To be Argued by:
DANIEL P. DEBOLT
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Fourth Department

Docket No.:
CA 20-00826

In the Matter of the Application of

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

Petitioners-Respondents,

– against –

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

Respondents-Respondents,

COUNCIL OF THE CITY OF ROCHESTER,

Respondent-Appellant,

– and –

THE MONROE COUNTY BOARD OF ELECTIONS,

Respondent.

BRIEF FOR PETITIONERS-RESPONDENTS

TREVETT CRISTO P.C.
Daniel P. DeBolt, Esq.
Attorneys for Petitioners-Respondents
Two State Street, Suite 1000
Rochester, New York 14614
(585) 454-2181
ddebolt@trevettcristo.com

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QUESTION PRESENTED

Although it may be divided into subcomponents, the central question presented in this appeal is whether those portions of Local Law No. 2 which gave the newly formed Police Accountability Board authority over police discipline violate State law.

The lower court held that those disciplinary components of Local Law No. 2 did violate State law, specifically Civil Service Law § 75, the Taylor Law and Unconsolidated Law § 891, and petitioners-respondents submit this determination was entirely correct and should be affirmed by this Court.

STATEMENT OF FACTS

The relevant facts in this case are not in dispute.

A. Local Law No. 2

On May 21, 2019, Respondent-Appellant Council of the City of Rochester ("City Council") passed Local Law No. 2, the complete text of which is contained at pages 125 through 143 of the record on appeal. The legislation was subsequently signed by Mayor Warren. (R. 143). Local Law No. 2 created a new Police Accountability Board ("Board" or "PAB") with an array of powers and responsibilities. At issue in this litigation is the authority given to the Board to conduct investigations and hearings and to impose discipline on police officers.

Due to the fact that the legislation took away the Mayor's authority under the City Charter to appoint members of all boards, pursuant to the Municipal Home Rule Law it was contingent upon approval by the voters at a public referendum.

B. Locust Club's Legal Challenge

Prior to the referendum, Petitioners-Respondents (collectively the "Locust Club") brought a hybrid Article 78/declaratory judgment action seeking both a declaration that Local Law No. 2 was invalid and unenforceable, on a number of grounds, and an injunction preventing a public vote on the invalid legislation. (R. 109-213). The Honorable John J. Ark, J.S.C., initially issued a Decision, Judgment and Order which granted the Locust Club's request for a preliminary injunction barring Local Law No. 2 from being voted upon in the November 5, 2019 election. (R. 52-55). That ruling was appealed, and in a Memorandum and Order entered on October 17, 2019, this Court reversed Justice Ark's decision, vacated the preliminary injunction and allowed the referendum to proceed. (R. 50-51). The Court specifically noted that the substantive merits of the legislation were not before it on the appeal. (R. 51).

Following the vote on the referendum, which approved passage of the legislation, the Supreme Court turned to addressing the merits of the Locust Club's challenge to Local Law No. 2. Justice Ark requested additional information from the parties (R. 364-366), which was provided in January 2020. (R. 367-420). On

May 7, 2020, Justice Ark issued a Decision, which was subsequently incorporated into an Order and Judgement and entered on May 19, 2020. (R. 3-42).

C. Justice Ark's Decision

Justice Ark concluded that those components of Local Law No. 2 which vested the Board with authority for conducting hearings and determining discipline for police officers were void and unenforceable as violative of several provisions of State law. Breaking the case down into four (4) distinct issues, Justice Ark held that: (1) local legislation enacted in 1985, which amended the City Charter, resulted in State law governing police discipline in the City of Rochester from that point forward, and that the disciplinary aspects of Local Law No. 2 violate several provisions of that State law; (2) State law requires disciplinary hearings for Rochester police officers to be conducted by the Mayor, the Chief of Police, or one of their designees, that the Board is not such a designee and, therefore, cannot lawfully conduct hearings or impose discipline; (3) the transfer of disciplinary power to the Board violated the Mayor's obligations under the Taylor Law to negotiate police discipline with the Locust Club; and (4) the severability clause contained in Local Law No. 2 could be given effect and the non-disciplinary aspects of the legislation could continue. (R. 33-35).

City Council has now appealed from the lower court's decision. (R. 1). Notably, Mayor Warren and the City have notified the Court that they will not be filing any papers or taking any position on the merits of the appeal. (Doc. No. 2).

ARGUMENT

The Locust Club respectfully submits that the disciplinary aspects of Local Law No. 2 clearly violate multiple provisions of applicable State law, that Justice Ark was entirely correct in declaring those aspects of the legislation void and unenforceable and that his decision should be affirmed.

POINT I

THE CITY AND MAYOR HAVE NOT EVEN ATTEMPTED TO ARGUE THAT THE DISCIPLINARY ASPECTS OF LOCAL LAW NO. 2 ARE VALID

Before turning to a discussion of the merits, it is worth noting that throughout this litigation Mayor Warren and the City have never attempted to argue that the disciplinary aspects of Local Law No. 2 are valid. In their initial filings with the lower court, and in the brief submitted in connection with the first appeal in this matter, Mayor Warren and the City raised only procedural arguments (R. 223-225), seemingly taking great care to avoid making any statement concerning, or taking any position on, the validity of the legislation itself, despite the fact that Mayor Warren signed and approved Local Law No. 2. In the supplemental submissions provided by Mayor Warren and the City in January

2020, in response to Justice Ark's specific questions, they for the first time acknowledged that in fact "Local Law No. 2 may violate state law." (R. 31).

The decision by the City and Mayor to not even participate in this appeal – where there are no procedural issues remaining and the sole focus is on the legality of the disciplinary aspects of Local Law No. 2 – is telling and should not go unnoticed. It appears clear that the Mayor and the City, represented by Corporation Counsel, believe Local Law No. 2 violates State law.

POINT II

LOCAL LAW NO. 2 VIOLATES STATE LAW

The lower court was entirely correct in finding that the disciplinary aspects of Local Law No. 2 violate State law. In fact, it is clear on its face that the transfer of disciplinary authority from the Chief of Police to the newly created PAB, and without negotiations with the Locust Club, is contrary to the dictates of Civil Service Law § 75 and the Taylor Law. City Council does not actually dispute this, but counters by claiming that the City of Rochester is exempted from the applicability of these statutes by virtue of a "grandfathering" exception created by the Court of Appeals in *Matter of Patrolmen's Benevolent Ass'n of the City of New York, Inc. v. New York State Public Employment Relations Board* ("*NYC PBA"*) and its progeny. As discussed below, however, City Council interprets those holdings far too broadly and attempts to overlook or ignore the key fact that the

legislation which would at least have provided an argument for such grandfathering to be applicable to Rochester – although, as discussed below, even then City Council's argument would still fail – was repealed thirty-five (35) years ago.

A. The Court of Appeals Created a Narrow Exception.

The starting point and general rule in New York is that discipline of civil service employees, including police officers, is governed by Civil Service Law § 75 and is a mandatory subject of negotiation under the Taylor Law (Civil Service Law §§ 200, *et seq*.). *See NYC PBA*, 6 NY3d 563, 573 (2006) (discussing holding in *Matter of Auburn Police Local 195 v. Helsby*, 46 NY2d 1034 (1979), which allowed collective bargaining agreements to "supplement, modify or replace CSL § 75 and 76); *Town of Walkill v. Civil Serv. Employees Ass'n, Inc.*, 19 NY3d 1066, 1069 (2012) (noting general applicability of CSL § 75 and 76); *City of Schenectady v. New York State Public Employment Relations Bd.*, 30 NY3d 109, 114 (2017) (same).

Beginning with the *NYC PBA* case, and thereafter in *Town of Walkill* and *City of Schenectady*, the Court of Appeals has cited the language of Civil Service Law § 76(4), which states that Sections 75 and 76 shall not "be construed to repeal or modify" preexisting laws and determined that preexisting laws are "thus grandfathered" out of this otherwise generally applicable statutory framework for

discipline. *NYC PBA*, 6 NY3d at 573. The Court of Appeals has been very clear that the basis for its holdings in this entire line of cases is that Civil Service Law § 76(4) grandfathers in *preexisting* specific or local laws. Nothing in any of these decisions, however, in any way suggests that the resulting exception from the applicability of the Civil Service Law is broader than the specific preexisting law upon which it is based, that it may be altered or expanded by the municipality or that it can somehow be based upon legislation which was repealed decades ago.

B. The "Grandfathering" Exception Requires a Pre-Existing Statute, Which Rochester No Longer Has in Place.

City Council has pointed to the 1907 Act constituting the charter of the City of Rochester, and subsequent amendments, as the basis to exempt police discipline in Rochester from Civil Service Law § 75 and from mandatory bargaining and, in turn, permit the unilateral transfer of disciplinary authority to the PAB accomplished by Local Law No. 2. In its response to the petition, City Council's supporting papers included copies of excerpts from various amendments to the 1907 charter, up through 1963. (R. 250-309). City Council did not, however, discuss, or even initially mention, any of the charter amendments occurring after enactment of the Taylor Law.

These cited charter provisions, from 1907 through 1963, are similar to the provisions of the New York City charter considered by the Court of Appeals in the *NYC PBA* case and the provisions of the Second Class Cities Law evaluated in *City*

of Schenectady. All of these statutory provisions provide authority for police discipline to a Commissioner – in the City of New York to a Police Commissioner, and in Schenectady and Rochester to a Public Safety Commissioner.

Notably, however, the City of Rochester no longer has a Public Safety Commissioner. (R. 332). The City eliminated the office of Public Safety Commissioner in 1995, through amendments to the City Charter accomplished via Local Law No. 3-1995. (R. 331-334). The Charter provisions which pre-date Civil Service Law § 75 and are relied upon by City Council are no longer contained within the current City Charter. Under the current charter, the authority for the police department, including discipline of police officers, is expressly vested in the Chief of Police as the appointing authority. *See* City Charter § 8A-1.

The 1995 amendments to the City Charter not only eliminated the office of Commissioner of Public Safety, which had been created in 1985 and for the period of its existence had control over the Police Department, but also expressly added the provision: "The Chief of Police shall be the appointing authority for members and employees of the Police Department." Local Law No. 3-1995, Section 6. (R. 333). That local law also removed language which had previously subjected the Chief of Police to the authority of, and rules issued by, the Commissioner of Public Safety. (R. 333).

The City Charter had also previously contained a section specifically dealing with the discipline of police officers, entitled "Charges and trials of policemen." That provision was deleted in a 1985 amendment to the Charter accomplished through Local Law No. 2-1985, which stated:

> Chapter 755 of the Laws of 1907, entitled "An Act Constituting the Charter of the City of Rochester" is hereby amended by repealing Section 8A-7, Charges and trials of policemen, for the reason that *the subject matter is covered in the Civil Service Law*.

(R. 317) (emphasis added).

Thus, while it perhaps could previously have been argued that police discipline in the City of Rochester was governed by a pre-1958 statutory provision, once Local Law No. 2-1985 was enacted that earlier provision was eliminated, police discipline in the City of Rochester was no longer governed by a pre-Section 75 statute and, as a result, the City forfeited any ability to be "grandfathered" into the exception to the applicability of the Civil Service and Taylor laws. City Council cannot justify a 2019 legislative action by attempting to rely, as the source of authority, upon a charter provision which was repealed decades ago. This is particularly true where City Council expressly recognized that, at the latest, as of 1985 the subject of police discipline in Rochester is governed by Civil Service Law.

The decisions by the Court of Appeals in the *NYC PBA / Town of Walkill / City of Schenectady* line of cases represented a resolution of two competing

policies in New York State – the "strong and sweeping policy of the State to support collective bargaining under the Taylor Law and … the policy favoring strong disciplinary authority for those in charge of police forces." *NYC PBA*, 6 NY3d at 571 (citations omitted). In the absence of a specific pre-existing statute governing police discipline in a particular municipality, "the policy of the Taylor Law prevails, and collective bargaining is required …." *Id.* It is only "*where such legislation is in force*, [that] the policy favoring control over the police prevails, and collective bargaining over disciplinary matters is prohibited." *Id.* (citations omitted) (emphasis added). *See also City of Schenectady*, 30 NY3d at 115 (quoting *NYC PBA*). City Council attempts to entirely ignore this key language from the Court of Appeals and claim that Justice Ark cited no cases to support his conclusion that for *NYC PBA, Town of Walkill* and *City of Schenectady* to apply the legislation relied upon could not have been previously repealed. It is right in the Court of Appeals' own decisions – "*where such legislation is in force …*". *NYC PBA* 6 NY3d at 571 (emphasis added); *City of Schenectady*, 30 NY3d at 115 (quoting *NYC PBA*).

There is simply no such pre-existing legislation *in force* in the City of Rochester, and there has not been for decades. Thus, the *NYC PBA, Town of Walkill and City of Schenectady* cases are, by their express terms, inapplicable. As Justice Ark correctly noted, prior to 1985 the City had authority to impose police

discipline using the City Charter provisions, without an obligation to negotiate the subject matter.

> The State Legislature gave the City this power in 1907 through the City Charter, and the City's authority was "grandfathered" in by operation of CSL Section 76(4). However, in 1985, the City Council explicitly submitted RPD discipline matters to state law when it repealed the police discipline portion of the City Charter expressly "*for the reason that this subject matter is covered in the Civil Service Law*." That was a valid exercise of the power vested in it by the 1907 Charter, and the City opted to submit itself to the governance of state law. This ended the City's "grandfather" exemption. Thus, after 1985, state law governed RPD discipline.

(R. 25) (quotations and emphasis in original).

C. City Council's Argument Is Unsupported by Any Case Law.

In response to this seemingly inescapable conclusion, City Council attempts to make a unique and unprecedented argument, one which is not supported by any case law. City Council attempts to claim that it did not have the authority to amend the City Charter as it did in 1985 and, therefore, that the court should simply ignore the 1985 legislation and pretend that it never existed. As a slightly modified alternative form of that argument, City Council also asserts that the 1985 amendment to the City Charter was, in essence, a mistake and that Local Law No. 2 should be seen as a permissible attempt to undue, thirty-five (35) years later, a legislative act which City Council now regrets. Not surprisingly, Justice Ark noted that "Council has not submitted – and the court has been unable to locate – any

authority supporting the proposition that, once a local authority deliberately abdicated its 'grandfathered' status, it can revive that status decades later." (R. 25).

1. The 1985 Amendment Was a Valid Legislative Act.

City Council, now regretting the decision it made decades ago to amend the City Charter, attempts to argue that it did not actually have the authority to submit to State law governing police discipline. This position, however, is directly contradicted by City Council's own argument on the City's ability to amend its Charter.

As City Council acknowledges, the Municipal Home Rule Law specifically grants a municipality the right to revise its Charter through the passage of local laws, including changes concerning the "removal … of its officers and employees." Mun. Home Rule Law § 10(1)(ii)(a)(1). Thus, by the express terms of a statute enacted by the State Legislature, the City of Rochester had the authority to amend its Charter through local law and alter the procedure and source of authority for the discipline of police officers. City Council exercised this authority in 1985 and provided that discipline of police officers was governed by Civil Service Law. City Council is simply wrong when it argues that the State gave the City the power to discipline police officers "in the 1907 Charter and [that power] has never been repealed." City Council's Brief at p. 22. The 1907 Charter was not, as City Council claims, the State's last word on the subject. Rather, the State subsequently

enacted the Municipal Home Rule Law and provided the City with the express authority to make its own determinations on the matter of disciplining or removing its officers and to change the Charter by local law. The provisions of the City Charter vesting authority for police discipline in a Commissioner of Public Safety and providing a procedure for disciplinary actions were expressly repealed by City Council in 1985, pursuant to that authority granted by the State in the Municipal Home Rule Law.

Prior to such amendment, discipline of police officers in the City of Rochester was governed by a pre-1958 statute and, thus, entitled to the grandfathering provided by Civil Service Law § 76(4). Following the 1985 amendments, however, such discipline was expressly governed by Civil Service Law § 75, was a mandatory subject of negotiation under the Taylor Law, and any subsequent attempt by City Council to unilaterally alter the disciplinary process, such as Local Law No. 2, would violate those State statutes. City Council's authority to amend the Charter by local law is expressly limited to enactments which are "not inconsistent with the provisions of the constitution or not inconsistent with any general law …." Mun. Home Rule Law § 10(1)(i). Once State law applied, City Council no longer had any authority to make unilateral changes to police discipline.

City Council's argument that it did not have the power in 1985 to submit police discipline to the mandates of Civil Service Law § 75 because, pursuant to a case which would not be decided for another twenty-one (21) years, police discipline in Rochester was a prohibited subject of negotiations, is misplaced because it misconstrues both the Court of Appeals' holding in *NYC PBA* and the nature of the action taken by City Council. The Court of Appeals' decision in *NYC PBA*, which found police discipline in New York City to be a prohibited subject of bargaining, was expressly based upon the framework created by the New York City Charter and the grandfathering provision of Civil Service Law § 76(4). City Council's legislative actions in 1985 were not negotiations. Rather, pursuant to the express authority conveyed by the Municipal Home Rule Law, City Council permissibly altered the legal framework governing police discipline. This change in 1985 was permissible because it did not conflict with any State law. The subsequent attempt to enact Local Law No. 2, however, nearly thirty-five (35) years later, was not within City Council's authority because, now that State law applied, such a change was inconsistent with State law and, therefore, not permitted under the Municipal Home Rule Law.

2. The Failure to Foresee All Possible Consequences Does Not Render the Legislative Act Invalid.

Another component of City Council's argument which is entirely unsupported by any existing case law is the notion that an otherwise valid

legislative act can somehow, decades later, be ignored or retroactively undone because the legislature at the time did not foresee all possible consequence of the legislation or was operating under a mistaken belief about the law. First, any attempt to discern the motivation of City Council in 1985, or to gauge individual legislators' understanding of the law, is purely speculative. Second, the notion that a legislative enactment could subsequently be treated as invalid or 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 and potentially be applicable, at one time or another, to virtually every statute.

3. City Council's Argument Would Render Every Disciplinary Action Taken in the Last Thirty-Five Years Invalid.

In attempting to argue that it did not have the authority to amend the City Charter as it did in 1985 and submit police discipline to the mandates of the Civil Service Law, City Council is apparently asserting that every disciplinary action taken against a Rochester police officer pursuant to the Civil Service Law since 1985 has been invalid. Rochester police officers have been disciplined, and terminated, by the Chief of Police pursuant to Civil Service Law § 75. *See, e.g., Bustos v. City of Rochester*, 23 AD3d 1048, 1048 (4th Dept 2005) (upholding officer's termination). The consequence of accepting City Council's argument that the legislative act which made the Civil Service Law applicable to police discipline

was invalid would necessarily be that any disciplinary actions taken under such authority would also have to be invalid. That result, in addition to the lack of any legal authority supporting Council's argument, further supports rejection of the argument.

D. *City of Syracuse v. Syracuse PBA* is Directly Analogous, Reached the Same Conclusion as Justice Ark and is Persuasive.

In a recent case involving the City of Syracuse, which raised nearly identical issues, the Honorable Deborah H. Karalunas, reached the same conclusion as Justice Ark and issued a decision which, although obviously not binding on this Court, is highly persuasive and provides further support for Justice Ark's decision.

Although *City of Syracuse v. Syracuse PBA, Inc.*, 124 NYS3d 523 (Sup Ct, Onondaga County, 2020) did not involve newly enacted legislation, the central issue in the case was exactly the same as presented in this case – whether or not the City fell within the "grandfathering" exemption created in the *NYC PBA, Town of Walkill* and *City of Schenectady* cases. Just as in Rochester, the City of Syracuse had initially operated under a City Charter which placed authority for police discipline in a Commissioner of Public Safety, later transferred to the Chief of Police. *See id.* at 527. In 1960, Syracuse adopted a new Charter which kept authority for police discipline with the Chief of Police, but added language stating "Disciplinary proceedings against any member of the department shall be conducted in accordance with the rules and regulations of the department and the

provision of law applicable thereto, *including the Civil Service Law*." *Id.* (emphasis added).

Following essentially the same reasoning as Justice Ark, Justice Karalunas found that by amending its Charter after the passage of Civil Service Law § 75 and stating that discipline of police officers would be conducted in accordance with the Civil Service Law, which it had the authority to do under the Municipal Home Rule Law, the City had given up its grandfathered status under Civil Service Law § 76(4), thus rendering police discipline a mandatory subject of bargaining once the Taylor Law was enacted. *See id* at 531.

Syracuse and Rochester followed a similar course with respect to police discipline. Both initially had authority for police discipline vested, by the State Legislature, in a police commissioner and were therefore grandfathered out of the Civil Service Law framework generally applicable to police discipline; both subsequently exercised their authority under the Municipal Home Rule Law to abandon that system of police discipline and instead to utilize the Civil Service Law; both later regretted that action and attempted to abandon the Civil Service Law requirements and void agreements that had been negotiated with the police union; and both had those efforts correctly declared unlawful and improper by the Supreme Court.

E. Even If the Repealed Charter Provisions Were Still in Effect, They Would Not Authorize Local Law No. 2.

Furthermore, even if the City had not eliminated the position of Commissioner of Public Safety and transferred some of those powers, those concerning police discipline, to a Chief of Police and shifted to operating under the Civil Service Law, Local Law No. 2 would still not fall under the holdings in the *NYC PBA, Town of Walkill* and *City of Schenectady* cases because the City is not, as those municipalities were, simply exercising the authority granted by those pre-existing statutes. Rather, City Council is attempting to enact entirely new legislation which completely changes the framework and authority for police discipline. No pre-Civil Service or pre-Taylor Law legislation even arguably provides authority for police discipline in the City of Rochester to the City Council, nor to any advisory board. City Council is attempting to argue that legislation passed in 2019 (Local Law No. 2) is somehow grandfathered in the same manner as pre-existing statutes which were passed over fifty (50) years ago. That argument makes no sense, is not supported by any portion of the Court of Appeals' decisions and should be flatly rejected.

Nothing in the Court of Appeals' decisions even remotely suggests that a municipality operating under a pre-1958 legislative grant of authority may then, forever going forward, do whatever it wishes with respect to police discipline. Rather, the Court merely grandfathered such municipalities to continue operating

under those pre-1958 legal provisions. Even if the pre-1985 Charter provisions had remained in effect, the consequence would be that the City would be entitled to utilize those Charter provisions and to refuse to negotiate discipline – not that the City could unilaterally enact an entirely new disciplinary structure. Once the City departs from the pre-1958 statutes, it loses its grandfathered status.

F. City Council is Estopped from Taking the Position that CSL § 75 and Article 20 of the CBA are Inapplicable or Invalid.

Although the discussion above demonstrates that City Council's argument must fail on its own merits, it is also clear that City Council should be estopped from attempting to deny the applicability of Civil Service Law § 75 and the validity of Article 20 of the collective bargaining agreement in the first place.

As set forth in the record, for decades the discipline of police officers in Rochester has expressly been implemented under the authority and procedures found in Civil Service Law §75 and Article 20 of the CBA. (R. 335-347). The subject of discipline, including rights of officers and procedures for the investigation and hearing process, have also repeatedly been the subject of negotiations between the City and the Locust Club, and the Locust Club has made concessions to obtain the negotiated contractual provisions, including concessions based expressly on the position of the City that Civil Service Law § 75 provides the authority for the discipline of police officers.

The Court of Appeals has addressed the potential for a municipality to be estopped from abandoning Civil Service Law § 75 as the statutory basis for police discipline and instead claiming a grandfathered right to rely upon a century-old statute. In *City of Schenectady* the police union made this exact argument. Although the Court declined to apply estoppel to the City of Schenectady in that case, its discussion of the issue is important. In fact, equally as important is what the Court did *not* hold. It did not hold that a municipality in such circumstances could not, as a matter of law, be estopped from reverting to the "old" statute. Instead, it evaluated the specific conduct by the City of Schenectady and found estoppel to be inappropriate under those particular facts.

Specifically, the Court excused the City of Schenectady's pre-2006 use of Civil Service Law § 75, on the basis that it predated the Court's decision in *NYC PBA*. Because the City acted promptly following that decision to announce it would no longer utilize Civil Service Law § 75 for police discipline, the Court refused to apply estoppel to bar the City from changing positions. *See City of Schenectady*, 30 NY3d 109, 117 (2017).

In contrast, the City of Rochester has continued to utilize Civil Service Law § 75 for more than thirteen (13) years since the Court's decision in *NYC PBA*. The City has negotiated multiple CBAs with the Locust Club since that time, all of which included Article 20, and during the negotiations for each agreement the

subject of discipline was negotiated. In fact, the City and the Locust Club entered into a Memorandum of Agreement which altered a portion of the disciplinary process under Article 20 as recently as October 2018. (R. 340-341).

Thus, not only has the City of Rochester maintained the position that Civil Service Law § 75 applies and governs police discipline for more than a decade after the *NYC PBA*, in contrast to the City of Schenectady which acted promptly to alter its position, but in fact the City of Rochester has continued to maintain its position relative to Civil Service Law §75 and Article 20 of the CBA well after the Court of Appeals issued the *City of Schenectady* decision. The City and the Mayor actually have still not attempted to deviate from their long-held position.

City of Schenectady did not hold, as City Council suggests, that a municipality could not be estopped from disputing the applicability of the Civil Service Law to police discipline. In fact, *City of Schenectady* actually shows what a municipality was required to do following the *NYC PBA* case in order to avoid the application of estoppel. While the City of Schenectady avoided the application of estoppel due to its prompt action, the City of Rochester did exactly the opposite, maintaining its position that Civil Service Law § 75 and Article 20 of the CBA apply and govern police discipline, using them as the basis for imposing discipline and continuing to negotiate discipline for well over a decade, and therefore the

opposite result should occur. Appellant should be estopped from any attempt to deny the applicability of Civil Service Law § 75 and Article 20 of the CBA.

G. Local Law No. 2 Also Violates Unconsolidated Law § 891.

Although it is not necessarily critical to the ultimate outcome of this case, since Local Law No. 2 so clearly violates the Civil Service Law and is therefore invalid regardless of other laws it may additionally violate, it is worth noting, as the lower court held, that Local Law No. 2 also violates Unconsolidated Law § 891. That statutory provision, which is specific to instances in which a municipality seeks to remove a police officer, essentially mirrors Civil Service Law § 75 in terms of its procedural requirements. As particularly relevant to this matter, and to Local Law No. 2, the statute specifically requires that the hearing be held before the body or officer having the power to remove the officer. Local Law No. 2 unequivocally violates this requirement because the hearing would be held before members of the newly created PAB, and not before the Chief of Police (or his designee), who under the City Charter remains the appointing authority for police officers and has the authority to remove an officer.

Contrary to City Council's argument, the PAB is not the body with authority to remove an officer. While, under Local Law No. 2, the PAB may be the body that makes the determination as to whether or not an officer will be removed, it is clear from Local Law No. 2 itself, and the fact that the Chief of

Police remains the appointing authority under Section 8A-1 of the City Charter, that it is the Chief who has the power of removal. This is evident by the fact that under Local Law No. 2 the PAB makes a determination, but that determination is then carried out by the Chief. If the PAB itself had the authority to remove a police officer, there would be no need for this process of binding the Chief to carry out the PAB's determinations; the Board itself would simply carry out the removal of the officer. The fact that it cannot carry out the removal itself clearly demonstrates that it does not have the authority. Because PAB does not itself have that authority, and it is not a designee of the Chief of Police, a hearing to remove a police officer held before the PAB would violate the State statute.

POINT III

CITY COUNCIL LACKS STANDING TO CHALLENGE THE VALIDITY OF THE CBA AND THE CHIEF'S USE OF CSL § 75

As mentioned in Point I, supra, neither the City nor the Mayor has attempted to defend the legality of Local Law No. 2. In addition to revealing their view on the substantive merits, this is also significant because City Council lacks standing to challenge the validity of provisions of a contract to which it is not a party or to challenge the Chief of Police's use of Civil Service Law § 75 for imposing discipline.

The CBA is a contract between the Locust Club and the City of Rochester. Pursuant to the Taylor Law, the legal authority on behalf of the City with respect to

a labor contract is expressly placed solely in the Mayor. *See* Civil Service Law § 201(12). As the Court of Appeals has stated: "It has been held … that the Taylor Law prohibits local legislative bodies from usurping the executive's prerogative to agree with unions on terms and conditions of employment." *Mayor of the City of New York v. Council of the City of New York*, 9 NY3d 23, 31 (2007) (citing *Matter of Doyle v. City of Troy*, 51 AD2d 845 (3d Dept 1976). Where a local law or "charter provision impairs the full range of negotiations to which the city is entitled under the Taylor Law, it is inconsistent therewith and unauthorized and prohibited." *Matter of Doyle*, 51 AD2d at 845 (affirming decision declaring charter provision invalid where it limited ability to negotiate wages). *See also Wholesale Laundry Bd. of Trade, Inc. v. City of New York*, 17 AD2d 327, 330 (1st Dept 1962) (noting that a local law which makes impermissible something which is permissible under state law "is unauthorized"). Thus, City Council may not attempt, by local legislation, to usurp the Mayor's authority with respect to the CBA.

City Council is not a party to the CBA and, as a non-party, it lacks standing to challenge the validity or enforceability of any provision contained in that contract. *See Babu v. Jack and George Murdich, Inc.*, 141AD2d 593, 594 (2d Dept 1988) (rejecting attempt by non-party to contract to claim non-compliance with provision). *See also Salm v. Sammito*, 111 AD2d 844, 845 (2d Dept 1985) (same).

Only the City, through the Mayor, has the ability to assert an argument that police discipline is a prohibited subject of negotiations and, therefore, that the disciplinary provisions of the CBA are void and do not prevent the enactment of Local Law No. 2 and they have not done so.

Similarly, City Council has no standing to challenge the Chief of Police's decades-long use of Civil Service Law § 75 as the source of the authority and procedures for disciplining police officers. The City Charter expressly provides that the "Chief of Police shall be responsible for the operation of the Police Department." City Charter § 8A-1(A). The Charter also expressly provides that the "Chief of police shall be the head of the Police Department and shall have control of its administration." City Charter § 8A-1(D). The Chief "shall be the appointing authority for members and employees of the Police Department" and, finally, the "Chief of Police has the power and it is the Chief's duty to see that all rules and regulations relating to the Police Department are enforced and carried out …." City Charter § 8A-1(D) and (E). It is also the Mayor, not City Council, who has the authority to oversee the Chief. *See* City Charter 3-3(D) and (E).

These Charter provisions, none of which are purported to be repealed or expressly amended by Local Law No. 2, clearly and unequivocally give the Chief of Police control over the Police Department. Therefore, City Council has no

standing to dispute or contest the Chief's reliance on Civil Service Law § 75 to impose discipline upon police officers.

The *NYC PBA* and *City of Schenectady* cases are not to the contrary, as neither of those cases involved an effort by the City Council to override, challenge or replace the manner in which police discipline was being handled by the Commissioner.

CONCLUSION

Petitioner-Respondents respectfully submit that the lower court's decision should be affirmed. It cannot be disputed that the disciplinary components of Local Law No. 2 are contrary to multiple provisions of State Law. City Council does not dispute this, but attempts to argue that the City of Rochester falls within the narrow exemption created in the *NYC PBA* line of cases which affords a municipality grandfathered status to operate under a law which preceded the enactment of Civil Service Law §§ 75 and 76 in 1958, based upon the savings clause contained in CSL § 76(4). In Rochester, however, there has not been any such pre-existing law since at least 1985, when the City amended the City Charter to eliminate the prior, locally enacted, police disciplinary scheme and to, thereafter, utilize the New York State Civil Service Law provisions. Once the pre-1958 legislation no longer existed, and State law applied, the grandfathering exemption created by the *NYC PBA* line of cases was inapplicable and any attempt to

unilaterally alter police discipline was violative of State law and not authorized by the Municipal Home Rule Law. Furthermore, even the grandfathering exemption created by the Court of Appeals did nothing more than allow a covered municipality to continue operating under the pre-existing disciplinary statutes without negotiating with a police union. Nothing in any of the Court's decisions provides even a suggestion that a grandfathered municipality would be empowered to enact new legislation putting a new police discipline system in place, which would clearly be inconsistent with the entire notion of grandfathering.

Justice Ark was entirely correct to invalidate the disciplinary portions of Local Law No. 2 and his decision should be affirmed.

Dated: August 13, 2020

By: _____

Daniel P. DeBolt, Esq.
TREVETT CRISTO P.C.
Attorneys for Petitioners-Respondents
Two State Street, Suite 1000
Rochester, New York 14614
(585) 454-2181

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