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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FOURTH DEPARTMENT

IN THE MATTER OF THE APPLICATION OF
ROCHESTER POLICE LOCUST CLUB, INC.,
MICHAEL MAZZEO AND KEVIN SIZER,

Petitioner-Respondents,

Docket No:
CA20-00826

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

Respondent-Respondents,

COUNCIL OF THE CITY OF ROCHESTER,

Respondent-Appellant,

MONROE COUNTY BOARD OF ELECTIONS,

Respondent.

BRIEF OF AMICI CURIAE CITY OF KINGSTON

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CERTIFICATE OF COMPLIANCE

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FOURTH DEPARTMENT
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ROCHESTER POLICE LOCUST CLUB, INC., ET. AL

PETITIONERS,

- against -

DOCKET
CA 20-00826

CITY OF ROCHESTER, ET. AL

APPELLANT-RESPONDENTS.

CITY OF KINGSTON,

AMICUS CURIA
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PRELIMINARY STATEMENT

On or about May 7, 2020, an Order was entered by the Supreme Court, County of Monroe, granting a petition filed by the Rochester Police Locust Club, Inc., finding that portions of Rochester Local Law 2 which created a Police Accountability Board was unlawful in that it conflicts with provisions of the New York State Civil Service Law with regard to collective bargaining. In reaching this conclusion, the Court found that by repealing a portion of the Rochester City Charter in 1985, the legislature in essence repudiated the authority over police discipline which was reserved in Rochester's original charter. Notice of Appeal was timely filed by the City of Rochester.

This brief is submitted on behalf of the City of Kingston, a City located in Ulster County, New York, in support of the appeal of the City of Rochester. Specifically, the City of Kingston requests that this Court find that when a provision of a City Charter was in place at the time of the enactment of the Civil Service Law, that City retains the authority to adopt legislation regulating the discipline of law enforcement outside the collective bargaining process and that said authority cannot be waived by anything other than a clear and unequivocal act of the legislature.

QUESTION PRESENTED

> Did the Supreme Court commit reversible error and improperly interfere with the City of Rochester's right to enact and implement legislation regarding the discipline of law enforcement officers?

PRELIMINARY STATEMENT

It is well accepted that "the Civil Service Law (CSL) and Unconsolidated Law 891 govern and establish comprehensive procedures for police discipline in New York State. Except for local discipline schemes that predate the CSL . . . the CSL's disciplinary procedures occupy the field and preclude other, contradictory local disciplinary regimes" (Decision and Order, page 10). It is respectfully submitted that insofar as the City of Rochester enacted its Charters long before the enactment of the Civil Service Law, and

that Charter clearly contains a local disciplinary scheme, Rochester retains jurisdiction over police discipline.

The City of Kingston is located in Ulster County and, according to the provisions of the General City Law, it is classified as a Third Class City. Its first Charter was adopted by the New York State Legislature in 1896 and provided that a Police Commission would be established. Much like Rochester, the Charter provided the Commission with clear disciplinary powers[1]. In 1993, the City empowered a Charter Revision Commission and fully rewrote its charter to transform the City towards a strong Mayor form of government. With regard to police discipline, the Charter provides that "a commission will be established for the Police Department which will have the authority to set departmental practices in recruiting, hiring, promoting and disciplining, all in accordance with statutory authority, and to make recommendations to the Mayor and Police Chief regarding practices, procedures, policy and planning (Kingston City Charter C-15-3).

On July 13, 2015, the City of Kingston entered into a contract with the Kingston Police Union for the 2013-2016 contract years. At the time of the execution of the contract, the City and its police force had been operating without a contract for approximately eighteen months. That contract expired

[1] City of Kingston Charter, Section C-83(7).

in December 2016. Negotiations on a new contract were unsuccessful and, after extensive and time consuming negotiations, the parties participated in statutorily required mediation and then binding arbitration. Finally, in July of this year, a settlement was entered regarding a three-year contract covering the 2016-2019 years, a contract that expired before it was even signed and the City and the Police Union must immediately begin discussing terms of the next contract. The City of Kingston fully anticipates that negotiations will be difficult and unproductive, that the parties will be operating without a contract for the foreseeable future and the matter will likely return to binding arbitration. In the experience of this office, this seemingly endless cycle of negotiations is common in municipal contract negotiations.

While the above history differs in certain details from the history set forth in the decision regarding Rochester's attempt to revise its disciplinary process, there are numerous similarities between the situation in the two municipalities. As is the case with the City of Rochester, Kingston's original Charter specifically addressed police discipline. Also similar to Rochester, that Charter was subsequently amended and the language regarding police discipline was slightly altered. While Rochester fully removed the language regarding police discipline from its charter, Kingston's new charter was changed to include minimal language about police discipline.

Like Rochester, police discipline in Kingston is based on a "command structure", wherein ultimate decisions regarding allegations of police misconduct rest with the Mayor and the Police Chief. Also, like Rochester, due to allegations of police misconduct and excessive force, the City of Kingston has been attempting to address police discipline for years. In deference to and recognition of the collective bargaining process, to the greatest extent possible, these attempts have been coordinated with the collective bargaining process. At the same time, the Police Commission has operated according to its own skeletal rules and it exercises investigatory powers on a case by case basis. Recommendations regarding discipline are made by the Commission to the Mayor and the Police Chief.

Like the City of Rochester and other municipalities throughout the country, allegations of police misconduct and particularly cases of alleged excessive use of force have increased and community outrage regarding these incidents have led to a significant public outcry to elected officials. Elected officials have made efforts to address these complicated and critical public safety issues within the legislative process and their efforts have been stymied by rules regarding collective bargaining. Most significantly, as the result of the status of ongoing contract negotiations, and attendant limits on interjecting mandatory collective bargaining issues at such a late stage of

negotiations, local legislators and the Mayor are, as a practical matter, unable to effectively address a critical issue related to public safety.

It is in this context that the City of Kingston makes this application to be recognized and given permission to submit argument in the pending matter. While the City of Kingston is in the Third Department, any decision from the Fourth Department regarding the issues in this case potentially will impact the City of Kingston. The import of this decision on the City of Kingston is also heightened by the fact that the Supreme Court in this case seemingly ignored the reasoning and history regarding the controlling issues as set forth by the Court of Appeals in Matter of P.B.A. of N.Y., v. N.Y.S. Pub. Empl. Relations Bd., 6 NY3d 563 (2006) (hereinafter referred to as "PBANYC"); Matter of Wallkill v. CSEA, Inc., 19 NY3d 1066 (2012); Matter of City of Schenectady v. NYS Pub. Emp. Relations Bd., 30 NY3d 109 (2017). In so doing, the Supreme Court ignored a well-established and clear standard set forth by the Court of Appeals and created an unprecedented exception for municipalities that changed their charters after the enactment of the Civil Service Law.

As outlined below, it is the position of the City of Kingston that there is no authority or persuasive rationale for the Supreme Court's conclusion that a municipality could repudiate a clear reservation of authority of police

disciplinary issues prior to the Court of Appeals decision in PBANYC. In essence, the Court's decision imposes on the municipality the responsibility to act in accordance with a rule of law that had yet to be enunciated by the Court of Appeals. As such, an affirmance by this Court could legitimatize a heretofore non-existent exception to the rule of law set forth by the Court of Appeals and create a split of appellate authority on a critical public policy issue.

In moving forward on legislation that is currently being considered by our Common Council, decisions have to be made with regard to the scope of the City's authority over this very significant public policy issue. As these issues have been placed directly before this Court, the City of Kingston respectfully requests that the following arguments be considered by the Court.

POINT ONE
THE SUPREME COURT INCORRECTLY DETERMINED THAT POLICE DISCIPLINE IN THE CITY OF ROCHESTER IS A MANDATORY SUBJECT OF COLLECTIVE BARGAINING

Throughout New York State, various municipalities of different sizes and different classes have attempted to enact legislation outlining disciplining processes for law enforcement. These attempts to regulate community police forces have been consistently met with resistance from police unions who attempt to defeat legislative action on the grounds that discipline must be negotiated through collective bargaining.

The Court of Appeals addressed this issue in Matter of P.B.A. of N.Y., v. N.Y.S. Pub. Empl. Relations Bd., 6 NY3d 563 (2006) (hereinafter referred to as "PBANYC") wherein the Court addressed a challenge to New York City Code provisions regarding police discipline. At issue was whether sections 75 and 76 of the Civil Service Law (L. 1958, c. 790) rendered police discipline a mandatory subject of bargaining. The Court noted that the New York City Charter was enacted by the State Legislature in 1897 and it provides the police commissioner with "[c]ognizance and control of the government, administration, disposition, and discipline of the department, and of the force of the [police] department." Insofar as the Charter predated Civil Service Law §§ 75 & 76, the court determined that the Charter made police discipline, as a matter of public policy, a prohibited subject of bargaining (6

NY3d at 573-574). The court explained that as §§ 75 and 76 cannot be construed to repeal or modify any general, special or local law, or charter provision expressly committing police disciplinary authority, New York City's Charter and Code provisions that were in place prior to 1958 were preserved.

The question of whether police discipline is a mandatory subject of collective bargaining was revisited by the Court of Appeals in 2012 in Matter of Wallkill v. CSEA, Inc., 19 NY3d 1066 (2012). The Court affirmed PBANYC, 6 NY3d 563 and held that Town Law § 155 was a general law enacted by the Legislature that committed police disciplinary authority to local officials making police discipline in the Town of Wallkill a prohibited subject of bargaining. Citing to PBANYC, the Court explained that "[w]e held that police discipline may not be a mandatory subject of bargaining under the Taylor Law when the Legislature has expressly committed disciplinary authority over a police department to local officials." (id, 1069). The Court found that because Town Law § 155 was enacted by the Legislature before Civil Service Law §§ 75 & 76, it was grandfathered. The court further determined that Town Law §155 evinced an intent to commit police discipline to local authorities and prohibited negotiations over police discipline.

Most recently in Matter of City of Schenectady v. NYS Pub. Emp. Relations Bd., 30 NY3d 109 (2017), the Court of Appeals reiterated that police discipline may be the subject of collective bargaining where there is no legislation that 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. The Court of Appeals relied on the specificity of the legislation to determine whether the police discipline is, in fact, committed to the discretion of local officials. The Court found that the procedures in Schenectady provided for the "cognizance and control" over police discipline and specified that officials had the clear authority to "adopt and make rules and regulation for the examination, hearing, and investigation and, determination of charges."

See also, City of Middletown v. City of Middletown PBA, 81 AD3d 1238 (3rd Dept., 2011) wherein the Court held that a charter provision, as amended, addressing police discipline was sufficient to remove police discipline from the scope of negotiations. In Middletown, while the Charter provision in question had been originally enacted by the State Legislature, it was subsequently amended by local law without Legislative enactment. The Third

Department found that despite the fact that the amendments were not enacted by the State Legislature, these provisions were sufficient to remove police discipline from the collective bargaining process. Also, Roberts v New York City Off. of Collective Bargaining, 113 AD3d 97 (1st Dept. 2013), the First Department held that where discipline is committed to local authorities through Legislation enacted before Civil Service Law §§ 75 & 76, discipline is a prohibited subject of bargaining. The court relied on and employed the same analysis used outlined above but applied it to firefighters and emergency medical service workers.

As such, it is well settled that where a general, special or local law or charter provision enacted by the State Legislature exists that expressly commits police discipline to local authorities, and the law at issue pre-dates the enactment of Civil Service Law §§ 75; 76 in 1958, police discipline is a prohibited subject of bargaining. This case of first impression addresses whether a municipality that has reserved the authority to regulate police discipline pursuant to a pre-existing charter can repudiate that authority by subsequent legislative action. This Court must also determine whether such repudiation must be by a clear, intention and unequivocal action by the legislature or whether a municipality can essentially repudiate such authority by implication.

It is the position of the amicus that prior to the Court of Appeals decision in PBANYC, a municipality could not have known that a charter amendment would effectively act as a repudiation of authority over police discipline. This is particularly true when the amendment at issue is not a clear and unambiguous expression of the intent to repudiate such authority. In the case of Rochester, the legislature merely repealed the applicable section of the Charter so that the present Charter is silent regarding charges and trials of police officers.

In contrast, in the City of Syracuse, Charter provisions that predated the enactment of the Civil Service Law were replaced in 1960 with language which specifically provides that "[d]isciplinary proceedings against any member of the department shall be conducted in accordance with the rules and regulations of the department and the provisions of law applicable thereto, including the Civil Service Law" (Syracuse v. Syracuse Police Benevolent Assoc., 124 N.Y.S.3d 523 (Supreme Court, Onondaga County, May 11, 2020)). It is respectfully submitted that even in the case of Syracuse, there was no repudiation of the pre-existing authority over the issue of police discipline. Rather, the City of Syracuse exercised that continuing authority by expressing its intention to apply the terms of the Civil Service Law. Nothing

in the amended Syracuse Charter implies that this decision constituted a repudiation of local control over the issue.

Here, citing to the Court of Appeals decisions in 41 Kew Gardens Rd. Assocs. v. Tyburski, 70 N.Y.2d 325 (1987), Lighthouse Shores Inc. v. Town of Islip, 41 N.Y.2d 7 (1976) and Matter of Ricker v. Village of Hempstead, 290 N.Y.1 (1943), the Supreme Court specifically recognized that Petitioner as the party challenging a local law has a heavy burden to prove that the law is inconsistent with the New York State Constitution or any general law of New York State" and further acknowledged that "[t]he presumption of constitutionality must be rebutted beyond a reasonable doubt, and a court should only declare a law unconstitutional as a last resort". Then, after recognizing this high standard of proof, the Court found that the City repealed its prior legislative authority over police discipline "by implication". Clearly, this finding was inconsistent with the "beyond a reasonable doubt" standard that was specifically acknowledged by the Court.

It is also respectfully submitted that the trial court improperly interfered with the province of the legislature by evaluating and casting judgment on the substance of the Rochester legislation rather than focusing on the authority of the legislature to act with regard to police discipline. By so doing, the Court over reached into the operational decision of the municipality regarding law

enforcement discipline. The Court did not base it's conclusions regarding these operational decisions based on any citation to the record, but rather, based on its own expansion of the record with collateral information about police review board practice in various municipalities.

In essence, rather than adjudicating the issue of the scope of the municipalities authority regarding these issues, the Court delved into the merits of assigning discipline outside the normal command structure and performed its of "in-depth analysis of multiple other civilian review boards from around New York and the United States". The Court continued that "Local Law No. 2 was not drafted based on any other similar legislation anywhere in New York or the United States. There is no indication that the respondent Council considered any alternate legislation". The Court further noted that "this Court has been unable to locate a comparable statute that removes discipline authority of the police department from the executive branch of government and transfers that power to an unelected civilian body that is not subject to any elected officials" (Decision, page 7, 8).

It is respectfully submitted that the Court committed reversible error when it delved into the province of the legislature rather than adjudicating the limited issue before it. In so doing, the Supreme Court demonstrated that its real interest was to set policy rather than to determine the issue raised in the

pleadings. In this regard, the Court's own research regarding comparable police discipline statutes was not part of the record nor was it proper for the Court to speculate regarding whether the legislature consider other comparable legislations when it adopted Local Law 2. Simply, the Court's opinion regarding these issues was irrelevant to the issue at bar. Clearly, while the Court was free to disagree with the voters of the City of Rochester with regard to police discipline, using this case as a vehicle to override the will of the legislature and the voters of Rochester was improper and it constituted reversible error.

The Court also committed reversible error by misplacing the burden on the municipality to present authority for the position that the amendments to the Charter did not divest the City of the authority to make decisions regarding police discipline. Citing to Consol. Edison v. Dept. of Environ. Prot. 71 N.Y.2d 186 (1988), the Court explained that "repeals of earlier statutes by implication are not favored and a statute is not deemed repealed by a later one unless the two are in such conflict that both cannot be given effect". Then, without articulating any specific conflict, and utterly failing to recognize that the omission of language from the initial Charter could not create a conflict, the terms of the original Charter, the Court proceeded to find that the amendments to the Charter repudiated the City's authority over police

discipline by implication. In reaching this conclusion regarding the "breadth of changes Local Law No. 2 triggered in the City Charter", the Court utterly fails to identify precisely how these changes are, in any way, inconsistent with the Charter.

Contrary to the decision of the Court, there is no authority for placing and burden on the City of Rochester. As it is the Petitioner who is the moving party, and the Petitioner is arguing that the amendments constituted a repudiation, they should have been required to carry the burden of proof to establish such an intent on the part of the City. Following the Court's rationale, by revising language in a Charter, a City can essentially waive an important government power by accident. Clearly, no authority was presented to support the argument that this basic statement should be treated as a broad and intentional divestment of authority over all issues related to police discipline.

While the City of Kingston supports the arguments raised by the City of Rochester regarding the disciplinary matrix, and agrees that it falls within the authority of a municipality, insofar as Kingston is not considering legislation with this type of language, the arguments regarding the matrix will not be addressed in this brief.

CONCLUSION

For the foregoing reasons, the Decision and Order entered by the Supreme Court, County of Monroe on May 7, 2020 must be reversed in all respects.

Dated : August 11, 2020

Respectfully submitted,

Electronically signed by

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