Monroe County Clerk's Index No. E2019008543
Appellate Division–Fourth Department Docket No. CA 20-00826

Court of Appeals

of the

State of New York

In the Matter of the Application of

ROCHESTER POLICE LOCUST CLUB, INC.,
MICHAEL MAZZEO and KEVIN SIZER,

Petitioners-Respondents,

– against –

CITY OF ROCHESTER and LOVELY A. WARREN,
as Mayor of the City of Rochester,

Respondents-Respondents,

– and –

COUNCIL OF THE CITY OF ROCHESTER,

Respondent-Appellant,

– and –

THE MONROE COUNTY BOARD OF ELECTIONS,

Respondent.

OPPOSITION TO MOTION FOR LEAVE TO APPEAL

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DISCLOSURE STATEMENT – 22 NYCRR § 500.1(f)

The Rochester Police Locust Club, Inc. is a not-for-profit corporation organized and existing under the laws of New York State. It has no parent or subsidiary entities, and its only affiliated entity is the Rochester Police Locust Club PAC Fund.

PRELIMINARY STATEMENT

Petitioners-Respondents the Rochester Police Locust Club, Inc., Michael Mazzeo and Kevin Sizer (collectively "Locust Club") respectfully submit that the motion brought by the Council of the City of Rochester ("City Council") seeking permission to appeal from a decision of the Appellate Division, Fourth Department in this matter should be denied.

Contrary to the assertions of City Council, there is no conflict between the Fourth Department's decision and this Court's previous decisions in the *NYC PBA, Town of Wallkill* and *City of Schenectady* line of cases. As discussed below, the Fourth Department correctly interpreted and applied those cases in invalidating the disciplinary components of Local Law No. 2, which attempted to unilaterally create a new system for police discipline in the City of Rochester in clear violation of state law. There is simply no merit to City Council's arguments and any further appeal would be a waste of time and resources, both from the perspective of the parties and of the Court.

Additionally, this case does not warrant the attention of the Court because any holding would lack widespread applicability and be limited to a very narrow category of municipalities which had pre-1967 legislation specifically governing police discipline, followed by a post-1967 repeal or amendment of such legislation, followed by a subsequent attempt to unilaterally impose a different police discipline system without collectively bargaining with a recognized employee organization. While Rochester may not be the only municipality in the State in which such a sequence of events and legislation has occurred, it seems extremely unlikely that this scenario can exist in more than a handful of municipalities throughout the State.

Finally, to the extent that City Council argues that the Court should grant permission for the appeal in order to "provide clarity" to municipalities on the permissible scope of police disciplinary reform, such request is misplaced. This Court has already issued three (3) separate decisions on this issue and, it is submitted, has provided all the clarity necessary, as evidenced by the fact that the Fourth Department had no difficulty applying such precedent in this case and reaching a clear, and unanimous, decision. In reality, City Council is not seeking clarity, but rather modification, which must come from the Legislature.

ARGUMENT

City Council's motion for leave to appeal should be denied because any decision would be applicable only to very small number of municipalities, there is no conflict among the Departments of the Appellate Division on this issue, and because the Fourth Department's decision in this matter does not conflict with any prior decisions of this Court.

POINT I

THIS CASE DOES NOT PRESENT ANY ISSUE OF WIDESPREAD APPLICABILITY

As an initial matter, leave to appeal should be denied because this case does not present any issue of widespread applicability. This Court has already issued multiple decisions on the issue of police discipline as it relates to both Civil Service Law §§ 75 and 76 and to the Taylor Law's mandate for collective bargaining. *See Matter of Auburn Police Local 195 v. Helsby,* 46 NY2d 1034 (1979)*; Matter of Patrolmen's Benevolent Ass'n of the City of New York, Inc. v. New York State Public Employment Relations Board,* 6 NY3d 563 (2006) ("*PBA*")*; Town of Wallkill v. Civil Serv. Employees Ass'n, Inc.,* 19 NY3d 1066 (2012) ("*Wallkill*")*; City of Schenectady v. New York State Public Employment Relations Bd.,* 30 NY3d 109 (2017) ("*Schenectady*"). These cases provide clear rules concerning police discipline, and particularly whether police discipline in a

particular municipality is a mandatory subject of negotiation under the Taylor Law, and no further pronouncements from the Court are needed.

The difference between the Court's previous decisions and the situation presented in the current case is that, unlike the specific legislation which governed police discipline in the above-cited cases, in the City of Rochester the prior legislation had been repealed decades before the passage of the new local law underlying the current litigation. As discussed below, the necessity of the pre-Taylor Law legislation being "in force", *PBA*, 6 NY3d at 571, was clearly a central component of this Court's prior decisions and a prerequisite to a municipality being able to avoid the otherwise applicable mandate for collective bargaining under the Taylor Law. However, at this point it is sufficient to note that the scenario presented in the City of Rochester – a pre-Taylor Law charter provision governing police discipline, followed by a subsequent repeal of such charter provision, then decades of utilizing Civil Service Law § 75 and negotiating police discipline into the governing collective bargaining agreement, followed by a unilateral implementation of an entirely new disciplinary system enacted through local legislation – has to be incredibly rare. While Rochester may not be entirely unique, this is not a scenario which could reasonably be expected to have occurred in more than a small handful of municipalities.

According to the 2020 Annual Report of the Clerk of the Court of Appeals, last year the Court granted thirty-two (32) out of 870 motions for leave to appeal, or 3.7 percent. The present case is simply not worthy of taking one of these very few appeal slots as any decision would be of very limited applicability.

POINT II

THERE IS NO CONFLICT AMONG THE DEPARTMENTS OF THE APPELLATE DIVISION

City Council's motion should also be denied because there is no conflict among the Departments of the Appellate Division on this issue. City Council's motion papers do not point to any contrary holding by a Department of the Appellate Division, and the Locust Club is not aware of any such conflicting case. While this is almost certainly a result of the very few municipalities in the State which could be expected to have a similar legislative background, as discussed in Point I, *supra*, it nevertheless also weighs against granting leave to appeal.

POINT III

THE FOURTH DEPARTMENT'S DECISION IS NOT IN CONFLICT WITH THIS COURT'S PRIOR DECISIONS

Despite City Council's assertion, there is no conflict between the decision issued by the Fourth Department in this case and the prior decisions issued by this Court in *PBA, Wallkill* and *Schenectady.* In fact, the Fourth Department's decision clearly followed the explicit holdings of those cases.

1. *PBA, Wallkill* and *Schenectady* Require Legislation to be "In Force" for Police Discipline to be a Prohibited Subject of Negotiation.

Throughout this litigation, City Council has repeatedly attempted to simply ignore the language in this Court's prior decisions holding that the prohibition on bargaining police discipline applies where legislation committing police discipline to local officials "*is in force*". *Schenectady*, 30 NY3d at 115 (italics added) (quoting *PBA*, 6 NY3d at 571-572). *See also Wallkill*, 19 NY3d at 1069 (discussing Town's authority under Town Law § 155). In addition to describing the basis for an exemption from the Taylor Law's otherwise applicable mandate for collective bargaining as being "grandfathered", *Schenectady*, 30 NY3d at 114 (quoting *PBA*, 6 NY3d at 573), the Court specifically noted "that the Taylor Law prevails where 'no legislation specifically commits police discipline to the discretion of local officials.'" *Schenectady*, 30 NY3d at 115 (quoting *PBA*, 6 NY3d at 571) (citations omitted). This pronouncement is stated in the present tense; the Court did *not* state that the Taylor Law only prevails where no legislation *ever* previously committed police discipline to the discretion of local officials, which is the unsupported proposition now put forth by City Council.

In 2019, when Local Law No. 2 was enacted, and in fact for the past 35 years, there has not been any legislation committing police discipline to the sole

discretion of local officials in Rochester. Rather, the City has explicitly stated that discipline of police officers in Rochester is governed by the Civil Service Law.

The Fourth Department correctly applied this prior precedent, finding that:

> 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.

Opinion at pp. 6-7 (emphasis in original).

2. The City had the Authority to Amend Its Own Charter.

City Council repeatedly, and somewhat disingenuously, asserts that the State's 1907 grant of the City Charter was the State's last pronouncement on the issue of police discipline in the City of Rochester. *See, e.g.,* City Council's MOL at p. 25. This assertion, however, is critically flawed because it improperly suggests that an action from the State Legislature on the very specific issue of police discipline within the City of Rochester was required to change the 1907 City Charter. This is simply not the case. As the Fourth Department explained:

> 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.

Opinion at p. 7.

For the majority of its argument City Council attempts to completely ignore the existence and impact of the Municipal Home Rule Law, mentioning it only near the end as part of a nonsensical argument that the Municipal Home Rule Law somehow gave the City the authority to make all of the changes to the police discipline provisions of the City Charter made over the decades, up to and including the current changes which are the subject of this lawsuit, except for the one change made in 1985 which stands as a barrier to the establishment of the new accountability board. *See* City Council's MOL at pp. 28-30. Noting this inherent inconsistency in City Council's apparent position on the authority of the City to alter its own Charter, the Fourth Department stated, "[t]he very rationale that the City Council deploys to invalidate the 1985 repeal would equally doom its own 2019 legislation." Opinion at p. 8.

City Council's attempt to get out of this paradox, by creating a nonexistent and illogical distinction between "the question of *whether it has the power* to discipline" and changes to the manner in which the City exercises or carries out its power to discipline, *see* City Council's MOL at pl 29, is unconvincing and

unsupported by any authority. To begin with, the 1985 City Charter amendments did not in any way question, or deal with the issue of, whether the City had the power to discipline police officers. Nothing about the 1985 local law took away the City's authority or power to discipline police officers – it had the power to discipline before 1985, and it had the power to discipline after 1985. What the Charter amendments did accomplish was the same type of change City Council has claimed to have the authority to make through local legislation – it changed "who the relevant official or body is, and how they exercise their powers …." City Council's MOL at p. 29. With the 1985 amendments discipline was conducted under the process set forth in the Civil Service Law, with the Chief of Police having the ultimate authority to decide upon and impose discipline.

More significantly, however, City Council's attempted distinction finds no support in the Municipal Home Rule Law itself, or any other source of precedent. To the contrary, the Municipal Home Rule Law expressly grants a municipality the authority to revise its Charter through the passage of local laws concerning the "removal … of its officers and employees" as long as such change is not inconsistent with the State Constitution or any general law. Mun. Home Rule Law §10(1)(ii)(a)(1). There is absolutely nothing in the language of the statute itself, or in any case law identified by City Council, to suggest some other level of distinction in the types of changes a municipality may enact.

As the Fourth Department correctly noted, there can be no claim that the 1985 City Charter amendments were inconsistent with either the State Constitution or any general law, as they actually resulted in Rochester becoming aligned with the majority of the State in terms of police discipline being governed by Civil Service Law § 75 and the Taylor Law. *See* Opinion at p. 7. In fact, it found that City Council's argument on this point "defies reason". *Id.*

3. City Council Improperly Ignores the Distinction Between Legislation and Collective Bargaining.

City Council repeatedly asserts that the *PBA, Wallkill* and *Schenectady* line of cases stands for the proposition that municipalities in which a pre-Taylor Law statute governed police discipline cannot collectively bargain the issue of police discipline. Indeed, each of those cases did address the issue of whether or not the municipality had the obligation, or authority, to collectively bargain police discipline. However, what City Council attempts to ignore is the distinction between legislation and collective bargaining.

To begin with, the legal authority for collective bargaining with a labor organization on behalf of a city is expressly placed solely in the Mayor. *See* Civ. Serv. Law § 201(12). Thus, there is an inherent logic in the Court's *PBA, Wallkill* and *Schenectady* holdings which prevent the Executive branch of a municipality, the Mayor, from effectively nullifying a statutory framework previously put in place by the Legislative branch, through statute, by collectively bargaining a

different process for police discipline. The current case, however, does not involve any attempt by the City's Executive branch to nullify or deviate from a statutory procedure enacted by the Legislative branch. Rather, in this case it was the City's Legislative branch, City Council, which itself altered the statutory framework through the 1985 Charter amendments.

As the Fourth Department noted:

> 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 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). *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, City Council embraces the very specter of dead-hand control that its brief repeatedly decries.

Opinion at p. 8 (footnoted omitted) (emphasis in original).

PBA, Wallkill and *Schenectady* held that under a qualifying grandfathered statutory scheme collective bargaining over police discipline is a prohibited subject. Those cases did not, however, in any way preclude a local legislative body from utilizing its home rule authority to repeal such a statutory scheme and elect to have police discipline "covered [by] the Civil Service Law." Local Law

No. 2-1985 (R. 317). This is exactly what City Council did with the 1985 Charter amendments. The City did not, as City Council suggests, "surrender" its unilateral control over police discipline through collective bargaining, *see* City Council's MOL at p. 6, but rather through legislation which it had the express authority to enact pursuant to the Municipal Home Rule Law.

4. The 1985 City Council's Subjective Intent Is Totally Irrelevant.

City Council also suggests, apparently, that the 1985 amendments to the City Charter should, more than three decades later, be treated as a nullity because, perhaps, the 1985 City Council did not fully understand the ramifications of its actions. *See* City Council's MOL at pp. 27-28. Consistent with all established law and common sense, the Fourth Department correctly rejected this argument, stating:

> there is absolutely no record support for the current City Council's speculation that its 1985 predecessor unwittingly repealed the 1907 City 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.

Opinion at p. 8 (quotations and citations omitted).

The notion that a legislative enactment could subsequently be treated as invalid or be ignored after decades merely because a consequence or impact

becomes apparent that might not have been contemplated by the legislature that passed the statute is not only absurd but would wreak havoc upon, and potentially be applicable, at one time or another, to virtually every statute ever enacted.

CONCLUSION

The Locust Club respectfully submits that, for the reasons discussed above, City's Council's motion for leave to appeal to the Court of Appeals should be denied.

Dated: July 29, 2021
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