured without it.
14. Change Date	Enter the effective date of the deletion or modification.
15. Work Status	Enter "F" Full-time or "P" Part-time.
16. Rank or Title	Enter the agency rank and/or title.

9. Transaction Code	10. Reason For Deletion (Required)	11. Last Name, First Name, MI	12. Social Security Number*	13. Date of Birth (mm/dd/yy)	14. Change Date	15. Work Status P/F	16. Rank or Title

I am the chief law enforcement officer responsible for appointing the persons named as police officers of the above named law enforcement agency. I understand that I am responsible to report employment transactions, pursuant to §845 of the Executive Law. I understand I am responsible to provide each police officer the required training, pursuant to §209-q of the General Municipal Law. I understand the information contained in this document is part of a written statement that will be presented to the Division of Criminal Justice Services for filing, and I certify that it is true to the best of my knowledge and belief.

17. Chief Law Enforcement Officer Name - Printed	18. Chief Law Enforcement Officer Signature	19. Date

***Pursuant to the New York State Personal Privacy Protection Law, DCJS is authorized to collect personal identifying information as part of a public safety agency record. Personal identifying information on this form shall not be revealed, released, transferred, disseminated or otherwise communicated orally, in writing, or by electronic means other than to the registrant. Disclosure of personal identifying information is voluntary. Refusal to provide personal identifying information shall not result in the denial of any right, benefit, or privilege.**

**** Leave of absence includes only those situations in which an employee is considered by the department to be separated from employment. Leave of absence for purposes of 9 NYCRR Part 6056.4(c)(1) does not include situations such as maternity leave, military leave or other circumstances where the employee is still considered by the department to be employed.**

PART 6056
CENTRAL STATE REGISTRY OF POLICE OFFICERS AND PEACE OFFICERS

§ 6056.1 Purpose

The purpose of this Part is to set forth reporting and recordkeeping procedures to be followed by employers of police and peace officers and by the Division of Criminal Justice Services in maintaining the Central State Registry of Police Officers and Peace Officers, pursuant to *section 845of the Executive Law*, and:

(a) to provide for the establishment and maintenance of a permanent system of identification for each police and peace officer whose name is required by law to be entered in the Central State Registry of Police Officers and Peace Officers, pursuant to section 845(3) of such law;

(b) to ensure the accuracy of the information contained in the Central State Registry of Police Officers and Peace Officers and the integrity of the registry as a public record;

(c) to ensure that persons whose names are contained in the Central State Registry of Police Officers and Peace Officers are lawfully appointed; and

(d) to enhance the ability of the Division of Criminal Justice Services to cooperate with the Division of State Police in making information in the Central State Registry of Police Officers and Peace Officers available for the purpose of verifying transactions involving firearms, pursuant to section 845(5) of such law.

§ 6056.2 Definitions

As used in this Part, the following terms shall have the following meanings:

(a) *Division* means the Division of Criminal Justice Services.

(b) *Commissioner* means the Commissioner of the Division of Criminal Justice Services or his or her designee.

(c) *Employer* means the chief executive officer of any State or local agency, unit of local government, State or local commission, public authority, or organization which employs police officers or peace officers.

(d) *Police officer* means a person designated as such in *section 1.20(34) of the Criminal Procedure Law.*

(e) *Peace officer* means a person designated as such in *section 2.10 and 2.16 of the Criminal Procedure Law.*

(f) *Registry* means the Central State Registry of Police Officers and Peace Officers created by *section 845 of the Executive Law.*

(g) Removal for cause means removal after a hearing on stated charges pursuant to Civil Service Law §75 or retirement or resignation while disciplinary charges pursuant to Civil Service Law §75, which may result in removal are pending.

(h) *Removal during probationary period* means a probationary period not successfully completed due to incompetence or misconduct that would have subjected a permanent employee to disciplinary charges pursuant to Civil Service Law §75.

§ 6056.3 Division responsibility

(a) The division shall maintain the Central State Registry of Police Officers and Peace Officers, pursuant to *section 845 of the Executive Law*. The division shall enter into such registry all information concerning police or peace officers required to be reported by employers by such law and in accordance with such rules and regulations as the commissioner may adopt to ensure the accuracy of such information and integrity of the registry as a public record.

(b) The division shall not enter the name of any person in the registry if it has knowledge that such person is not lawfully appointed or eligible to be a police or peace officer, notwithstanding the submission of the name of such person by an employer for registration.

(c) Where the division has cause to believe that any person whose name is submitted for entry in the registry or who is registered as a police or peace officer may not be eligible, the division shall proceed pursuant to section 6056.6 of this Part.

§ 6056.4 Employer reporting requirements

(a) Each employer shall, in the form set forth in section 6056.5 of this Part, with respect to each police or peace officer employed by it, submit or cause to be submitted the following:

(1) name;

(2) social security number;

(3) date of birth;

(4) rank or title;

(5) official station;

(6) whether employed full-time or part-time; and

(7) date of appointment or employment.

Employers shall inform police or peace officer employees that disclosure of an employee's social security number is for identification purposes only and is voluntary on the employee's part. A post-office box number shall not be accepted as an employee's permanent residence or domicile.

(b) The commissioner may require any employer to report the following additional information in such form as he may prescribe:

(1) a certified copy of its articles of incorporation and bylaws relating to the authority and procedure for the employment, election, appointment and removal of officers, agents and employees having police or peace officer status;

(2) minutes of meetings or proceedings concerning appointment and removal of police or peace officers; and

(3) the street address of its principal place of business or official station and its telephone number.

(c) Each employer shall, in the form set forth in section 6056.5 of this Part, with respect to each police or peace officer employed by it, immediately notify the division when such officer ceases to serve and the reason for such, which shall include one of the following:

1. Leave of Absence
2. Resignation
3. Removal
4. Removal for Cause as defined in 6056.2(g) of this Part
5. Removal during Probationary Period as defined in 6056.2(h) of this Part
6. Subdivision (c)(1)(2) and (3) constitute an interruption in service pursuant to General Municipal Law 209-(q) 1-(c) and Criminal Procedure Law 2.30 (6).

(d) A certificate of completion attesting to the fulfillment of the training requirements for police officers set forth in section 209-q(1) of the General Municipal Law and a certificate of completion attesting to the fulfillment of the training requirements for peace officers set forth in Criminal Procedure Law 2.30 shall immediately be deemed invalid when an officer ceases to serve pursuant to subdivision (c)(4) or (5) of this section, as authorized by General Municipal Law §209-q(1)(c) and Criminal Procedure Law 2.30(6).

(e) Upon inquiry from an employer, the division shall notify the employer of the reason a police or peace officer ceased to be previously employed as reported pursuant to subdivision (c) of this section.

§ 6056.5 Form for reports

Information reported in accordance with the provisions of section 6056.4 of this Part shall be reported as follows:

(a) Each police officer employer shall complete and submit for each police officer employee the form entitled Police Officer Registry Entry Form available on request from the division. Such form shall be submitted to the division at the time of initial appointment.

(b) Each peace officer employer shall complete and submit for each peace officer employee the form entitled "Peace Officer Registry Entry Form" available on request from the division. Such form shall be submitted to the division at the time of initial appointment.

(c) Each employer shall immediately notify the division when an officer's registry information needs to be modified or deleted, including when such officer ceases to serve pursuant to section 6056.4(c). Such information shall be submitted on the form entitled "Registry Update Form."

(d) Each employer shall notify the division no later than the 15th day of each January of the names of all police or peace officers who have ceased to be employed by it in the preceding twelve months.

(e) The division may provide each employer with a list of all police or peace officers identified in the registry as employed by it. The employer shall examine such list and return it to the division, deleting therefrom the names of any persons no longer employed by it as police or peace officers. Completion and submission of such a list shall be deemed compliance with the reporting requirements of subdivision (d) of this section.

(f) The commissioner may approve a reporting format other than that set forth in subdivisions (a), (b), (c) or (d) of this section. Such approval shall be granted in writing.

§ 6056.6 Exclusion from registry

(a) Where the division has cause to believe that any person whose name has been submitted for entry in the registry, or who is already registered as a police or peace officer, may be ineligible under any provision of article 2 or article 3 of the Public Officers Law or of article 1 or article 2 of the Criminal Procedure Law to be a police or peace officer, or prohibited from possessing firearms by federal law, the division shall notify the person's employer and the employer shall notify the division within 30 days that the person's name should be deleted from the registry.

(b) The division shall also notify the Division of State Police where questions concerning the lawful possession of firearms are involved, and the Attorney General where questions concerning charitable corporations are involved.

(c) Where the division has cause to believe that a person who is registered as a police or peace officer has not completed the required training in the timeframe prescribed by law or regulation, the division may notify the person's employer and the employer shall notify the division within 30 days that the person's name should be deleted from the registry.

§ 6056.7 Review

(a) Any person whose name is not accepted for entry in the registry, or whose name is removed therefrom, shall, on request, be provided the opportunity to review all information in the possession of the division on which such determination was based subject to the requirements and conditions set forth in Part 6050 of this Title, where applicable. Such person may present argument on issues of law and fact to the employer. The employer may then resubmit such person's name for registration, along with a statement of the reasons establishing such person's eligibility to be a police or peace officer.

(b) When such person is removed from the registry pursuant to section 6056. 4(c)(4) or (5) of this Part the Division may submit such person's name to the national decertification index.

§ 6056.8 Severability

If any provision of this Part or the application thereof to any person or circumstance is adjudged invalid by a court of competent jurisdiction, such judgment shall not affect or impair the validity of the other provisions of this Part or the application thereof to other persons or circumstances.

Uniformed Fire Officers Ass'n v. De Blasio

United States Court of Appeals for the Second Circuit

February 16, 2021, Decided

No. 20-2789-cv(L), No. 20-3177-cv(XAP)

Reporter
846 Fed. Appx. 25 *; 2021 U.S. App. LEXIS 4266 **; 2021 WL 561505

UNIFORMED FIRE OFFICERS ASSOCIATION; UNIFORMED FIREFIGHTERS ASSOCIATION OF GREATER NEW YORK; POLICE BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., CORRECTION OFFICERS' BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., SERGEANTS BENEVOLENT ASSOCIATION, LIEUTENANTS BENEVOLENT ASSOCIATION, CAPTAINS ENDOWMENT ASSOCIATION, DETECTIVES' ENDOWMENT ASSOCIATION, Plaintiffs-Appellants-Cross-Appellees, v. BILL DE BLASIO, IN HIS OFFICIAL CAPACITY AS MAYOR OF THE CITY OF NEW YORK, CITY OF NEW YORK, NEW YORK CITY FIRE DEPARTMENT, DANIEL A. NIGRO, IN HIS OFFICIAL CAPACITY AS THE COMMISSIONER OF THE FIRE DEPARTMENT OF THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF CORRECTIONS, CYNTHIA BRANN, IN HER OFFICIAL CAPACITY AS THE COMMISSIONER OF THE NEW YORK CITY DEPARTMENT OF CORRECTIONS, DERMOT F. SHEA, IN HIS OFFICIAL CAPACITY AS THE COMMISSIONER OF THE NEW YORK CITY POLICE DEPARTMENT, NEW YORK CITY POLICE DEPARTMENT, FREDERICK DAVIE, IN HIS OFFICIAL CAPACITY AS THE CHAIR OF THE CIVILIAN COMPLAINT REVIEW BOARD, CIVILIAN COMPLAINT REVIEW BOARD, Defendants-Appellees, COMMUNITIES UNITED FOR ***POLICE REFORM***, Intervenor-Defendant-Appellee-Cross-Appellant.

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: **[**1]** Appeal from an order of the United States District Court for the Southern District of New York (Katherine P. Failla, Judge).

Uniformed Fire Officers Ass'n v. Deblasio, 2020 U.S. Dist. LEXIS 251913 (S.D.N.Y., Aug. 21, 2020)

Core Terms

records, disclosure, preliminary injunction, arbitration, disciplinary, merits, irreparable harm, obligations, personnel

Case Summary

Overview

HOLDINGS: [1]-The unions were not likely to

prevail on their claim that disclosure of certain types of disciplinary records violated the CBAs as removal of such records from a personnel file did not require eliminating them from all of the city's records. Moreover, the police department could not bargain away disclosure obligations under New York's Freedom of Information Law, *N.Y. Pub. Off. Law § 84 et seq.*; [2]-The unions had not raised sufficiently serious questions on the merits as the potential for diminished employment opportunities resulting from a damaging reputation was not enough to show that and officer would be deprived of a tangible interest or property rights; [3]-The equal protection claim was likely to fail as the public had a stronger legitimate interest in the disciplinary records of law enforcement officers than in those of other public employees.

Outcome
Order affirmed.

LexisNexis® Headnotes

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN1[] **Injunctions, Preliminary & Temporary Injunctions**

Under New York law, a court may issue a preliminary injunction in aid of arbitration if the movant demonstrates that (1) absent a preliminary injunction, an award in arbitration may be rendered ineffectual, (2) the movant is likely to succeed on the merits of the claim to be arbitrated, (3) there is a danger of irreparable harm to the movant should preliminary relief be denied, and (4) the balance of the equities tips in the petitioner's favor.

Administrative Law > Governmental Information > Freedom of Information > Compliance With Disclosure Requests

Governments > Local Governments > Employees & Officials

Governments > Local Governments > Police Power

HN2[] **Freedom of Information, Compliance With Disclosure Requests**

The New York City Police Department cannot bargain away its disclosure obligations under New York's Freedom of Information Law, *N.Y. Pub. Off. Law § 84 et seq.*

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Balance of Hardships

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Likelihood of Success

HN3[] **Grounds for Injunctions, Balance of Hardships**

District courts may grant a preliminary injunction where a plaintiff demonstrates irreparable harm and meets either of two standards: (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits to make them a fair ground

for litigation, and a balance of hardships tipping decidedly in the movant's favor.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Irreparable Harm

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN4[] **Grounds for Injunctions, Irreparable Harm**

In general, for purposes of a preliminary injunction, irreparable harm is not shown in employee discharge cases simply by a showing of financial distress or difficulties in obtaining other employment however severely they may affect a particular individual.

Civil Rights Law > ... > Section 1983 Actions > Scope > Due Process in State Proceedings

HN5[] **Scope, Due Process in State Proceedings**

Under both federal and state law, stigma-plus claims require the plaintiff to adequately demonstrate an injury to one's reputation (the stigma) coupled with the deprivation of some tangible interest or property right (the plus), without adequate process.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN6[] **Procedural Due Process, Scope of Protection**

Diminished future employment opportunities resulting from a damaged reputation, as opposed to some independent legal detriment, are not sufficient to state a stigma-plus claim.

Constitutional Law > Equal Protection > Nature & Scope of Protection

HN7[] **Equal Protection, Nature & Scope of Protection**

Because law enforcement officers are not a protected class for equal protection purposes, they must show that there is no rational and nondiscriminatory basis to treat their records differently from the records of other public employees.

Constitutional Law > Congressional Duties & Powers > Contracts Clause > Scope

HN8[] **Congressional Duties & Powers, Contracts Clause**

A contract does not transform all statutory requirements that may otherwise be imposed under the governing law into contractual obligations. Case law declines to interpret a contract as impliedly stating something which the signatories have neglected to specifically include. Reading into contracts terms that do not exist based on then-existing statutory language, would protect against all changes in legislation, and severely limit the ability of state legislatures to amend their regulatory legislation.

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Law Enforcement Records

HN9[] **Defenses & Exemptions From Public Disclosure, Law Enforcement Records**

Under New York law, a law enforcement agency may redact records pertaining to technical infractions prior to disclosing such records pursuant to New York's Freedom of Information Law, *N.Y. Pub. Off. Law § 84 et seq.* *N.Y. Pub. Off. Law § 89(2-c)*.

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FOR AMICUS CURIAE JUSTICE COMMITTEE INC.: David L. Kornblau, Russell M. Squire, Covington & Burling LLP, New York, NY.

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FOR AMICI CURIAE GIRLS FOR GENDER EQUITY, TRANSGENDER LAW CENTER: Joel M. Cohen, Shireen Barday, Katherine M. Marquart, Maya **[**3]** H. Nuland, Sarah L. Segal, Gibson, Dunn & Crutcher, New York, NY; Julie Hamilton, Gibson, Dunn & Crutcher,

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FOR AMICUS CURIAE SYRACUSE POLICE BENEVOLENT ASSOCIATION, INC.: Roger W. Bradley, Elizabeth A. Genung, Melvin & Melvin, PLLC, Syracuse, NY.

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FOR AMICI CURIAE FORMER PROSECUTORS ALVIN BRAGG, TARYN MERKL, CHIRAAG BAINS, NATHANIEL AKERMAN, G. MICHAEL BELLINGER, RICHARD F. ALBERT, ROLAND G. RIOPELLE, ISABELLE A. KIRSHNER, ALEXANDER RIAS, LAUREN-BROOKE EISEN, XAVIER DONALDSON: Joshua Colangelo-Bryan, Anthony P. Badaracco, Dorsey & Whitney **[**4]** LLP, New York, NY.

FOR AMICI CURIAE COMMON CAUSE/NEW YORK, REINVENT ALBANY, CITIZENS UNION, BETANYC: Sean Murphy, Kamel Aitelaj, Milbank LLP, New York, NY.

FOR AMICI CURIAE SUFFOLK COUNTY POLICE CONFERENCE, INC., SUFFOLK COUNTY POLICE BENEVOLENT ASSOCIATION, INC., METROPOLITAN TRANSPORTATION AUTHORITY POLICE BENEVOLENT ASSOCIATION, INC: Alex J. Kaminski, Davis & Ferber, LLP, Islandia, NY.

Judges: PRESENT: AMALYA L. KEARSE, PIERRE N. LEVAL, RAYMOND J. LOHIER, JR., Circuit Judges.

Opinion

[*29] SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the order of the District Court is AFFIRMED.

This appeal arises from the repeal of *§ 50-a of the New York Civil Rights Law*, which for decades shielded law enforcement disciplinary records from public disclosure. Shortly after the repeal, New York City (the "City") announced its intention to proactively publish certain types of disciplinary records and provide other records upon request consistent with its obligations under *New York's Freedom of Information Law (FOIL), N.Y. Pub. Off. Law §§ 84-90*. Several unions (the "Unions") representing uniformed members of the New York City Police Department ("NYPD"), the New York City Fire Department ("FDNY"), and the New York City Department of Correction ("DOC") **[**5]** filed this action against the City, the NYPD, the FDNY, the DOC, the Civilian Complaint Review Board ("CCRB"), and their principal officers. The Unions moved to preliminarily enjoin any disclosure of allegations of misconduct against

their members that are unsubstantiated, unfounded, or non-final, or that resulted in an exoneration or a finding of not guilty. The District Court (Failla, J.) denied the motion in substantial part, but granted a limited preliminary injunction in favor of the Unions, which we explain further below. The Unions appealed from the denial of their motion, and Communities United for ***Police Reform*** ("CPR"), which intervened in this case, cross-appealed from the District's Court's limited preliminary injunction. Another panel of this Court granted a stay of the District Court's order pending disposition of this appeal.

We assume the parties' familiarity with the underlying facts and prior record of proceedings, to which we refer only as necessary to explain our decision to affirm.

1. The Unions' Appeal: Preliminary Injunction in Aid of Arbitration

We review the District Court's order for abuse of discretion. See *SG Cowen Sec. [*30] Corp. v. Messih, 224 F.3d 79, 81 (2d Cir. 2000)*.

Each of the Unions' collective bargaining agreements **[**6]** ("CBAs") contains an arbitration provision, and the Unions ask the Court to enjoin the NYPD's and the CCRB's planned disclosures pending adjudication of their claims in arbitration. *HN1*[↑] Under New York law, which governs the CBAs, a court may issue a preliminary injunction in aid of arbitration if the movant demonstrates that (1) absent a preliminary injunction, an award in arbitration "may be rendered ineffectual," (2) the movant is likely to succeed on the merits of the claim to be arbitrated, (3) there is a "danger of irreparable harm" to the movant should preliminary relief be denied, and (4) the balance of the equities "tips in the petitioner's favor." *Id. at 81-84*.

Here, the Unions assert that the planned disclosures will violate two provisions common to all of their CBAs. The District Court denied the Unions' motion for a preliminary injunction only as it related to the first provision, which states that upon an officer's "written request to the Chief of Personnel," NYPD "will. . . remove from the Personnel Folder investigative reports which, upon completion of the investigation are classified 'exonerated' and/or 'unfounded.'" App'x 1528. We agree with the District Court that this provision does **[**7]** not conflict with the planned public disclosures, substantially for the reasons set forth in the District Court's decision. Special App'x 19-21. Removal of such records from a personnel file, as called for by the CBAs, does not require eliminating them from all of the City's records. There is no contention that the City has failed to adhere to its obligation to remove the records from personnel files or has improperly considered them in connection with personnel decisions (such as promotion or termination). Moreover, to the extent that this claim implicates records that must be disclosed under FOIL, *HN2*[↑] the NYPD cannot bargain away its disclosure obligations. *M. Farbman & Sons, Inc. v. New York City Health & Hospitals Corp., 62 N.Y.2d 75, 80, 464 N.E.2d 437, 476 N.Y.S.2d 69, 71 (1984)*. The District Court therefore acted within its discretion when it concluded that the Unions failed to demonstrate a likelihood of success on the merits in the arbitration of this claim. See *SG Cowen, 224 F.3d at 84*.

2. The Unions' Appeal: Preliminary Injunction Pending Resolution of Remaining Claims

HN3[↑] "[D]istrict courts may grant a preliminary injunction where a plaintiff demonstrates irreparable harm and meets either of two standards: (a) a likelihood of success on

the merits, or (b) sufficiently serious questions going to the merits to make them a fair ground **[**8]** for litigation, and a balance of hardships tipping decidedly in the movant's favor." *Trump v. Deutsche Bank AG, 943 F.3d 627, 635 (2d Cir. 2019)* (quotation marks omitted), vacated and remanded on other grounds, *140 S. Ct. 2019, 207 L. Ed. 2d 951 (2020)*. We do not decide whether the Unions must satisfy one standard or the other here because we conclude that the District Court did not abuse its discretion under either standard.

A. Irreparable Harm

The Unions assert that law enforcement officers will have fewer employment opportunities in the future if records of the allegations against them that prove to be unfounded or unsubstantiated are disclosed, even though each record will reveal the outcome of the investigation. But the District Court noted that future employers were unlikely to be misled by **[*31]** conduct records that contained "dispositional designations" specifying that allegations of misconduct were unsubstantiated, unfounded, or that the accused officer was exonerated. See Special App'x 14-15. As the District Court also noted, despite evidence that numerous other States make similar records available to the public, the Unions have pointed to no evidence from any jurisdiction that the availability of such records resulted in harm to employment opportunities. Id. For these reasons, **[**9]** the District Court did not abuse its discretion when it determined that the asserted harm was speculative and that the Unions had failed to demonstrate on this record that the officers will suffer irreparable harm to their employment opportunities that cannot be remedied by an award of lost wages. *HN4*[↑] In general, "irreparable harm is not shown in employee discharge cases simply by a showing of financial distress or difficulties in obtaining other employment 'however severely they may affect a particular individual." *Stewart v. INS, 762 F.2d 193, 199 (2d Cir. 1985)* (quoting *Sampson v. Murray, 415 U.S. 61, 92 n.68, 94 S. Ct. 937, 39 L. Ed. 2d 166 (1974))*.

We also address the Union's more general assertion of heightened danger and safety risks to police officers. We fully and unequivocally respect the dangers and risks police officers face every day. But we cannot say that the District Court abused its discretion when it determined that the Unions have not sufficiently demonstrated that those dangers and risks are likely to increase because of the City's planned disclosures. In arriving at that conclusion, we note again that many other States make similar misconduct records at least partially available to the public without any evidence of a resulting increase of danger to police officers. See App'x 1035-36,1163, 2140-42. **[**10]**

B. The Merits

The Unions also have not raised sufficiently serious questions on the merits of their claims. First, the Unions assert a "stigma-plus" claim under the Federal and New York State Constitutions. *HN5*[↑] Under both federal and state law, stigma-plus claims require the plaintiff to adequately demonstrate an "injury to one's reputation (the stigma) coupled with the deprivation of some 'tangible interest' or property right (the plus), without adequate process." *DiBlasio v. Novello, 344 F.3d 292, 302 (2d Cir. 2003)*; see *Matter of Lee TT. v. Dowling, 87 N.Y.2d 699, 708, 664 N.E.2d 1243, 642 N.Y.S.2d 181, 187 (1996)*. The Unions fail to demonstrate that any officer will be deprived of a tangible interest or property right. *HN6*[↑] We have held that diminished future employment opportunities resulting from a

damaged reputation, as opposed to some independent legal detriment, are not sufficient. See *Sadallah v. City of Utica, 383 F.3d 34, 38-39 (2d Cir. 2004)*.[1]

The Unions' equal protection claims fare no better. *HN7*[↑] Because law enforcement officers are not a protected class for equal protection purposes, they must show that there is no rational and nondiscriminatory basis to treat their records differently from the records of other public employees. See *Sensational Smiles, LLC v. Mullen, 793 F.3d 281, 284 (2d Cir. 2015)*. Even the Unions recognize that "the unique responsibilities of law enforcement officers set them apart." Unions Br. 56. Because the public has a stronger **[**11]** legitimate interest in the disciplinary records of law enforcement officers than in those of other public employees, the District Court correctly determined that there was a rational, **[*32]** nondiscriminatory basis for treating the two sets of records differently.

Next, the Unions contend that when officers entered plea agreements in disciplinary proceedings, those agreements implicitly incorporated *§ 50-a* of the Civil Rights Law. Again, we disagree. *HN8*[↑] The New York Court of Appeals has cautioned that a contract "does not transform all statutory requirements that may otherwise be imposed under [the governing] law into contractual obligations," and it has " decline [d] to interpret [a contract] as impliedly stating something which [the signatories] have neglected to specifically include." *Skanska USA Bldg. Inc. v. Atl. Yards B2 Skanska USA Bldg. Inc., 31 N.Y.3d 1002, 1007, 74 N.Y.S.3d 805, 807-08, 98 N.E.3d 720 (2018)* (quotation marks omitted). "[R]ead[ing] into . . . contracts terms that do not exist based on then-existing statutory language,. . . would protect against all changes in legislation,. . . [and] severely limit the ability of state legislatures to amend their regulatory legislation." *Am. Econ. Ins. Co. v. State of N.Y., 30 N.Y.3d 136, 154, 65 N.Y.S.3d 94, 107, 87 N.E.3d 126 (2017)* (quotation marks omitted). The Unions do not point to any legislative history in support of their **[**12]** argument, or to any evidence that the parties to the plea agreements intended to incorporate *§ 50-a* as the Unions suggest. Nor do the Unions argue that *§ 50-a* "affect[s] the validity, construction, and enforcement" of the plea agreements. Id.

The Unions also argue that the City's decision to publish certain disciplinary records without individualized review is arbitrary and capricious under Article 78 of the New York Civil Practice Law and Rules. See *N.Y. C.P.L.R. §§ 7801, 7803(3)*. Substantially for the reasons provided by the District Court in its order, we reject their argument. As the District Court observed, the City appears to still recognize those specific FOIL exemptions that are designed to protect against unwarranted invasions of personal privacy or endangering a person's safety. See *N.Y. Pub. Off. Law § 87(2)(b), (f)*.

Alternatively, the Unions assert that it was arbitrary and capricious for the City to change without explanation its established practice of asserting that records relating to unsubstantiated allegations should be withheld under FOIL's exemption for documents whose disclosure would constitute an unwarranted invasion of privacy. See Unions Br. 48-51; *Matter of Charles A. Field Delivery Serv., Inc., 66 N.Y.2d 516, 520, 488 N.E.2d 1223, 498 N.Y.S.2d 111, 115 (1985)*. But that practice, if it ever existed, appears to have ended no later

[1] We assume, without deciding, that the protections provided by the New York State Constitution are equivalent to their federal counterparts, as no party has suggested otherwise.

than 2017. **[**13]** See App'x 1614, 1643. And any change in the CCRB's position was adequately explained by the Mayor's public remarks following the repeal of *§ 50-a*. See Transcript: Mayor de Blasio Holds Media Availability, NYC.gov (June 17, 2020), available at https://wwwl.nyc.gov/office-of-the-mayor/news/446-20/transcript-mayor-de-blasio-holds-media-availability .

C. Balance of the Equities

As for the balance of the equities, the Unions argue that the equities favor a preliminary injunction because disclosure of information is permanent, while those who seek information will suffer only delay if an injunction is entered. We do not doubt the sincerity of the Unions' concerns. As several amici point out, however, delay for victims unable to obtain information about the status of their complaints is itself costly both for them and for various other stakeholders in the criminal justice system, see, e.g., Brief for Former Prosecutors as Amici Curiae Supporting Intervenor-Defendant-Appellee-Cross-Appellant 6-10, as well as the press, see Brief for The Reporters Committee for Freedom of the Press & 31 News Media Organizations **[*33]** as Amici Curiae Supporting of Intervenor-Defendant-Appellee-Cross-Appellant 15-21. Because **[**14]** the Unions' stated interests are counterbalanced by other important policies, the District Court did not abuse its discretion in determining that the balance of the equities does not tip in their favor.

3. CPR's Cross-Appeal

The District Court granted the Unions' motion for a preliminary injunction in aid of arbitration as it related to the second provision of the CBAs relevant to this appeal, *Section 8*.[2] Under *Section 8*, a police officer who has "been charged with a 'Schedule A' violation as listed in [the] Patrol Guide," proceeds to a disciplinary trial on such charge, and is not determined guilty may "petition the Police Commissioner for a review for the purpose of expunging the record of the case." App'x 1528. On its cross-appeal, CPR argues that the District Court's decision to enjoin the disclosure of these records was an abuse of discretion because the NYPD cannot bargain away its FOIL obligations. See CPR Br. 22-29, 70-73.[3] But on this record, we conclude that enforcing *Section 8* would not affect those obligations. As the City notes, "Schedule A" lists "technical violations," City Br. 16, such as "[i]mproper uniform or equipment" and "[r]eporting late for duty," N.Y. Police Dep't Patrol Guide 206-03 Schedule **[**15]** A (effective April 20, 2017). *HN9*[↑] And under New York law, "a law enforcement agency may redact records pertaining to technical infractions . . . prior to disclosing such records" pursuant to FOIL. *N.Y. Pub. Off. Law § 89(2-c)*. Accordingly, we conclude that the District Court did not abuse its discretion in preliminarily enjoining disclosure of these records. If CPR can show that "Schedule A" violations include anything other than "[t]echnical infraction[s]" as defined by New York law, see *N.Y. Pub. Off. Law § 86(9)*, it may move the District Court for appropriate relief, see *Weight Watchers Int'l, Inc. v.*

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[2] The relevant provision appears in *Section 8* of most, but not all, CBAs. Like the District Court, we refer only to its usual location for ease and clarity.

[3] We are not persuaded by the Unions' contention that CPR lacks standing to appeal because it is not a signatory to the CBAs. CPR is injured by the injunction because it prevents the NYPD from fulfilling CPR's FOIL request for documents covered by this provision. CPR argues that the CBAs impermissibly deprive it of rights guaranteed by FOIL.

Luigino's, Inc., 423 F.3d 137, 141 (2d Cir. 2005).

We have considered the Unions' remaining arguments and conclude that they are without merit. For the foregoing reasons, the District Court's order is AFFIRMED.

End of Document

City of Country Club Hills v. Charles

Appellate Court of Illinois, First District, Fifth Division

December 24, 2020, Decided

No. 1-20-0546

Reporter
2020 IL App (1st) 200546 *; 2020 Ill. App. LEXIS 890 **

CITY OF COUNTRY CLUB HILLS, Plaintiff-Counterdefendant-Appellant, v. DERRICK CHARLES, Defendant-Counterplaintiff-Appellee.

Subsequent History: Appeal denied by *City of Country Club Hills v. Derrick, 2021 Ill. LEXIS 485, 2021 WL 2221367 (Ill., May 26, 2021)*

Prior History: [**1] Appeal from the Circuit Court of Cook County. No. 18 CH 13458. Honorable Michael T. Mullen, Judge Presiding.

Disposition: Reversed and remanded with instructions.

Core Terms

arbitrator, public policy, door, police officer, termination, ***arbitration*** award, summary judgment, circuit court, night, offender, dishonesty, ***vacate***, lock, written warning, booking, collective bargaining agreement, circumstances, credibility, parties, levied, parking lot, overturn, unlocked, traffic, lobby, police station, discipline, witnesses, omission, video

Case Summary

Overview
HOLDINGS: [1]-The circuit court erred in confirming the arbitrator's award, which called for a written warning, and the award itself must have been ***vacated*** and replaced by a discharge order because the only remedy consistent with public policy for the police officer's misconduct was termination as there was a recognized public policy in Illinois that a police officer must be honest and not provide false, misleading, or incomplete statements in connection with his duties, the record, and the arbitrator's ruling, established that the officer was dishonest in several respects, and the overwhelming weight of authority suggested that not only was discharge an appropriate remedy for police dishonesty, it was virtually the only appropriate penalty.

Outcome
Order reversed. Case remanded with instructions.

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Judicial Review

Labor & Employment Law > ... > Labor ***Arbitration*** > Arbitrators > Authority

Labor & Employment Law > ... > Labor ***Arbitration*** > Judicial Review > Scope of Authority

Labor & Employment Law > ... > Labor ***Arbitration*** > Judicial Review > Essence of Agreements

Labor & Employment Law > ... > Labor ***Arbitration*** > Judicial Review > Second Level Review

HN1[] **Alternative Dispute Resolution, Judicial Review**

The Uniform ***Arbitration*** Act, *710 ILCS 5/1* to 23 (2018), provides for very limited judicial review of an arbitrator's award. An arbitrator's award may be ***vacated*** only (1) if the award was procured by fraud, corruption, or other undue means, (2) when partiality or misconduct by the arbitrator is evident, (3) when the arbitrator exceeded his or her powers, or (4) when the arbitrator improperly refused to postpone a hearing or hear material evidence to a party's prejudice. On judicial review, there is a presumption the arbitrator did not exceed his or her authority and the court must construe the award, when possible, to uphold its validity. This is because the parties have contracted how their disputes are to be resolved, and judicial modification of an arbitrator's decision deprives the parties of that choice. However, there is an exception to this general rule. A court should not enforce a collective bargaining agreement when to do so would be repugnant to established norms of public policy.

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > Cross Motions

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN2[] **Motions for Summary Judgment, Cross Motions**

An appellate court reviews the circuit court's decision as to cross-motions for summary judgment de novo.

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Judicial Review

Labor & Employment Law > Collective Bargaining & Labor Relations > Labor ***Arbitration*** > ***Arbitration*** Awards

Labor & Employment Law > ... > Labor ***Arbitration*** > Judicial Review > Essence of Agreements

Labor & Employment Law > ... > Labor ***Arbitration*** > Judicial Review > Second Level Review

Labor & Employment Law > ... > Labor ***Arbitration*** > Judicial Review > Scope of Authority

HN3[] **Alternative Dispute Resolution, Judicial Review**

It is well established that judicial review of an arbitrator's award is extremely limited and the award must be construed, if possible, as valid. The Supreme Court of Illinois, however, has recognized a public-policy exception to ***vacate arbitration*** awards that are based on collective bargaining agreements. Under the public-policy exception, if an ***arbitration*** award is derived

from the essence of the collective-bargaining agreement, the court will ***vacate*** the award if it is repugnant to established norms of public policy. Such vacatur is rooted in the common-law doctrine that a court may refuse to enforce contracts that violate law or public policy. The public-policy exception is a narrow one—one that is to be invoked only when a party clearly shows enforcement of the contract, as interpreted by the arbitrator, contravenes some explicit public policy.

Business & Corporate
Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Judicial Review

Labor & Employment Law > ... > Labor ***Arbitration*** > Judicial Review > Essence of Agreements

Civil Procedure > Appeals > Standards of Review > De Novo Review

Labor & Employment Law > ... > Labor ***Arbitration*** > Judicial Review > Second Level Review

Labor & Employment Law > ... > Labor ***Arbitration*** > Judicial Review > Scope of Authority

HN4[] **Alternative Dispute Resolution, Judicial Review**

In order to ***vacate*** an award under the public-policy exception to ***vacate arbitration*** awards that are based on collective bargaining agreements, the court applies a two-step analysis. The initial question is whether a well-defined and dominant public policy can be identified through a review of Illinois' constitution, statutes, and relevant judicial opinions. If the court establishes the existence of a well-defined and dominant public policy, the court must then determine whether the arbitrator's award, as reflected in his interpretation of the agreement, violated the public policy. Because the court's inquiry is whether the arbitrator's construction of the collective bargaining agreement, as reflected in his award, is unenforceable due to a predominating public policy, which is a question of law, the court's review is de novo.

Business & Corporate
Compliance > ... > Alternative Dispute Resolution > ***Arbitration*** > Arbitrability

HN5[] **Arbitration, Arbitrability**

Questions of public policy are left to the courts, not the arbitrator.

Governments > Local
Governments > Employees & Officials

HN6[] **Local Governments, Employees & Officials**

There is a robust and uniform body of case law establishing a public policy in Illinois that police officers be absolutely honest.

Governments > Local
Governments > Employees & Officials

HN7[] **Local Governments, Employees & Officials**

As the guardians of the laws, police officers are expected to act with integrity, honesty, and trustworthiness. A law enforcement officer is in a peculiar and unusual position of public trust

and responsibility, and by virtue thereof, the public body has an important interest in expecting the officer to give frank and honest replies to questions relevant to his fitness to hold public office. The high obligation owed by a policeman to his employer and his peculiar position in society certainly must be taken into account in considering the nature and effect of disciplinary proceedings instituted by the employer. A police officer's credibility is inevitably an issue in the prosecution of crimes and in the police department's defense of civil lawsuits. A public finding that an officer had lied on previous occasions is detrimental to the officer's credibility as a witness and as such may be a serious liability to the department. Therefore, there is a recognized public policy in Illinois that a police officer must be honest and not provide false, misleading, or incomplete statements in connection with his duties.

Business & Corporate
Compliance > ... > Pretrial
Matters > Alternative Dispute
Resolution > Judicial Review

Civil Procedure > Appeals > Record on Appeal

Evidence > Burdens of Proof > Allocation

HN8[] **Alternative Dispute Resolution, Judicial Review**

With respect to evidence presented to the arbitrator, on appeal the appellant has the burden to provide a complete record for review in the appellate court to support a claim of error. If no such record is provided, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis. All doubts and deficiencies arising from an insufficient record will be construed against the appellant.

Business & Corporate
Compliance > ... > Pretrial
Matters > Alternative Dispute
Resolution > Judicial Review

Labor & Employment Law > ... > Labor ***Arbitration*** > Judicial Review > Scope of Authority

HN9[] **Alternative Dispute Resolution, Judicial Review**

A court's role is not to reweigh the evidence presented to the arbitrator. When the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept.

Governments > Local
Governments > Employees & Officials

HN10[] **Local Governments, Employees & Officials**

While not every violation of a department rule should warrant discharge, there is substantial authority supporting the proposition that dishonesty of a police officer regarding his official duties is inimical to the sound operation of a department. Courts have recognized keeping dishonest police officers on the force creates liability issues for the department.

Governments > Local
Governments > Employees & Officials

HN11[] **Local Governments, Employees &**

Officials

Even a single violation of a department rule has been found to be sufficient to warrant discharge. Cause for discharge exists when a police officer lies to his employer. It is a violation of public policy to require the continued employment of an officer who has been found to be abusive and untruthful. It would be repugnant to public policy to retain the police officer in these circumstances.

Governments > Local
Governments > Employees & Officials

HN12[] **Local Governments, Employees & Officials**

"Cause" in the context of discharge of a public employee is some substantial shortcoming which renders the employee's continuance in office in some way detrimental to the discipline and efficiency of the service and which the law and sound public opinion recognize as good cause for his no longer holding the position. When public policy is at issue, it is the court's responsibility to protect the public interest at stake. That is why courts will not give the drunken pilot the opportunity to fly a commercial airliner again even though no harm befell his passengers. Even so, courts do not find there is an absolute rule that any instance of police dishonesty must result in termination from service. Obviously, each case presents unique facts which must take into account the officer's prior record, the benefits of progressive discipline, the culpability of the officer, and the potential peril to the municipality created by the particular dishonesty at issue. A remand to the arbitrator may be appropriate to allow the arbitrator to correct a mistake which is apparent on the face of the award, complete an ***arbitration*** that is not complete, and clarify an ambiguity in the award. Courts have historically exercised the power to remand a matter to an arbitrator in limited circumstances, such as where the award is obviously incomplete or ambiguous.

Governments > Local
Governments > Claims By & Against

Governments > Local
Governments > Employees & Officials

HN13[] **Local Governments, Claims By & Against**

Dishonesty by a police officer is detrimental to the service because, among other things, it undermines the officer's credibility when testifying in criminal cases and creates liability for the municipality in civil cases.

Counsel: John B. Murphey, of Odelson & Sterk, Ltd., of ***Chicago***, for appellant.

Ivan M. Rittenberg, of Saks, Robinson & Rittenberg, Ltd. and John T. Moran, Jr., of Moran Law Group, both of ***Chicago***, for appellee.

Judges: PRESIDING JUSTICE DELORT delivered the judgment of the court, with opinion. Justice Rochford concurred in the judgment and opinion. Justice Cunningham dissented, with opinion.

Opinion by: DELORT

Opinion

PRESIDING JUSTICE DELORT delivered the judgment of the court, with opinion.

Justice Rochford concurred in the judgment and opinion.

Justice Cunningham dissented, with opinion.

OPINION

[*P1] The City of Country Club Hills charged police officer Derrick Charles with lying in connection with the City's investigation of a 2017 detainee escape, and with malingering overnight in a deserted parking lot when he was supposed to be helping maintain order after the nightly last call at a notoriously rowdy local night club. An arbitrator heard evidence regarding the charges. The arbitrator found there was a valid basis for discipline only as to the detainee escape charge, and determined **[**2]** that the penalty as to that charge would be a written warning. The City then filed a complaint in circuit court against Charles and his union to ***vacate*** the ***arbitration*** award. The complaint asked the court to overturn the arbitrator and terminate Charles's employment, on the basis that the light penalty of a written warning was against public policy. Charles and the union filed a counterclaim seeking confirmation and enforcement of the arbitrator's award. The circuit court granted summary judgment in favor of Charles and the union, and against the City. We reverse.

[*P2] BACKGROUND

[*P3] Most, but not all, of the relevant facts are uncontested, and we recite them as they were determined by the arbitrator. The first incident occurred on June 24, 2017 when Charles arrested Bernard Barfield for criminal trespass relating to a stolen vehicle. Charles placed Barfield into a holding room at the police station. He later removed Barfield from the holding room and took him into a booking room. The booking room was fitted with a steel door and a combination lock on the outside which unlocks with a numerical code. Police department rules require that the booking room door must be closed when a suspect is **[**3]** inside to prevent escape. A "no firearms beyond" sign is posted on the door. Outside the room, there is a metal gun locker built into the wall in which officers may secure their weapons. The no-firearms rule applies to police officers, but Charles brought his firearm into the room.

[*P4] Barfield escaped from the booking room through an open door, ran down the lobby hallway, and unlocked a door leading to the lobby. There was a struggle inside the police station vestibule but Barfield was able to escape from the building. Eventually, Charles tased Barfield and he was apprehended. Barfield was charged with aggravated battery for spitting on an officer during the fracas. A police sergeant was also injured and required medical treatment.

[*P5] At the direction of the police chief, a supervisor sent an email to Charles requiring him to provide a statement: "Regarding the Bernard Barfield incident *** please reply with a **detailed** account of events; explanation of the circumstances leading up to prisoner Barfield managing to exit the building, the force and type used to secure him back in custody, and what your intentions are to prevent a repeated incident." (Emphasis in original). Charles responded **[**4]** in an email, stating in pertinent part:

> "I took the offender from room #2 to the lock up area to make a phone call. *** As I was escorting the offender back to room #2 he pushed me and ran toward the lobby exit door. I grabbed the offender several times

before he reached the lobby door but was unable to get a hold of him. The offender then opened the lobby exit door and ran into the lobby. I continued to struggle with the offender and he made it to the vestibule, the offender continued resisting while in the vestibule and was then able to maneuver his way outside of the building. Once outside of the building I was able to grab the offender near the bike racks, I held the offender ordering him to get on the ground, and stop resisting. The offender refused and continued to resists. [The email continues with a description of how other officers arrived and assisted in subduing the offender.] *** I believe that the offender's familiarity with the layout of the CCH police station and prior knowledge that the lobby exit door is not locked were factors in his attempt to escape. Although it is not common practice, I intend to handcuff all prisoners in my custody even while escorting them to **[**5]** various locations inside the police station. Nothing further."

[*P6] Charles's email omits that he had forgotten to lock the door and that he had carried a weapon into a secure area where weapons were prohibited. The police chief determined that Charles's response was not a "detailed" account and that it omitted those critical facts. Charles eventually admitted that he omitted these facts from his response and conceded that his failure to lock the door was, at least, a contributing factor to the escape.

[*P7] The booking room and other areas of the police station were under video surveillance, and the videotape of the incident was shown to the arbitrator, which corroborated the testimony of witnesses regarding the chain of events. While no copy of the video is in the record transmitted to this court, the record does contain two "placeholder" pages suggesting that a video was submitted to the circuit court.

[*P8] The second incident occurred on August 25, 2017. Room 183, a night club in the City (the Club), sponsored a "Ladies' Night" every Thursday which was known to produce an unruly crowd at closing time, around 2:00 a.m. Based on the Club's past history, police supervisory staff reallocated personnel **[**6]** from other duties and authorized overtime to ensure maximum coverage outside the Club on Thursday nights. Charles volunteered for an overtime shift running from 10:30 p.m. on Thursday, August 24 to 7:00 a.m. the following morning. Various witnesses testified to the arbitrator that: (1) it was well known in the police department that officers would staff the Club's Thursday closings; and (2) at the roll call for the shift, the commanding officer announced, "Fellows, we've got the Club tonight." Charles admitted he was aware of the club's notoriety, but variously either denied hearing the admonition "we've got the Club tonight" or claimed that he misunderstood it as not specifically requiring *him* to report to the Club that evening.

[*P9] Charles did not, in fact, report to the Club at the closing hour. An investigation, which included review of the GPS tracker on his squad car, revealed he was not dispatched to any other calls that night, but instead remained stationary in the parking lot of an abandoned nursing home a mile away from the Club during the Club's closing hours. The ignition in his squad car was turned off from 1:14 a.m. to 2:08 a.m. which rendered him unable to hear certain radio **[**7]** dispatches. During an investigatory interrogation conducted pursuant to the *Uniform Peace Officers' Disciplinary Act (50 ILCS 725/1 et seq.* (West 2018)), Charles denied that he was directed to be at the Club

that night. He also denied hearing any radio traffic regarding any need for Room 183 police presence, which could have been because the radio channel would not be heard if the squad car was off. Charles claimed he was "doing traffic enforcement, reading reports, or typing a report" during the time in question. However, no such reports were produced by him or the City during the investigation. Testimony was presented that the isolated location was not suitable to monitor passing traffic and that an officer running traffic enforcement must keep his squad car's ignition on to better pursue a passing motorist. Charles eventually admitted he was aware of the need for extra crowd control at the Club on Ladies' Nights. He gave the following testimony before the arbitrator:

"Q. So you knew you had a bar where there was tough stuff happening, right, right?
A. Yes.
Q. Potentially, right?
A. Correct.
Q. You knew the shift commander said it is club night guys, correct?
A. Yes.

Q. And isn't it true then that you made **[**8]** a conscious decision not to go by that bar during the hour period where there is tough stuff going on?
A. No, sir.
Q. Well, did you attempt to go there?
A. As I stated, I went to the club several times during my shift.
Q. The question is you made a conscious decision, didn't you, sir, not to go to that bar during the hour that you knew was the priority time between 1:00 and closing time?
A. I wouldn't say that I made a conscious decision. I was doing something else pertaining to police work at that time.
Q. What were you doing?
A. I don't recall. I was in the City of Country Club Hills. I was in my squad car.
* * *
Q. You don't know what you were doing for that hour, do you?
A. I don't recall exactly, no.
Q. You don't know if you were doing traffic enforcement?
A. No.
Q. And are you disputing the GPS?
A. No."

[*P10] The police chief filed charges against Charles, alleging that he violated numerous department rules and regulations. In summary, and as relevant here, the charges alleged that Charles: (1) submitted an incomplete, and therefore untruthful, report regarding the escape incident, specifically regarding the unlocked door and the transportation of a weapon into a secure area; (2) failed to follow **[**9]** an order of a superior officer by failing to report to the Club; and (3) was untruthful by claiming that he was typing and preparing official reports while he was in the nursing home parking lot. The chief sought to terminate Charles's employment as a City police officer.

[*P11] The collective bargaining agreement between the City and Charles's union allowed officers to have disciplinary matters submitted to binding ***arbitration***. Charles opted for ***arbitration***. The collective bargaining agreement provides that the City may discipline an officer for "just cause," but the agreement does not define that term. At all pertinent times, the City had rules in place requiring police officers: (1) to "be constantly alert *** keeping a vigilant watch for needed police services"; (2) to keep prisoners securely; (3) to obey lawful orders of superior officers; and (4) authorizing discipline up to and including discharge for acts "which endanger[] the safety, health or well-

being of any City employee, the public, vendors or agents" or for violation of department rules.

[*P12] Charles was terminated from the police force pending the ***arbitration***. At the ***arbitration***, the parties stipulated to the arbitrator's jurisdiction **[**10]** and that the issues for him to decide were whether the City had just cause to discharge Charles, and, if not, what the penalty should be.

[*P13] After hearing the evidence set forth above, the arbitrator issued an opinion and award. As to the prisoner escape incident, the arbitrator found that Charles failed to follow proper procedures during arrest and booking; failed to lock the booking room door, which was a contributing factor in Barfield's escape; and improperly omitted his failure to lock the door in his post-incident report. While he found some of Charles's statements "could be viewed as somewhat self-serving and self-exonerating," he determined there was insufficient evidence to find they were made with the intent to deceive "through omission of material fact."

[*P14] Regarding the Club incident, the arbitrator found that the City failed to prove the existence of an order requiring Charles to report to Room 183, but that Charles nonetheless lacked candor in his report of his activities that night. Despite these findings, the arbitrator determined to impose no discipline regarding the Club incident. He allowed the City to issue a written warning for his failure to secure his weapon and lock **[**11]** the booking room door, and directed the City to reinstate Charles.

[*P15] The City filed a single-count complaint in the circuit court to ***vacate*** the ***arbitration*** award, arguing that the award was against public policy to the extent that it did not impose the penalty of discharge. The complaint also requested that the court "uphold the termination of Charles" from the police department. The union and Charles filed an answer and a counterclaim seeking confirmation of the award. The parties filed cross-motions for summary judgment on the complaint and counterclaim and fully briefed the relevant issues. During the pendency of the litigation, the City's police officers certified a new union which was briefly substituted as a party in place of its predecessor. However, the successor union was eventually dismissed by agreement, leaving Charles as the only defendant. The City filed an amended complaint which was identical to the original except for the change in the status of the union as a party. The pending motions for summary judgment proceeded under the amended complaint.

[*P16] On February 24, 2020, the circuit court entered an order confirming the ***arbitration*** award, granting Charles's motion for summary **[**12]** judgment, and denying the City's motion for summary judgment, "for the reasons stated on the record." No report of those proceedings is in the record before us. This appeal followed.

[*P17] ANALYSIS

[*P18] On appeal, the City argues that the circuit court erred by granting summary judgment in favor of Charles, by denying its motion for summary judgment, resulting in a final order upholding the arbitrator's award. The City contends that, under the facts presented, any award imposing a penalty of less than discharge violates public policy. Recognizing the deference which we must afford to the arbitrator's findings of fact, the City also presses that certain facts relating to

Charles's conduct are uncontested. Charles, for his part, urges this court to affirm the circuit court, contending that the arbitrator was in the best position to view and consider the credibility of the witnesses and that public policy does not specifically require that Charles be discharged for his conduct.

[*P19] *HN1*[↑] The *Uniform **Arbitration** Act* (***Arbitration*** Act) (*710 ILCS 5/1 to 23* (West 2018)) "provides for very limited judicial review of an arbitrator's award." *Hawrelak v. Marine Bank, Springfield, 316 Ill. App. 3d 175, 178, 735 N.E.2d 1066, 249 Ill. Dec. 241 (2000)*. An arbitrator's award may be ***vacated*** only (1) if the award was procured by fraud, **[**13]** corruption, or other undue means, (2) when partiality or misconduct by the arbitrator is evident, (3) when the arbitrator exceeded his or her powers, or (4) when the arbitrator improperly refused to postpone a hearing or hear material evidence to a party's prejudice. *Id. at 179*. On judicial review, there is a presumption the arbitrator did not exceed his or her authority and we must construe the award, when possible, to uphold its validity. *Id.* This is because the parties have contracted how their disputes are to be resolved, "and judicial modification of an arbitrator's decision deprives the parties of that choice." *Id.* However, there is an exception to this general rule. A court should not enforce a collective bargaining agreement when to do so would be "repugnant to established norms of public policy." *American Federation of State, County & Municipal Employees, AFL—CIO v. Department of Central Management Services, 173 Ill. 2d 299, 306, 671 N.E.2d 668, 219 Ill. Dec. 501 (1996)*.

[*P20] On appeal, the City contends that the circuit court erred in granting summary judgment to the union and Charles, and in denying summary judgment to the City. Since the parties filed cross-motions for summary judgment, they conceded that no material questions of fact existed and that only a question of law was involved that the **[**14]** court could decide based on the record. *Pielet v. Pielet, 2012 IL 112064, ¶ 28, 978 N.E.2d 1000, 365 Ill. Dec. 497*. *HN2*[↑] We review the circuit court's decision as to cross-motions for summary judgment *de novo*. *Id. ¶ 30*; see also *Outboard Marine Corp. v. Liberty Mutual Insurance Co., 154 Ill. 2d 90, 102, 607 N.E.2d 1204, 180 Ill. Dec. 691 (1992)* (circuit court's entry of summary judgment is reviewed *de novo*).

[*P21] *HN3*[↑] Just a few months ago, our supreme court summarized the law regarding ***vacating*** an arbitral award in the public employment context on the basis it violated public policy, stating:

> "It is well established that judicial review of an arbitrator's award is extremely limited and the award must be construed, if possible, as valid. This court, however, has recognized a public-policy exception to ***vacate arbitration*** awards that are based on collective bargaining agreements. Under the public-policy exception, if an ***arbitration*** award is derived from the essence of the collective-bargaining agreement, this court will ***vacate*** the award if it 'is repugnant to established norms of public policy.' Such vacatur is rooted in the common-law doctrine that a court may refuse to enforce contracts that violate law or public policy. The public-policy exception is a narrow one—one that is to be invoked only when a party clearly shows enforcement of the contract, as interpreted by the arbitrator, contravenes **[**15]** some explicit public policy.

HN4[↑] In order to ***vacate*** an award under the exception, this court applies a two-step analysis. The initial question is whether a well-defined and dominant public policy can be identified through a review of our constitution, statutes, and relevant judicial opinions. If we establish the existence of a well-defined and dominant public policy, we must then determine whether the arbitrator's award, as reflected in his interpretation of the agreement, violated the public policy. Because our inquiry is whether the arbitrator's construction of the [collective bargaining agreement], as reflected in his award, is unenforceable due to a predominating public policy, which is a question of law, our review is *de novo*." (Internal citations omitted.) *City of Chicago v. Fraternal Order of Police, 2020 IL 124831, ¶¶ 25-26*.

[*P22] We begin as the supreme court has instructed, by assuming that the award which punished Charles with only a written warning is valid. From that starting point, we next consider whether there is a "well-defined and dominant public policy [which] can be identified through a review of our constitution, statutes, and relevant judicial opinions." *Id. ¶ 26*; see also *Dep't of Cent. Mgmt. Services v. Am. Fed'n of State, County & Mun. Employees (AFSCME), AFL-CIO, 197 Ill. App. 3d 503, 512, 554 N.E.2d 759, 143 Ill. Dec. 824 (1990)*. *HN5*[↑] "Questions of public policy are left to the courts, not the arbitrator." **[**16]** ***Chicago Fire** Fighters Union Local No. 2 v. City of **Chicago**, 323 Ill. App. 3d 168, 175, 751 N.E.2d 1169, 256 Ill. Dec. 332 (2001)*.

[*P23] *HN6*[↑] There is a robust and uniform body of case law establishing a public policy in Illinois that police officers be absolutely honest. In *Village of Oak Lawn v. Human Rights Comm'n, 133 Ill. App. 3d 221, 224, 478 N.E.2d 1115, 88 Ill. Dec. 507 (1985)*, the court rejected a discrimination claim brought by a police applicant who lied on her application, stating: "Trustworthiness, reliability, good judgment, and integrity are all material qualifications for any job, particularly one as a police officer. Her lying from the beginning disqualified her from consideration for the position and made her an unfit employee for the Oak Lawn Police Department." *HN7*[↑] Likewise, in *Sindermann v. Civil Serv. Comm'n of Village of Gurnee, 275 Ill. App. 3d 917, 928, 657 N.E.2d 41, 212 Ill. Dec. 346 (1995)*, the court explained: that "[A]s the guardians of our laws, police officers are expected to act with integrity, honesty, and trustworthiness." The *Sindermann* court then quoted, with approval, a federal court which stated: "'[A] law enforcement officer is in a peculiar and unusual position of public trust and responsibility, and by virtue thereof, the public body has an important interest in expecting the officer to give frank and honest replies to questions relevant to his fitness to hold public office. *** The high obligation owed by a policeman to his employer and his peculiar position in our society certainly must be taken into account **[**17]** in considering the nature and effect of disciplinary proceedings instituted by the employer.'" *Id.* (quoting *Grabinger v. Conlisk, 320 F.Supp. 1213, 1219-1220 (N.D. Ill.1970))*.

[*P24] This court has further explained that "[a] police officer's credibility is inevitably an issue in the prosecution of crimes and in the *** police department's defense of civil lawsuits. A public finding that an officer had lied on previous occasions is detrimental to the officer's credibility as a witness and as such may be a serious liability to the department." *Rodriguez v. Weis, 408 Ill. App. 3d 663, 671,*

946 N.E.2d 501, 349 Ill. Dec. 307 (2011) (upholding termination of a police officer who altered written reports to favor her own interests); *accord,* Thanasouras v. Police Bd., City of Chicago, 33 Ill. App. 3d 1012, 1014, 339 N.E.2d 504 (1975) (affirming termination of police officer who submitted a false report to his commanding officer).

[*P25] We therefore find there is a recognized public policy in Illinois that a police officer must be honest and not provide false, misleading, or incomplete statements in connection with his duties.

[*P26] Our analysis of the second prong of the test requires us to review the evidence presented to the arbitrator. HN8[↑] With respect to that evidence, we note that on appeal, the appellant has the burden to provide a complete record for review in the appellate court to support a claim of error. Foutch v. O'Bryant, 99 Ill. 2d 389, 391, 459 N.E.2d 958, 76 Ill. Dec. 823 (1984). If no such record is provided, "it **[**18]** will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis." Id. at 392; see also In re Marriage of Abu-Hashim, 2014 IL App (1st) 122997, ¶ 15, 383 Ill. Dec. 241, 14 N.E.3d 524 (all doubts and deficiencies arising from an insufficient record will be construed against the appellant). The City has not provided this court with the video recording of the prisoner escapee incident which the arbitrator viewed. Despite this omission, the record does contain testimony of persons who were present during the prisoner escapee incident or were familiar with the police station rooms in question. We will therefore limit our consideration to that evidence rather than that contained in the missing video recording.

[*P27] Charles contends that altering the penalty imposed by the arbitrator improperly infringes on the arbitrator's authority and his role as the finder of fact. The parties present widely divergent viewpoints on the second part of this issue. HN9[↑] Our role is not to reweigh the evidence presented to the arbitrator. See, *e.g.,* American Federation of State, County & Municipal Employees, AFL-CIO v. State, 124 Ill. 2d 246, 255, 529 N.E.2d 534, 124 Ill. Dec. 553 (1988) (quoting United Paperworkers International Union v. Misco, Inc., 484 U.S. 29, 37, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987) ("'[b]ecause the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they **[**19]** have agreed to accept'")).

[*P28] The City, for its part, expresses disagreement with the factual findings but recognizes it is not this court's role to reweigh the credibility of the witnesses. Even so, the City relies not only on the arbitrator's own findings of instances of Charles's dishonesty, but on additional instances of dishonesty which the City contends are demonstrated by undisputed evidence. These include that the video (which we will not consider) and the GPS tracking on Charles's squad car.

[*P29] We agree with the City that the GPS evidence is undisputed and that it directly rebuts the truth of Charles's investigatory statements that he was running a traffic patrol. If Charles was performing some sort of duty in the parking lot, his absence from the Club might be explainable. But he eventually admitted that he did not type any reports during the crucial closing hour during which the Club's patrons were leaving the premises, and that he did not stop any motorists or write tickets during that time, even with his engine off.

Despite being provided a lengthy hearing and months to prepare, Charles was unable to produce a single report he wrote or typed while in the nursing home parking **[**20]** lot. This demonstrates that his statements that he was preparing reports in the parking lot were not true. Some of Charles's conduct with respect to the Barfield escape constituted lying by omission, rather than by commission. But it takes elusive logic to explain how an officer asked to truthfully and "in detail" explain how a suspect escaped from custody would not mention that the suspect escaped because the reporting officer forgot to lock the door. We agree with the City that the record, and the arbitrator's ruling, establish that Charles was dishonest by: (1) stating he was monitoring traffic and typing reports in the parking lot of the nursing home; (2) claiming a lack of knowledge that he was to report to the Club at closing hour; and (3) omitting the facts that he brought his gun into a secure area and failed to lock the door, which allowed a detainee to escape from custody.

[*P30] The arbitrator noted conflicting evidence regarding whether Charles was ordered to report to the Club on August 24-25, both based on Charles's denial that he heard any verbal order at the roll call to that effect, and Charles's interpretation of such an order as not applying to him. We must, and do, defer **[**21]** to the arbitrator's resolution of the facts surrounding whether the commanding officer at the roll call gave a verbal order to Charles to report to the Club, and we do not disturb that specific factual finding. Even so, we note that the record is replete with undisputed evidence that Charles knew or should have known that he was to report to the Club: after all, he volunteered to take an extra shift whose purpose was specifically to ensure sufficient manpower on Ladies' Night at the Club.

[*P31] With that factual backdrop, we proceed to apply the second prong of the test, and consider whether the arbitrator's award, as reflected in his interpretation of the agreement, violated that public policy. This presents the question of whether providing only a written warning to Charles is sufficient to fulfill the public policy interest regarding honesty of police officers.

[*P32] *HN10*[↑] While we recognize that not every violation of a department rule should warrant discharge, there is substantial authority supporting the proposition that dishonesty of a police officer regarding his official duties is inimical to the sound operation of a department. As noted above, courts have recognized keeping dishonest police **[**22]** officers on the force creates liability issues for the department (*Rodriguez v. Weis, 408 Ill. App. 3d 663, 671, 946 N.E.2d 501, 349 Ill. Dec. 307 (2011)*). This makes sense, since police officers must testify in criminal trials and cross-examination regarding known incidents of past dishonesty would undermine their credibility to a court or jury and jeopardize otherwise sound prosecutions of criminal offenders.

[*P33] Imposing only a written warning allows Charles to remain on the force, creating the possibility that his credibility as a witness will be undermined for the remainder of his career, and would encourage other officers to be dishonest when doing so would benefit them, knowing that, if caught, they would receive only a light penalty. Indeed, the overwhelming weight of authority suggests that not only is discharge an appropriate remedy for police dishonesty, it is virtually the only appropriate penalty. *HN11*[↑] Even a single violation of a department rule has been found to

be sufficient to warrant discharge. *Reich v. Bd. of Fire & Police Com'rs, 13 Ill. App. 3d 1031, 1033, 301 N.E.2d 501 (1973)*. Cause for discharge exists when a police officer lies to his employer. *Slayton v. Board of Fire & Police Commissioners, 102 Ill. App. 3d 335, 430 N.E.2d 41, 58 Ill. Dec. 99 (1981)*; *Kupkowski v. Board of Fire & Police Commissioners, 71 Ill. App. 3d 316, 389 N.E.2d 219, 27 Ill. Dec. 407 (1979)*. "It is a violation of public policy to require the continued employment of an officer who has been found to be abusive and untruthful. *** It would be repugnant to public policy to retain [the] **[**23]** police officer in these circumstances." *Decatur Police Benevolent & Protective Ass'n Labor Comm. v. City of Decatur, 2012 IL App (4th) 110764, ¶ 44, 968 N.E.2d 749, 360 Ill. Dec. 256*.

[*P34] *HN12*[↑] Our supreme court has explained that "cause" in the context of discharge of a public employee is "'some substantial shortcoming which renders the employee's continuance in office in some way detrimental to the discipline and efficiency of the service and which the law and sound public opinion recognize as good cause for his no longer holding the position.'" *Dep't of Mental Health & Developmental Disabilities v. Civil Serv. Comm'n, 85 Ill. 2d 547, 551, 426 N.E.2d 885, 55 Ill. Dec. 560 (1981)* (quoting *Kreiser v. Police Board, 40 Ill. App. 3d 436, 441, 352 N.E.2d 389 (1976)*). As explained by our supreme court in an opinion written by Justice Freeman, "[W]hen public policy is at issue, it is the court's responsibility to protect the public interest at stake. That is why courts will not give the drunken pilot the opportunity to fly a commercial airliner again even though no harm befell his passengers." *American Federation of State, County & Municipal Employees, AFL-CIO v. Dep't of Central Management Services, 173 Ill. 2d 299, 333, 671 N.E.2d 668, 219 Ill. Dec. 501 (1996)*.

[*P35] Even so, we do not find, from our review of the case law, there is an absolute rule that any instance of police dishonesty must result in termination from service. Obviously, each case presents unique facts which must take into account the officer's prior record, the benefits of progressive discipline, the culpability of the officer, and the potential peril to the municipality created by the particular dishonesty at issue. A remand to the arbitrator **[**24]** may be appropriate to allow the arbitrator to "correct a mistake which is apparent on the face of the award, complete an ***arbitration*** that is not complete, and clarify an ambiguity in the award." *Federal Signal Corp. v. SLC Technologies, Inc., 318 Ill. App. 3d 1101, 1111, 743 N.E.2d 1066, 252 Ill. Dec. 910 (2001)*; ***Chicago*** *Teachers Union v. Illinois Educational Labor Relations Board, 344 Ill. App 3d 624, 632, 800 N.E.2d 475, 279 Ill. Dec. 406 (2003)* ("Courts have *** historically exercised the power to remand a matter to an arbitrator in limited circumstances, such as where the award is obviously incomplete or ambiguous."); see also *Clanton v. Ray, 2011 IL App (1st) 101894, ¶¶ 30-38, 979 N.E.2d 371, 365 Ill. Dec. 767* (holding circuit court did not err in remanding award to arbitrator for clarification because the award was ambiguous as to whether the arbitrator had imposed joint and several liability).

[*P36] In light of these authorities, no circumstances exist here which would suggest that we should remand this case to the arbitrator for imposition of a more severe penalty than a written warning. *HN13*[↑] Dishonesty by a police officer is detrimental to the service because, among other things, it undermines the officer's credibility when testifying in criminal cases and creates liability for the municipality

in civil cases. Based on the authorities cited herein and taking into consideration the cumulative mosaic of facts regarding the two incidents, we find that the only remedy consistent with public policy for Charles's misconduct **[**25]** is termination. Accordingly, the circuit court erred in confirming the arbitrator's award and the award itself must be ***vacated*** and replaced by a discharge order

[*P37] CONCLUSION

[*P38] We reverse the circuit court's orders granting summary judgment to Charles and the union, and denying summary judgment to the City. Pursuant to our authority under *Illinois Supreme Court Rule 366(a)(5)* (eff. Feb. 1, 1994), we remand the case to the arbitrator with instructions to enter an award discharging Charles.

[*P39] Reversed and remanded with instructions.

Dissent by: CUNNINGHAM

Dissent

[*P40] JUSTICE CUNNINGHAM, dissenting:

[*P41] I respectfully dissent from the ruling of the majority in this case.

[*P42] Unlike the majority, I conclude that the arbitrator's decision did not run afoul of public policy simply because he levied a sanction which was less than termination. It was a sanction, which in the arbitrator's judgment, was appropriate for the offense. To find otherwise would be to conclude that termination is the *only* sanction that is allowable or possible under the facts of this case. In my view, there is no support in the record or the law for such a conclusion. Therefore, reversing the arbitrator and the circuit court of Cook County, as the majority has done, amounts to imposing the **[**26]** sanction that *they* think is appropriate for the conduct of officer Charles. I suggest that this is not our role.

[*P43] It has long been the law in Illinois and across the country, that when parties agree to ***arbitration*** to resolve conflicts, the arbitrator's decision is given great weight unless it can be shown that there was fraud, bias, or misconduct by the arbitrator. See, *e.g., Craig v. United Automobile Ins. Co., 377 Ill. App. 3d 1, 4, 878 N.E.2d 155, 315 Ill. Dec. 929 (2007)*. No such showing has been made in this case.

[*P44] The majority's decision to reverse the arbitrator's ruling and impose their own sanction against officer Charles seems to be based on their belief that the sanction levied by the arbitrator was too light for the conduct which the arbitrator found officer Charles to have committed. But there is nothing about the sanction levied by the arbitrator that clearly falls outside his authority or the collective bargaining agreement between the city of Country Club Hills and the union which represents officer Charles. Thus, I find the overturning of the arbitrator's decision, based on this record, to be unfounded.

[*P45] The two reasons which were put before the arbitrator by the city of Country Club Hills as the bases for termination of officer Charles were: (1) officer Charles lied **[**27]** by omission in his report regarding the attempted escape of Bernard Barfield in that officer Charles failed to highlight that *he* had left the door of the booking room unlocked; and (2) officer Charles' failed to follow an order to

be on hand at Room 183 (as was customary when the club closed for the night) and was untruthful about that failure.

[*P46] It should be noted that unlike this court, which relies solely on the cold record, the arbitrator heard live testimony from several witnesses and considered exhibits over the course of what was a lengthy hearing. There was ample opportunity to observe the witnesses and determine their credibility and the visual nuances that give the trier of fact an impression of the witnesses and their testimony. Although the arbitrator found that some of officer Charles' statements lacked candor, he did not find that there was a concerted effort to be dishonest as the city of Country Club Hills suggested. As his attorney explained during oral argument, officer Charles' version of the events was at great variance with the city of Country Club Hills regarding the alleged order for him to be on hand at Room 183 at closing time. The city makes much of the fact **[**28]** that several months elapsed between the time that officer Charles was to have been stationed outside the club and the time of the ***arbitration*** hearing. They reason that if officer Charles had been engaged in the activities that he claimed, there was ample time for him to produce evidence of such activities, but he did not, therefore, that was further proof that he was lying. On the other hand, the lengthy passage of time may be the very reason that no such proof of his activities on the night in question, is available. It is not beyond reason or belief for a police officer to be unable to recall with precision, exactly what he was doing on a particular night many months earlier. Thus, offering an explanation of his *usual* and/or *likely* activities under similar circumstances does not necessarily equate to dishonesty. Based on the arbitrator's finding, it can reasonably be inferred that he gave some weight to officer Charles' testimony. The result is that there was no clear finding that he had failed to follow an order to go to Room 183.

[*P47] On the question of officer Charles' written account of the attempted escape by the detainee, Barfield, it is clear that he did not highlight the fact **[**29]** that he had left the door unlocked. However, the content of the report was very factual and nothing in the record suggests that there was any untruth or misleading statements other than the omission of who left the door unlocked. The city's complaint centers around officer Charles' failure to *highlight* the fact that he had left the door unlocked. While the city's interpretation that he lied by omission is certainly reasonable, it is not the *only* interpretation that can be gleaned from his written report. Thus, it can be inferred that the arbitrator recognized that and ruled accordingly.

[*P48] I agree with the majority that the seminal assumption when reviewing an ***arbitration*** order is that the arbitrator, after hearing the facts and presumably applying the law to the facts, entered a valid order. That assumption should, and does, in my opinion, apply with equal force to this case. Here, specifically, the arbitrator found that when all of the evidence, facts, and circumstances were considered, the appropriate sanction for officer Charles was a written warning. I see no reason whatsoever to overturn that ruling.

[*P49] The majority relies on the public policy exception in overturning the arbitrator **[**30]** and the circuit court of Cook County. The majority correctly applies a *de novo* standard of review to the determination of whether the public policy exception applies. However, application of the *de novo* standard should not equate to substituting the reviewing court's judgment for that of the arbitrator. I

agree with officer Charles' argument before this court that the public policy exception is *very* narrow and depends upon the facts of each case. See ***Chicago*** *Transit Authority v. Amalgamated Transit Union, Local 241, 399 Ill. App. 3d 689, 696, 926 N.E.2d 919, 339 Ill. Dec. 444 (2010)*. In this case, although the majority has not clearly identified or explained the specific actions of officer Charles which bring this case within the narrow exception, nevertheless, my colleagues have overturned the arbitrator's ruling and entered their own. This is inconsistent with the collective bargaining agreement which mandated ***arbitration*** to resolve the very type of conflict that occurred here. And, in my view, is inconsistent with established Illinois case law.

[*P50] I do not disagree that a law enforcement officer must be held to a high standard of honesty. Indeed, I recently authored an opinion affirming the principle that "the job of a police officer requires the utmost integrity and honesty," on which counsel for the city of Country **[**31]** Club Hills relied during oral argument. See *Rios v. Cook County Sheriff's Merit Board, 2020 IL App (1st) 191399, ¶ 34*. But the officer in *Rios* was terminated after she had a conversation with her incarcerated sibling during which he asked her to engage in witness tampering. *Id. ¶ 4*. Not only did the officer fail to report the conversation, she denied that it even occurred, and admitted the truth only when confronted with the recording. *Id. ¶ 30*. This is a far cry from officer Charles' conduct here. Moreover, in *Rios*, we made clear the substantial deference to be accorded to the Cook County Sheriff's Merit Board findings (*id. ¶ 33*), which is akin to the deference we should accord the arbitrator here.

[*P51] The majority's reliance on *Village of Oak Lawn v. Human Rights Commission, 133 Ill. App. 3d 221, 224, 478 N.E.2d 1115, 88 Ill. Dec. 507 (1985)*, suffers from similar infirmities. In that case, the applicant clearly and intentionally lied on an application designed to gather accurate information about an applicant's fitness to join the police force. That is a very different scenario than the actions of officer Charles in this case. Nevertheless, that case seems to form the basis for the belief by the city of Country Club Hills and the majority here that officer Charles' conduct warranted nothing less than termination.

[*P52] I do not agree that under the facts of this case, a breach **[**32]** of the standard of honesty so clearly occurred, that termination was the *only* possible sanction. In my view, this case is similar to countless cases which come before this court wherein a lower tribunal levied a sanction different from what we may have levied, if we stood in the place of the lower court. In those instances, we do not ***vacate*** the sanction and impose the one which we deem appropriate. Rather, we recognize that as a court of review while we may differ with the lower court regarding the appropriate sentence, as long as the sentence falls within the permissible range for the offense, we may not reverse or ***vacate*** it and impose our own simply because we disagree with it. See, *e.g., People v. Alexander, 239 Ill. 2d 205, 214, 940 N.E.2d 1062, 346 Ill. Dec. 458 (2010)*; *People v. Knox, 2014 IL App (1st) 120349, ¶ 46, 385 Ill. Dec. 874, 19 N.E.3d 1070*.

[*P53] In this case, while the majority claims they are not suggesting that discharge is the *only* sanction for dishonesty, they go on to overturn the arbitrator's ruling on the reasoning that the facts of *this* case warrants such action. They do not explain what distinguishes this case from others in which discharge may not be

an appropriate sanction and in which an arbitrator's ruling would be allowed to stand. The majority's ruling simply says, they thought the sanction was too light in this case [**33] and wanted to impose their own sanction, regardless of the arbitrator's findings.

[*P54] Thus, in my view, although the majority's analytic language says otherwise, their ruling says that discharge is the only sanction that they would accept in a case of police dishonesty even if imposing that sanction requires overturning an otherwise properly entered ***arbitration*** finding. And further, their action makes it clear that they are doing so simply because they disagreed with the arbitrator and wanted a different, more stringent sanction. I do not believe that is our role especially under the facts of this case. It is a slippery slope indeed, once this court inserts itself into the array of possible sanctions levied by a lower tribunal in order to determine if "the punishment fits the crime." I hasten to reiterate that a written warning *is* a sanction although the inference from the argument made by the city of Country Club Hills is that officer Charles "got off Scot free." Not so. The arbitrator found the sanction he levied to be the appropriate one under the facts that he had personally heard and reviewed. Although it is clearly not the sanction that the city of Country Club Hills wanted, I can [**34] find no support for the position that termination is the *only acceptable sanction* for the lack of candor which the arbitrator found officer Charles to have committed. In fact, a review of the testimony suggests ambiguity in addition to the lack of candor which the arbitrator found. So, there was no clear-cut evidence that the totality of facts and circumstances were so egregious that termination was the only and obvious conclusion at the end of the ***arbitration*** process.

[*P55] Additionally, there has been no suggestion that the arbitrator was biased, acted fraudulently or outside the bounds of his authority. On the contrary, the hearing was lengthy and thorough. The arbitrator acted within the parameters of the collective bargaining agreement and his professional capacity as the trier of fact and levied a sanction which in his judgment, based on the facts and circumstances of this case, was appropriate.

[*P56] In light of the fact that there is no clear and overwhelming support for the conclusion that this case falls within that narrow exception to the rule which *requires* this court to accept the arbitrator's ruling, I would affirm the arbitrator and the circuit court of Cook County, rather than [**35] reverse that ruling and impose a different sanction.

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Matter of N.Y. off. for People with Dev.al Disabilities (civil Serv. Empls. Ass'n, Local 1000, Afscme, Afl-Cio)

Supreme Court of New York, Appellate Division, Third Department

April 29, 2021, Decided; April 29, 2021, Entered

531029

Reporter

193 A.D.3d 1305 *; 2021 N.Y. App. Div. LEXIS 2679 **; 2021 NY Slip Op 02579 ***; 2021 WL 1676979

[*1]** In the Matter of the Arbitration between New York Office for People with Developmental Disabilities, Respondent, and Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, et al., Appellants.

Core Terms

arbitrator, sexual ***harassment***, coworker, ***public policy***, disciplinary, suspension, charges, vacate, reinstatement, termination

Case Summary

Overview

HOLDINGS: [1]-The court had before it a series of four separate, escalating and outrageous sexual ***harassment*** incidents. The events were particularly troublesome considering that the employee engaged in annual sexual ***harassment*** training since 2013 and promised not to re-offend; [2]-The events that followed were even more egregious and rose to the level of criminal conduct. Given the extremely inappropriate nature of the employee's conduct, the arbitrator's decision violated ***public policy***. The award failed to account for the rights of other employees to a non-hostile work environment and conflicted with the employer's obligation to eliminate sexual ***harassment*** in the workplace; [3]-As such, Supreme Court properly vacated the award as violative of the ***public policy*** prohibiting sexual ***harassment***. It was authorized to remit the matter to a different arbitrator for imposition of a new penalty.

Outcome

The order was affirmed, without costs.

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Judicial Review

Labor & Employment Law > Collective Bargaining & Labor Relations > Labor Arbitration > Arbitration Awards

Labor & Employment Law > ... > Labor Arbitration > Judicial Review > Scope of Authority

HN1[] **Alternative Dispute Resolution, Judicial Review**

It is manifest that there is a strong ***public policy*** under both state and federal law that prohibits sexual misconduct in the workplace. A court may vacate an arbitrator's award only on grounds stated in *CPLR 7511 (b)*, which include an instance where an arbitrator exceeds his or her power (*CPLR 7511 [b] [1] [iii]*) by rendering an award that violates a strong ***public policy***. This limited ***public policy*** exception pertains only when ***public policy*** considerations, embedded in statute or decisional law, prohibit, in an absolute sense, certain relief being granted by an arbitrator. Stated another way, the courts must be able to examine the award on its face without engaging in extended factfinding, or legal analysis, and conclude that ***public policy*** precludes its enforcement. This inquiry necessitates that the court gauge the penalty against the sustained charges.

Counsel: **[**1]** Daren J. Rylewicz, Civil Service Employees Association, Inc., Albany (Scott Lieberman of counsel), for appellants.

Letitia James, Attorney General, Albany (Sarah L. Rosenbluth of counsel), for respondent.

Judges: Before: Egan Jr., J.P., Lynch, Aarons, Pritzker and Colangelo, JJ.

Opinion by: Lynch

Opinion

[*1306] Lynch, J.

Appeal from an order of the Supreme Court (Ferreira, J.), entered February 6, 2020 in Albany County, which granted petitioner's application pursuant to *CPLR 7511* to vacate an arbitration award.

On ***April*** 20, 2018, petitioner issued a notice of suspension and a notice of discipline to an employee, respondent Chad Dominie, advising of his immediate suspension, without pay, based on various disciplinary charges related to sexual ***harassment*** in the workplace. The notices specified that petitioner was seeking a penalty terminating Dominie's employment. The matter proceeded to arbitration pursuant to a collective bargaining agreement (hereinafter CBA) between petitioner and respondent Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (hereinafter CSEA) — the collective bargaining representative for certain of petitioner's employees, including Dominie.

Following a hearing, in a "Decision and Award" dated **[**2]** July 16, 2019, the arbitrator sustained four of the 13 charges and determined that there was probable cause for the interim suspension. The arbitrator found that certain mitigating factors warranted a penalty less than termination. Noting that Dominie was a 20-year employee without a prior disciplinary record, that the coworker who had been sexually harassed no longer worked in the office and that the office lacked proper supervision, the arbitrator found that a suspension without pay until Dominie "returned to active employment" was the "appropriate penalty." The arbitrator cautioned that her decision "serve[d] as a final warning to [Dominie] that any repeat of offending conduct

will most surely result in his termination." The arbitrator further directed that Dominie was "to be returned to work as soon as practicable."

Petitioner commenced this CPLR article 75 proceeding seeking to vacate the award, contending that the penalty was against ***public policy***. After issue was joined, Supreme Court granted the petition, vacated the award and remitted the matter for the imposition of a new penalty before a new arbitrator. Respondents appeal.

The core issue presented is whether the arbitrator's award violated **[**3]** established ***public policy*** considerations prohibiting sexual ***harassment*** in the workplace. *HN1*[↑] As Supreme Court duly **[*1307]** recognized, it is manifest that there is a strong ***public policy*** under both state and federal law that prohibits sexual misconduct in the workplace (*see Newsday Inc. v Long Island Typographical Union No. 915, CWA, AFL-CIO, 915 F2d 840, 844-845 [1990], cert denied 499 U.S. 422 [1991]*; *Matter of New York City Tr. Auth. v Phillips, 162 AD3d 93, 97, 75 N.Y.S.3d 133 [2018], lv dismissed 31 NY3d 1139 [2018]*; *Matter of Phillips v Manhattan & Bronx Surface Tr. Operating Auth., 132 AD3d 149, 155, 15 N.Y.S.3d 331 [2015], lv denied 27 NY3d 901 [2016]*). A court may vacate an arbitrator's award only on grounds stated in *CPLR 7511 (b)*, which include an instance where an arbitrator "exceed[s] his [or her] power" (*CPLR 7511 [b] [1] [iii]*) by rendering an award that **[***2]** violates a strong ***public policy*** (*see Matter of New York City Tr. Auth. v Transport Workers' Union of Am., Local 100, AFL-CIO, 6 NY3d 332, 336, 845 N.E.2d 1243, 812 N.Y.S.2d 413 [2005]*). This limited ***public policy*** exception pertains "only when '***public policy*** considerations, embedded in statute or decisional law, prohibit, in an absolute sense, certain relief being granted by an arbitrator. Stated another way, the courts must be able to examine the award on its face without engaging in extended factfinding, or legal analysis, and conclude that ***public policy*** precludes its enforcement'" (*Matter of Bukowski [State of N.Y. Dept. of Corr. & Community Supervision], 148 AD3d 1386, 1388, 50 N.Y.S.3d 588 [2017]*, quoting *Matter of New York City Tr. Auth. v Transport Workers Union of Am., Local 100, AFL-CIO, 99 NY2d 1, 7, 780 N.E.2d 490, 750 N.Y.S.2d 805 [2002]* [emphases, ellipses and brackets omitted]). This inquiry necessitates that we gauge the penalty against the sustained charges.

The arbitrator sustained charges 1, 4, 5 and 10, covering incidents from January 2017 to October 2017 in which Dominie **[**4]** was found to have sexually harassed a female coworker. Specifically, in the first January 2017 incident, Dominie approached the coworker from behind while she was on the phone, reached down her shirt and cupped her breast. A separate incident occurred that month when, among other things, Dominie tackled the coworker on a couch, grabbed her wrist and slapped her thigh. He also put a fake rat on her desk when she reported the incident to a supervisor. In this regard, the arbitrator credited the coworker's testimony that a supervisor's meeting ensued during which Dominie promised to stop his misbehavior. He failed to do so. In July 2017, Dominie lifted the coworker's dress with a hammer, exposing her underpants, blocked her from leaving her cubicle while exposing his penis, and lifted her shirt over her head. His conduct culminated with an incident in October 2017, when Dominie straddled the coworker at her desk and, utilizing vulgar language, threatened to "take" what he wanted. The coworker testified that she feared an imminent **[*1308]** rape. Her

complaint about this last incident prompted an investigation and the ensuing disciplinary charges. The coworker also filed criminal charges against **[**5]** Dominie, resulting in his plea of guilty to ***harassment*** in the second degree.

The findings of the arbitrator are not challenged on this appeal, only the penalty. Under article 33.4 (g) of the CBA, the arbitrator's decision as to a penalty "shall be final and binding upon the parties" and the arbitrator is authorized to "take any . . . appropriate action warranted under the circumstances including . . . ordering reinstatement and back pay for all or part of any period of suspension without pay." Respondents maintain that the arbitrator acted within her broad authority under the CBA to impose an extended suspension without pay and reinstatement given Dominie's lack of a prior disciplinary record. Notwithstanding this contractual authority, petitioner contends **[***3]** that the arbitrator's direct reinstatement of Dominie without conditions violates the ***public policy*** against sexual ***harassment***. It is worth noting here that petitioner is not asserting a per se rule that termination is mandatory upon a finding of sexual misconduct. In fact, petitioner's own policy against sexual ***harassment*** states that "[v]iolations of this [p]olicy may result in disciplinary action."

In *Newsday Inc. v Long Island Typographical* **[**6]** *Union No. 915, CWA, AFL-CIO* (*915 F2d at 844-845*), the Second Circuit held that an arbitral award was properly vacated under the ***public policy*** exception where an arbitrator reinstated a terminated employee who had engaged in multiple acts of sexual ***harassment***. The employee in *Newsday* had previously been disciplined for such conduct and warned, as here, that similar future conduct would warrant immediate discharge (*see Newsday Inc. v Long Island Typographical Union No. 915, CWA, AFL-CIO, 915 F2d at 843-845*). By comparison, 30 years later, in *Barnard College v Transport Workers Union of America, AFL-CIO, Local 264 (801 Fed Appx 40, 2020 US App LEXIS 12018 [2d Cir 2020])*, the Second Circuit upheld an arbitral award suspending an employee without pay for approximately one year and directing his reinstatement. Distinguishing *Newsday*, the Second Circuit emphasized that the employee "was being punished for only a single act, and ***public policy*** does not counsel as strongly against deference to the arbitral award" (*id. at 42*).

We are mindful that, unlike the employee in *Newsday*, Dominie does not have a disciplinary history. That said, the situation here does not involve a single act of misconduct as in *Barnard College*. In defined contrast, we have a series of four separate, escalating and outrageous sexual ***harassment*** **[*1309]** incidents. The events are particularly troublesome considering **[**7]** that Dominie engaged in annual sexual ***harassment*** training since 2013 and, when confronted by his supervisors after the two January 2017 incidents, promised not to re-offend. The events that followed were even more egregious and rise to the level of criminal conduct, as memorialized in Dominie's guilty plea to the ***harassment*** charge. Given the extremely inappropriate nature of Dominie's conduct, we conclude that the arbitrator's decision violates ***public policy***. The award fails to account for the rights of other employees to a non-hostile work environment and conflicts with the employer's obligation to eliminate sexual ***harassment*** in the workplace (*see Newsday Inc. v Long Island Typographical Union No. 915, CWA, AFL-CIO, 915 F2d at 845*; *Matter of New York City Tr. Auth. v Phillips, 162 AD3d*

at 99-100). The fact that the victimized coworker no longer worked in the office is hardly a mitigating factor. Nor is the penalty consistent with the arbitrator's "significant concern" that Dominie failed to acknowledge his own wrongdoing. As such, we find that Supreme Court properly vacated the award as violative of the ***public policy*** prohibiting **[***4]** sexual ***harassment***. We also conclude that the court was authorized to remit the matter to a different arbitrator for the imposition of a new penalty **[**8]** (*see CPLR 7511 [d]*).

Egan Jr., J.P., Aarons, Pritzker and Colangelo, JJ., concur.

ORDERED that the order is affirmed, without costs.

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