STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

In the Matter of the Application of

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

CITY OF ROCHESTER, LOVELY A. WARREN, as Mayor of the City of Rochester, COUNCIL OF THE CITY OF ROCHESTER, and the MONROE COUNTY BOARD OF ELECTIONS,
Respondents,

DECISION
Index No. E2019008543

Appearances:
Trevett Cristo, P.C. (Daniel P. DeBolt, Esq.) for Petitioners;

Emery, Celli, Brinckerhoff, & Abady, LLP (Andrew G. Celli Jr., Esq., Debra Greenberger, Esq., Scout Katovich, Esq.) for Respondent City Council;

Timothy R. Curtin, Esq. (Patrick Beath, Esq., of Counsel) for Respondents City of Rochester and Mayor Lovely A. Warren.

DECISION

Ark, J.

Certainly, "public confidence, vital to an effective police department, can be fostered by a well-run and well-publicized complaint review system."[1]

On May21, 2019, to "ensure public accountability and transparency over the powers exercised by sworn officers of the Rochester Police Department," the Rochester City Council passed Local Law No. 2 of 2019, which established the Police Accountability Board- " a civilian-controlled process to fairly investigate and make determinations respecting complaints of misconduct

[1] *Cassesse v. Lindsay*, 51 Misc. 2d 59 at 63 (NY County Sup. Ct. 1966).

involving sworn officers of the Rochester Police Department".[2] This decision addresses whether Local Law No. 2 complies with New York State law and the Rochester City Charter.

This case presents four questions:

First: Does City Council's 1985 law submitting police discipline to New York State law preclude the implementation of police discipline by the Police Accountability Board?

Second: Can the City of Rochester enact a local law which transfers from the Chief of Police the discipline of police officers employed by the Rochester Police Department to an appointed, autonomous civilian Police Accountability Board, which is not[3] *"the officer or body having the power to remove* [the person charged] . . . or by a deputy or other employee of such officer or body designated. . . for that purpose?"[4] In other words, can only an officer's commander or designee conduct a disciplinary hearing?[5]

Third: Does Local Law No. 2's transfer of police discipline to the Police Accountability Board, with the resulting divestiture of the Mayor's power over police discipline, violate Civil Service Law §200 *et seq.* (known as the "Taylor Law")[6] and New York State Constitution Art. I § 17 which obligate the Mayor to collectively bargain with a recognized bargaining unit?

Fourth: What is the import of Local Law No. 2's severability clause?

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[2] Local Law No. 2 § 18-1.

[3] Unconsolidated Law § 891; Civil Service Law (hereinafter, "CSL") § 75; *Lynch v. Giuliani*, 301 A.D. 2d 351, 355-56 (1st Dept. 2001) (Unconsolidated Law § 891 bars hearings "that may result in *recommendations* for termination against police officers" from being "conducted by a non-employee of the Police Department") (emphasis added).

[4] Unconsolidated Law § 891; CSL § 75(2).

[5] *Matter of Fraccola v. City of Utica*, 135 A.D. 2d 112 (4th Dept. 1987), *app. den.* 72 N.Y. 2d 807 (NY 1988), *cert. den.* 489 U.S. 1053 (US 1989) (noting that Unconsolidated Law § 891 and CSL § 75 require police removal hearings to be conducted by the employing agency, which was the Department of Public Safety).

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I. Procedural History and Motion Contentions

On May 21, 2019, respondent-defendant Council of the City of Rochester (hereinafter, "City Council") adopted Local Law No. 2 of 2019 (hereinafter, "Local Law No. 2") to amend the Rochester City Charter. Local Law No. 2 established a Police Accountability Board (hereinafter, "PAB" or "Board") vested with exclusive power to hear, determine, and assign discipline for alleged misconduct by officers employed by the Rochester Police Department (hereinafter, "RPD"). The respondent Mayor approved Local Law No.2 on June 7, 2019, thereby divesting herself of control over an important aspect of local government. "The Police Accountability Board shall be the mechanism to investigate such complaints of police misconduct and to review and assess RPD patterns, practices, policies, and procedures,[7] and establish a civilian-controlled Police Accountability Board with the power to investigate complaints of police misconduct and impose discipline on offending officers."

[7] Local Law No. 2 § 18-1.

Section 2 of Local Law No. 2 scheduled a referendum for the November 4, 2019 general election and provided that Local Law No. 2 would take effect only after approval by the vote of a majority of qualified electors voting in that referendum. Petitioners commenced this hybrid CPLR article 78 proceeding and declaratory judgment action seeking, inter alia, a declaration that Local Law No.2 is invalid, as well as injunctive relief. Petitioners also moved by order to show cause for a preliminary injunction, which this court granted, barring Local Law No. 2 from being voted on in the November 4, 2019 general election.

The respondent Mayor moved to dismiss the petition under CPLR 3211(7) for failure to state a cause of action and because the action was simultaneously too late and too early; that the petitioners' action was untimely; and that the action was not yet ripe (September 20, 2019 motion by Patrick Beath, Esq.). The respondent City Council moved to dismiss on the grounds that the petition was untimely[8] and on the alleged lack of legal merit to the petition.

On September 25, 2019, this court reserved decision on the substantive challenges to Local Law No. 2 until the issues could be fully briefed and argued.[9] This court granted a preliminary injunction enjoining the Monroe County Board of Elections from permitting or counting votes on the referendum of Local Law No. 2. The Supreme Court of the State of New York Appellate Division, Fourth Judicial Department[10] vacated the preliminary injunction and the referendum was approved by the vote of approximately seventy- five percent of the voting residents of Rochester in the November 4, 2019 election.[11] In its decision, the Fourth Department noted "that the substantive

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[8] This court previously decided that the respondents were not entitled to dismissal on the doctrine of laches (Ark, J. September 25, 2019 decision, p. 2; *aff'd in part In Matter of Rochester Police Locust Club, Inc. v. City of Rochester*, 176 A.D. 3d 1646 [4th Dept. 2019]).

[9] "The petitioners' legal challenges to Local Law No. 2 are multi-pronged and complex, as are the respondents' rebuttals. It would be a disservice to the community for the court to render its legal judgment on such important legislation without a thorough analysis of the legality of the statute . . . . The opportunity which this case presents should not be squandered with only a cursory review of the statute's legal implications" (Ark, J., September 25, 2019 decision, pp. 2-3).

[10] *Matter of Rochester Police Locust Club Inc., v. City of Rochester*, 176 A.D. 3d 1646, 1647 (4th Dept. 2019).

[11] The ballot stated:

> This proposal would amend the Rochester City Charter to authorize the creation of the Police Accountability Board (PAB). The PAB would consist of nine unpaid Rochester residents: one appointed by the Mayor and eight appointed by the City Council; four of the Council's appointees will be nominated by a coalition of community organizations. The PAB would have the power to independently investigate civilian complaints, subpoena information for its investigations, and determine whether individual officers have committed misconduct. The PAB will also create disciplinary guidelines, with an opportunity for input from the Chief of Police and the police union.

merits of the Local Law are not before us... and that our determination does not bar a subsequent action in the event that the referendum is approved by the voters..." Accordingly, this decision addresses the substantive merits of Local Law No. 2.

Petitioners challenge both the legality of the PAB's role in police discipline and its affect on collective bargaining with the police union (hereinafter "the Locust Club"). The core issue is whether the Rochester City Council can enact legislation regarding police discipline that conflicts with New York State laws regulating the same subject.[12]

A. **Overview** (paraphrasing: *Mayor v. Council,* 182 Misc. 2d 330).

Local governments most certainly have the power to "amend local laws which are not inconsistent with [the New York State Constitution] or any general law."[13] This power for the City of Rochester, New York is vested in its City Council. The home rule provision of N.Y. Const art. IX, § 2, cl. (c) gives local governments broad police powers relating to the welfare of their citizens.[14] Duly enacted local laws have the same presumption of constitutionality as state laws, and 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.[15] The presumption of constitutionality must be rebutted beyond a reasonable doubt, and a court only should declare a law unconstitutional as a last resort.[16] There must be a showing that a legislature has clearly usurped a prohibited power, in order to declare a statute unconstitutional.[17] Generally, it is for the legislative branch of

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If the PAB finds, after a hearing, that an officer has committed misconduct, the Chief of Police would be required to impose discipline consistent with disciplinary guidelines. The PAB would also recommend changes to the Police Department's policies, practices, and training.

The ballot did not indicate that the Chief of Police and the Mayor would lose control over the discipline of RPD Officers and that their authority would transfer to a board of civilians with no experience in the law enforcement field. It did not state that the PAB would have unfettered control over setting the disciplinary matrix that would govern how officers are punished. It did not state that neither the Police Chief, the Mayor, nor any other governmental official would be able to override the PAB's determination of discipline. It did not state that members of the PAB would not be able to be removed by any elected or governmental officer unless the PAB itself asked for removal. The Petitioners did not challenge the phrasing of the referendum on the ballots.

[12] Petitioners do not challenge the structure of the citizen involved PAB established in Local Law No. 2.

[13] N.Y. Const art. IX, § 2, cl. (c); Municipal Home Rule Law § 10(1); *see Belle v. Town Board of Onondaga*, 61 A.D. 2d 352, 356 (4th Dept. 1978).

[14] *New York State Club Assn., Inc. v. City of New York,* 69 N.Y.2d 211, 217(NY 1987), *affd.*, 487 U.S. 1 (1988).

[15] *41 Kew Gardens Rd. Assocs. v. Tyburski,* 70 N.Y.2d 325, 333 (NY 1987).

[16] *Lighthouse Shores, Inc. v. Town of Islip*, 41 N.Y.2d 7, 11 (NY 1976).

[17] *See Matter of Ricker v. Village of Hempstead*, 290 N.Y. 1, 5 (NY 1943).

government, not the courts, 'to determine 'the reasonableness, wisdom and propriety' of the regulations needed to protect the community."[18]

B. Composition of the Police Accountability Board

i. Appointment of Board Members

Nine residents of the City of Rochester will comprise the PAB. One member will be appointed by the Mayor.[19] The City Council will appoint four members.[20] The remaining four seats are to be filled by the City Council from a pool of nominees selected by "The Alliance,"[21] which is "a group of community organizations" listed on Appendix A to Local Law No. 2. Appendix A states that the list of "organizations" comprising "The Alliance" is "subject to change,"[22] but there is no indication of how the organization list will change. What qualifies as a "community organization" is not defined anywhere in Local Law No. 2. Other than explicitly excluding members of the Rochester Police Department, there appear to be no rules regarding what other "community organizations" may join "The Alliance."[23]

Aside from residence and association restrictions, there are no minimum qualification requirements for PAB members, nor are there any restrictions on who may serve as a PAB member. However, Local Law No. 2 § 18-4(E) and (F) precludes RPD members or their family from being members of the PAB and places limitations on former law enforcement officers or their family members, as well as attorneys who have litigated police misconduct lawsuits.[24] All members of the PAB must be approved "by a majority" of the City Council.[25]

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[18] *South Carolina Highway Dept. v. Barnwell Bros.*, 303 U.S. 177, 191; *Town of Hempstead v. Goldblatt*, 9 N.Y.2d 101, 105 (NY 1961), *affd.* 369 U.S. 590 (1962).
[19] *Id.* § 18-4(H)(1).
[20] *Id.* § 18-4(H)(2).
[21] *Id.* §§ 18-2; 18-4(H)(3).
[22] Local Law No. 2, Appendix A.
[23] Bylaws of the Police Accountability Board Alliance, Article 7 – New Members, (https://pabnow.github.io/Alliance_Bylaws.pdf). In the present lawsuit, the Petitioners have not challenged the legality of the significant role "The Alliance," or its component non-governmental and religious organizations, plays in this new governmental body that is in charge of police discipline. The question of whether a branch of government may divest itself of the duty of governing and transfer its power and responsibilities to a private organization that intentionally excludes membership solely on the basis of occupation is not before the Court.
[24] The petitioners have not challenged this portion of the law in the present lawsuit.
[25] § 18-4(H)(3).

PAB members may serve indefinitely. Initially, PAB member terms are three years long,[26] and a member may be reappointed for an additional term for a total of six years.[27] At the conclusion of that six-year initial tenure, the same member must wait three years before serving again.[28] Once a member is re-appointed to a second tenure after waiting three years, Local Law No. 2 contains no term limit.[29]

ii. Removal of Board Members

A member of the PAB cannot be removed unless the PAB itself makes that request. Local Law No. 2 provides for removal of a PAB member only upon a majority vote of the PAB asking the City Council to remove that member.[30] Additionally, Local Law No. 2 provides that the PAB is to be "an autonomous office of the City of Rochester separate from the Rochester Police Department and other local, state, and federal law enforcement agencies."[31] No elected official – including the Mayor – may remove a member of the PAB under any circumstances. The electorate of the City of Rochester cannot remove a member of the PAB. A PAB member can only be removed by a majority vote of both the PAB and a corresponding vote of the City Council.[32]

C. Comparable Boards

This court conducted an in-depth analysis of multiple other civilian review boards from around New York and the United States (see Decision Appendix). Local Law No. 2 was not drafted based upon any other similar legislation anywhere in New York or the United States. There is no indication that the respondent Council considered any alternative legislation[33] other than Local Law No. 2 as it currently exists before this court. 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

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[26] § 18-4(J)(2).
[27] § 18-4(J)(2).
[28] *Id.*
[29] § 18-4(J).
[30] § 18-4(L).
[31] §18-3(B) (emphasis added).
[32] The petitioners have not challenged this portion of the law in the present lawsuit.
[33] As set forth below (page 25), the respondent Council held the Mayor's proposed board - "Introductory 19"- in committee and refused to bring it to the floor for a vote.

officials. It appears that the PAB is *sui generis* in the scope of its powers and its composition, particularly in relation to the powers of the Police Chief and police discipline.

II. Validity of Local Law No.2 Under New York State Law

It is axiomatic that a government may only exercise that power which it possesses. "[T]he lawmaking authority of a municipal corporation, which is a political subdivision of the State, can be exercised only to the extent it has been delegated by the State."[34] When a local legislature attempts to exercise authority beyond its scope, the act "is *ultra vires* and void."[35] Therefore, "[s]o long as local legislation is not inconsistent with the State Constitution or any general law, localities may adopt local laws . . . with respect to their . . . affairs or government."[36]

Municipal Home Rule Law § 10 and Article IX § 2 of the New York State Constitution empower local governments to legislate regarding the discipline and removal of officers so long as their laws are "not inconsistent with the provisions of the constitution or not inconsistent with any general law."[37] A "general law" is "[a] state statute which . . . applies alike to all counties, all counties other than those wholly included within a city, all cities, all towns or all villages."[38] The Civil Service Law, Unconsolidated Law § 891, and the State Constitution are all "general laws" within the meaning of MHRL § 10 and Article IX § 2. Portions of Local Law No. 2 conflict with state law by divesting the Rochester Police Chief of control over hearings and discipline of RPD officers.

Under Local Law No. 2, the PAB has expansive powers that are unprecedented among civilian police review boards. The PAB will set a "disciplinary matrix," which will set "a range of disciplinary action options" which the Chief must impose for police misconduct.[39] The Police Chief must provide "input" regarding the matrix, but he has no authority to set it, and the final determination belongs to the PAB.[40] The Mayor has no role in setting the disciplinary matrix. The petitioners challenge this portion of Local Law No. 2.

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[34] *Albany Area Builders Ass'n. v. Town of Guilderland* ("*Guilderland*"), 74 N.Y.2d 372, 376 (NY 1989).
[35] *Kamhi v. Town of Yorktown*, 74 N.Y. 2d 423, 427 (NY 1989).
[36] *Guilderland*, 74 N.Y. 2d at 376 ([NY 1989).
[37] MHRL § 10(1)(i) and NY Constitution Art. IX §2(3)(c).
[38] MHRL § 2(5).
[39] Local Law No. 2 (hereinafter "LLN2") § 18-2; § 18-5(B).
[40] LLN2 § 18-5(B) ("The Board shall decide the final version of the disciplinary matrix to be used").

The PAB is empowered "to conduct independent investigations . . . and . . . to discipline RPD Officer(s) if a complaint is sustained."[41] The PAB may investigate any conduct involving a police officer, whether or not there is a civilian complaint or even any allegations of misconduct.[42] The PAB will conduct disciplinary hearings against RPD officers,[43] make "findings of fact," "determination[s] as to whether there is substantial evidence of misconduct, and assign punishment to guilty officers.[44] To remain employed with the RPD, all RPD officers – including the Police Chief – must fully cooperate with the PAB.[45]

Most importantly for purposes of this lawsuit, the PAB possesses almost total power over how an RPD officer is to be disciplined. The Board shall make the "final decision of discipline,"[46] and that "determination of discipline shall be binding on the Chief, who shall impose the discipline determined by the Board . . . within five . . . days of receipt of the Board's decision."[47] Discipline options available to the PAB "include . . . but are not limited to counseling, reprimand, retraining, suspension, demotion, or dismissal."[48] The only discretion Local Law No. 2 leaves to the Police Chief is the option "to impose additional discipline . . . above and beyond that recommended by the Board."[49] Under Local Law No. 2, the Mayor has no role and no authority over officer discipline.

A. New York State Law

The Civil Service Law (CSL) and Unconsolidated Law Section 891[50] govern and establish comprehensive procedures for police discipline in New York State. Except for local discipline

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[41] LLN2 § 18-3(E).
[42] *Id.* § 18-3(F) (the PAB may investigate "even in the absence of a civilian complaint"); § 18-3(I) ("the Board shall have the power to investigate any and all conduct, acts, or omissions by any RPD Officer"); 18-5(G)(2) (same). The petitioners have not challenged this portion of the Law in the present lawsuit.
[43] *Id.* § 18-5(I).
[44] *Id.* § 18-5(I)(10) and (13).
[45] *Id.* § 18-3(D) ("As a condition of employment . . . all Officers, including . . . the Chief, shall fully cooperate with the Board"). The petitioners have not challenged this portion of the Law in the present lawsuit.
[46] *Id.* § 18-5(J)(3).
[47] *Id.* § 18-5(J)(4).
[48] *Id.* § 18-5(I)(10(f).
[49] *Id.* § 18-5(J)(2).
[50] *Ligreci v. Honors*, 162 A.D.2d 1010, 1010 (4th Dept. 1990) (citing Section 891 and Civil Service Law Section 75 as the statutes governing police discipline procedures).

schemes that predate[51] the CSL (discussed *infra*), the CSL's disciplinary procedures occupy the field and preclude other, contradictory local disciplinary regimes. Police officers "shall not be removed or otherwise subjected to any disciplinary penalty . . . except for incompetency or misconduct shown after a hearing upon stated charges pursuant" to CSL Section 75.[52] The CSL and Unconsolidated Law § 891[53] govern who may conduct disciplinary hearings.[54] These statutes require that disciplinary "[h]earings upon charges [against police officers] . . . shall be held by *the officer or body having the power to remove* the person charged . . . or by a deputy or other employee of such officer or body designated. . . for that purpose."[55] In other words, only an officer's commander or designee may conduct a disciplinary hearing.[56]

The CSL and Unconsolidated Law Section 891 also control who may decide how an officer will be punished. If a designee holds the hearing, that designee "shall make a record of such hearing which shall, with his recommendations, be referred to" the commanding officer or body "for review and decision."[57] Thus, final authority over how an officer will be sanctioned remains with the officer's commander – whether a specific person (*e.g.*, police chief) or supervising governmental body (*e.g.*, town board[58]). Unconsolidated Law Section 891 mandates identical rules that are almost verbatim to those in the CSL, but is limited to police officer removal proceedings.

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[51] CSL § 76(4) states "Nothing contained in section seventy-five or seventy-six of this chapter shall be construed to repeal or modify any general, special or local law or charter provision relating to the removal or suspension of officers . . . . Such sections may be supplemented, modified or replaced by agreements negotiated between the state and an employee organization pursuant to article fourteen [the Taylor Law] of this chapter."

[52] CSL § 75(1).

[53] "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" (Unconsolidated Law § 891 [emphasis added]).

[54] *Lynch v. Giuliani*, 301 A.D. 2d 351, 355-56 (1st Dept. 2001) (Section 891 bars hearings "that may result in *recommendations* for termination against police officers" from being "conducted by a non-employee of the Police Department") (emphasis added).

[55] Unconsolidated Law § 891; CSL § 75(2).

[56] *Matter of Fraccola v. City of Utica*, 135 A.D. 2d 112 (4th Dept. 1987), *app. den.* 72 N.Y. 2d 807 (NY 1988), *cert. den.* 489 U.S. 1053 (US 1989) (noting that Unconsolidated Law § 891 and CSL § 75 require police removal hearings to be conducted by the employing agency, which was the Department of Public Safety).

[57] CSL § 75(2) (emphasis added).

[58] *Wallkill*, 19 N.Y. 3d 1066 (NY 2012).

Local Law No. 2 established a disciplinary regime that conflicts with the Civil Service Law and Section 891. Under Local Law No. 2, the PAB conducts disciplinary hearings, but it is not "the officer or body having the power to remove the person charged."[59] Although the PAB shall make "the final decision of discipline,"[60] the PAB has no inherent authority to punish or remove the officer. Once the PAB determines what punishment to impose, it is incumbent upon the Police Chief to impose that discipline."[61] If the PAB was the "body having the power to remove the person charged," there would be no need for the Police Chief to implement its decision.

Under Local Law No. 2, the PAB, not the Police Chief, decides how an officer is to be punished. The PAB "shall have . . . the power to discipline RPD Officer(s)."[62] The PAB has total control over the "disciplinary matrix," which sets mandatory punishments for offending police officers.[63] Local Law No. 2 makes the PAB's discipline decision binding upon the Chief: once the PAB decides a case, "[t]he Chief will be required to impose discipline utilizing the disciplinary matrix based on the Board's findings and determination."[64] "The Board's determination of discipline shall be binding on the Chief, who shall impose the discipline determined by the Board in accordance with the matrix within five days."[65]

Therefore, Local Law No. 2 facially conflicts with Civil Service Law Section 75 and Unconsolidated Law Section 891.

The procedures set forth in Unconsolidated Law Section 891 and CSL Section 75 comply with longstanding public policy favoring strong commander control over police officers. In 1987, the Court of Appeals held that:

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[59] Unconsolidated Law § 891; CSL § 75(2).
[60] Local Law No. 2 § 18-5(J)(3).
[61] Local Law No. 2 § 18-5(J)(4).
[62] Local Law No. 2 § 18-3(E).
[63] Local Law No. 2 §§ 18-3(G) ("The Board . . . shall establish a disciplinary matrix."); 18-5(B) ("The Board shall decide the final version of the disciplinary matrix to be used."); *see also* § 18-5(B) ("The disciplinary matrix shall include clearly delineated penalty levels with ranges of sanctions which progressively increase based on the gravity of the misconduct and the number of prior sustained complaints").
[64] Local Law No. 2 § 18-2.
[65] Local Law No. 2 § 18-5(J)(4); *see Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark*, 459 N.J. Super. 458, 467 (N.J. Superior Court, Appellate Division 2019) (striking down a portion of a statute establishing a police review board explicitly because the board's discipline decisions were binding upon the Chief and therefore interfered with the day-to-day administration of the police department by stripping the Chief of command authority), *cert. granted* 240 N.J. 7 (NJ Supreme Court 2019).

> "[i]n matters of police discipline, we must accord great leeway to the Commissioner's determinations concerning appropriate punishment, because he, and not the courts, is accountable to the public for the integrity of the Department."[66]

One of the reasons it is important to maintain commander control of a police force is because "of the sensitive nature of the work of the police department and the importance of maintaining both discipline and morale."[67] Because of these considerations, there is significant jurisprudence in New York expressing reluctance to uphold civilian review boards whose powers are not "purely investigative" in nature.[68]

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[66] *Patrolmen's Benevolent Ass'n of City of New York, Inc. v. New York State Pub. Employment Relations Bd.*, 6 N.Y.3d 563, 576 (NY 2006) ("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.'"); *Berenhaus v. Ward*, 70 N.Y.2d 436, 445 (NY 1987); *Kelly v. Safir*, 96 N.Y.2d 32, 38, 747 N.E.2d 1280, 1284 (NY 2001) ("[i]n matters concerning police discipline, great leeway must be accorded to the Commissioner's determinations concerning the appropriate punishment, for it is the Commissioner, not the courts, who is accountable to the public for the integrity of the Department"). Indeed, one of the cases cited by the Respondent City Council spoke to this precise point: In *Fraternal Order of the Police*, a New Jersey Appellate Division invalidated a Newark City Ordinance that required the police chief "to accept the [Civilian Complaint Review Board]'s findings of fact." That court held that "[t]he practical effect of this requirement . . . is that it interferes with the Chief's statutory responsibility for the routine day-to-day operations of the force." (*Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark*, 459 N.J. Super. 458, 467 (N.J. Superior Court, Appellate Division 2019), *cert. granted* 240 N.J. 7 (NJ Supreme Court 2019).

[67] *PBA*, 6 N.Y. 3d 563 at 576; *see also Wallkill*, 19 N.Y. 3d at 1969 [NY 2012] (highlighting "the tension between 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'"); *Matter of Schenectady v. New York State Pub. Empl.*, 30 N.Y. 2d 109 [NY 2017] (noting "a competing policy . . . favoring strong disciplinary authority for those in charge of police forces"); *Smeraldo v. Rater*, 55 A.D.3d 1298, 1299 [4th Dept. 2008] ("A police force is a quasi-military organization demanding strict discipline, and great leeway must be accorded to determinations concerning the appropriate punishment, for it is the Chief of Police who is accountable to the public for the integrity of the Department;" *Lundy v. City of Oswego*, 59 A.D. 3d 954, 955 [4th Dept. 2009] [because the police are a quasi-military body, "in matters concerning police discipline, great leeway must be accorded to determinations concerning the appropriate punishment"]; *Difate v. City Manager of Yonkers*, 105 A.D. 2d 744, 745 [2nd Dept. 1984]; *see Donofrio v. City of Rochester*, 144 A.D. 2d 1027 [4th Dept. 1988]).

[68] *See Mayor of City of New York v. Council of the City of New York*, 1995 WL 478872 (NY County Sup. Ct. 1995), *aff'd* 235 A.D. 2d 230 (1st Dept. 1997) ("The proposed . . . Board would not be a 'purely investigative' body"), *lv. app. den.* 89 N.Y. 2d 815 (NY 1997); *Cassesse v. Lindsay*, 51 Misc. 2d 59 (NY County Sup. Ct. 1966) (summarizing the history of police reform movements in the 1960s and noting that "policed morale will be adversely affected if the Board is composed of civilians; a degree of expertise and familiarity with police problems is required of those serving on a review board; the existence of a board dominated by civilians may deter an officer from exercising the necessary and proper authority at a critical moment for fear that his actions may not only be subject to criticism, but that he may be exposed to unwarranted civilian complaints; and, because the police department is a pari-military organization, discipline should remain entirely within the domain of police department personnel . . . . Public confidence, vital to an effective police department, can be fostered by a well-run and well-publicized complaint review system"); *Citizen Review Board of City of Syracuse v. Syracuse Police Dept.*, 150 A.D.3d 121 (4th Dept. 2017) (noting that Syracuse Citizen Review Board only possessed the power to "recommend action regarding police misconduct").

i. Police discipline in New York is presumptively subject to mandatory collective bargaining.

Article I Section 17 of the New York State Constitution states, "[e]mployees shall have the right to organize and to collectively bargain through representatives of their own choosing."[69] CSL Section 200 *et seq.* (known as the "Taylor Law") requires public employers (like the City of Rochester) to collectively bargain with police officer unions (like the Locust Club):

> Where an employee organization has been certified or recognized . . . the appropriate public employer shall be, and hereby 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 public employees (Civil Service Law § 204[2]).

Additionally, CSL §§ 75 and 76 explicitly provide for collective bargaining.[70] Therefore, collective bargaining is mandatory under the Civil Service Law and the State Constitution.

Local Law No. 2 established hearing procedures and empowered the PAB to establish a disciplinary matrix over which the Mayor has no control. Local Law No. 2 is non-negotiable and contains no provision preserving the Mayor's ability to collectively bargain. Indeed, the fact that it curtailed the Mayor's power necessitated the referendum.[71] Since Local Law No. 2 precludes the Mayor from engaging in collective bargaining regarding officer discipline, Local Law No. 2 conflicts with the New York State Constitution and the Civil Service Law.

In light of this conflict, the court can only uphold Local Law No. 2 *in toto* if the City of Rochester is exempt from the state laws requiring collective bargaining.

ii. State laws regarding police discipline, including collective bargaining, are binding upon the City of Rochester.

The conflicts between state law and Local Law No. 2 regarding the conduct of disciplinary proceedings, the imposition of discipline, and collective bargaining beget the question of whether those conflicts are legally significant. Because the issue here is whether RPD police discipline is governed by state or local law, this court's discussion of the Civil Service Law (generally) and the

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[69] NY Constitution Art. 1 § 17; also related is the Contracts Clause of the United States Constitution, which prohibits governments from "impairing the Obligation of Contracts" (US Constitution Art. I § 10).

[70] CSL §§ 75(2) ("this subdivision shall not modify or replace any written collective agreement between a public employer and employee organization negotiated pursuant to article fourteen [the Taylor Law] of this chapter"); 76(4) (quoted *supra*).

[71] As acknowledged by the parties. Municipal Home Rule Law § 23(2)(f).

Taylor portion of that Law (specifically) and Unconsolidated Law Section 891 will be merged. As demonstrated above, the presumptive general rule in New York is that the Civil Service Law[72] and Unconsolidated Law Section 891[73] govern police discipline. However, there is an exception to that general rule where "an *existing*" local law "committed the matter of police discipline to the local government".[74]

The Court of Appeals succinctly stated this exception: "When legislation exists *that predates* the enactment of Civil Service Law §§ 75 and 76, and such legislation commits police discipline to the discretion of local authorities, then, as a matter of public policy, discipline is a prohibited subject of collective bargaining."[75] This "grandfathering" exception is based upon Civil Service Law Section 76(4), which states

> [n]othing contained in section seventy-five or seventy-six of this chapter shall be construed to repeal or modify any general, special or local law or charter provision relating to the removal or suspension of officers or employees in the competitive class of the civil service of the state or any civil division.[76]

"Although Civil Service Law §§ 75 and 76 generally govern police disciplinary procedures, preexisting laws were 'grandfathered' under Civil Service Law § 76[4]."[77] Therefore,

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[72] *Matter of Town of Walkilll v. Civil Serv. Empls. Assn., Inc.*, 19 N.Y. 3d 1066 (NY 2012) ("Civil Service Law §§ 75 and 76 generally govern 'the procedures for disciplining . . . police officers"); *Patrolmen's Benevolent Ass'n of City of New York, Inc. v. New York State Pub, Employment Relations Bd.*, 6 N.Y.3d 563, 573 ("In general, the procedures for disciplining . . . police officers . . . are governed by Civil Service Law §§ 75 and 76 . . . . Thus, where Civil Service Law §§ 75 and 76 apply, police discipline may be the subject of collective bargaining.") (NY 2006).

[73] *Lynch v. Giuliani*, 301 A.D. 2d 351, 355-56 (1st Dept. 2001) (Section 891 bars hearings "that may result in *recommendations* for termination against police officers" from being "conducted by a non-employee of the Police Department") (emphasis added); *Fraccola v. City of Utica*, 135 A.D.2d 1112, 1113, 523 N.Y.S.2d 292, 292–93 (4th Dept. 1987) (except under extreme, unusual circumstances that leave no other practicable option, Section 891 requires that a disciplinary hearing for a police officer be held before an employee of the department in charge of supervising the officer); *see also Ligreci v. Honors*, 162 A.D.2d 1010, 1010, 557 N.Y.S.2d 216, 216 (4th Dept. 1990) (citing Section 891 and Civil Service Law Section 75 as the statutes governing police discipline procedures).

[74] *Town of Wallkill v. Civil Serv. Empls. Assn., Inc.*, 84 A.D. 3d 968, 971 (2nd Dept. 2011) (emphasis added), *aff'd Matter of Town of Walkilll v. Civil Serv. Empls. Assn., Inc.*, 19 N.Y. 3d 1066 (NY 2012).
Matter of Town of Walkilll v. Civil Serv. Empls. Assn., Inc., 19 N.Y. 3d 1066 (NY 2012) ("Civil Service Law §§ 75 and 76 general govern 'the procedures for disciplining . . . police officers"); *Patrolmen's Benevolent Ass'n of City of New York, Inc. v. New York State Pub. Employment Relations Bd.*, 6 N.Y.3d 563, 570-72 (NY 2006).

[75] *Town of Wallkill v. Civil Serv. Empls. Assn., Inc.*, 84 A.D. 3d 968, 971 (2nd Dept. 2011) (emphasis added), *aff'd Matter of Town of Walkilll v. Civil Serv. Empls. Assn., Inc.*, 19 N.Y. 3d 1066 (NY 2012).

[76] Civil Service law § 76(4).

[77] *Matter of City of Schenectady v. New York State Pub. Empl. Relations Board*, 30 N.Y. 3d 109, 115 (NY 2017).

> "the Taylor Law prevails where no legislation specifically commits police discipline to the discretion of local officials. However, where such legislation is in force, the policy favoring control over the police prevails, and collective bargaining over disciplinary matters is prohibited."[78]

The respondent Council argues that the City of Rochester is exempt from state law because the State Legislature granted the City of Rochester authority over police discipline when it enacted the City Charter in 1907.[79] Before addressing the merits of the argument, the Council's own words merit consideration. In 1985, the Council explicitly said that the Civil Service Law covered the topic of RPD officer discipline (discussed *infra*).[80] Local Law No. 2 itself declares that portions of CSL Sections 75 and 76 still apply to disciplinary proceedings before the PAB.[81] The respondent Council's argument for exemption claims that, since the State Legislature in 1907 granted Rochester authority over discipline of its own police force, that is the last word from the State on the matter, and therefore the City Council possessed authority to enact Local Law No. 2.

For that argument to prevail, a key premise must be true: that it is the "State's intent *at the point of the passage of the Taylor Law*" in 1967 which controls.[82] In other words, no intervening event between 1907 and 2019 (when Local Law No. 2 was enacted) could possibly divest the City of authority to regulate police discipline. Notably, the respondent Council did not reference authority supporting this premise, and this court has been unable to find any.

In fact, applying the legislative timeline to the respondent Council's argument leads to a different conclusion:

1907: State Legislature enacted the Charter of the City of Rochester expressly *granting Rochester officials authority over police discipline*.[83]

1923: State Legislature passed the Municipal Home Rule Constitutional Amendment, permitting local governments to legislate freely regarding their affairs, so long as the

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[78] *Matter of City of Schenectady v. New York State Pub. Empl. Relations Board*, 30 N.Y. 3d 109, 113 (NY 2017).
[79] Celli Memorandum of Law 9/20/19, p. 21 ("Section 75[4] thus 'grandfathered state laws passed prior to the enactment of Civil Service law §§ 75 and 76 – including the 1907 Rochester charter").
[80] That legislation 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 this subject matter is covered in the Civil Service Law*" (DeBolt 9/23/19 Affirmation, Exhibit B, p. 2 [emphasis added]).
[81] Local Law No. 2 §§ 18-5(I)(7) ("Hearing Process") ("All due process rights delineated in NYS Civil Service Law Section 75 shall apply"); 18-5(10)(e) (mandating that CSL § 76 governs officers' appellate rights).
[82] Celli 1/10/20 Submission, § 13.
[83] Rochester City Charter §§ 324 and 330.

"local laws [were] *not inconsistent with the provisions of this constitution or with a general law.*"[84]

1940: State Legislature enacted Unconsolidated Law Section 891, requiring that hearings to remove police officers be conducted before "the officer or body have the power to remove" the person charged unless a collective bargaining agreement provided otherwise.[85]

1958: State Legislature enacted the disciplinary portions of the Civil Service Law (Sections 75 and 76),[86] requiring *inter alia* that a disciplinary hearing against a police officer "shall be heard by the officer or body having the power to remove" the officer.[87]

1964: State Legislature adopted the "home rule package."[88] That legislation adopted Article IX of the State Constitution and the Municipal Home Rule Law,[89] both of which empowered local governments to enact or amend laws "not inconsistent with the provisions of the constitution or not inconsistent with any general law."[90]

1967: State Legislature enacted the Taylor Law (Civil Service Law Section 200 *et seq.*) requiring local public employers to engage in collective bargaining unless the municipality is "grandfathered" in.[91]

1985: Rochester City Council enacted legislation[92] repealing the "Charges and trials of policemen" portion of the City Charter "*for the reason that this subject matter is covered in the Civil Service Law.*"[93]

2019: Rochester City Council enacted Local Law No. 2 purporting to establish a comprehensive system for disciplining RPD officers.

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[84] MHRL §10(1)(i) (emphasis added).
[85] Unconsolidated Law § 891.
[86] McKinney's Civil Service Law § 75 and 76; *see also* Celli Memorandum of Law 9/20/19, p. 21, footnote 13, *citing Meringolo on Behalf of Members of the Correct6ion Captains Assn' v. Jacobson*, 173 Misc. 2d 650, 651 (Sup. Ct. NY County 1997, *aff'd sub nom. Meringolo v. Jacobson*, 256 A.D. 2d 20 (1st Dept 1998) (recognizing that Civil Service Law § 75 passed in 1958).
[87] Civil Service Law § 75(2).
[88] *Kamhi v. Town of Yorktown*, 74 N.Y. 2d 423, 428-29 (NY 1989).
[89] *Kamhi* at 428-29.
[90] McKinney's Municipal Home Rule Law § 10; McKinney's New York Constitution, Art. 9 § 2; *Kamhi*, 74 N.Y. 2d 423 (NY 1989); *Suffolk County v. New York State Civil Service Commission*, 44 Misc. 2d 557, 559 (Suffolk County Sup. Ct. 1964), *aff'd* 31 A.D. 2d 549 (2nd Dept. 1968), *aff'd* 29 N.Y. 2d 851 (NY 1971).
[91] *Matter of Town of Wallkill v. Civil Serv. Empls. Assn. Inc.*, 19 N.Y. 3d 1066, 1069 (NY 2012); *Matter of City of Schenectady v. New York State Pub. Empl. Relations Board*, 30 N.Y. 3d 109, 113 (NY 2017); Civil Service Law § 76(4).
[92] Confusingly, that legislation was also called "Local Law No. 2."
[93] 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 this subject matter is covered in the Civil Service Law*" (DeBolt 9/23/19 Affirmation, Exhibit B, p. 2 [emphasis added]).

Until 1985, the City of Rochester unquestionably possessed unfettered, exclusive authority to regulate matters of police discipline.[94] 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.*"[95] 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.

The City Council now asks this Court to ignore the 1985 action and to allow the Council to reverse course and reclaim what it explicitly surrendered to state law over thirty-four years ago. The respondent 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. Whether the City Council could regain its "grandfathered" status by simply repealing the 1985 law and what legal effect – if any – such a repeal would have is a question that is not before the Court.

In support of its argument that it was free to enact Local Law No. 2, the respondent City Council cited multiple sources that are actually to the contrary. For example, the respondent Council cited portions of Article IX and MHRL Section 10 claiming that those sections compel this court to uphold Rochester's freedom to enact Local Law No. 2.[96] However, the respondent disregards the first dispositive portion of those statutes which provide that localities may only enact "laws not inconsistent with the provisions of the constitution or not inconsistent with any general law."[97]

Additionally, the Council cited *Gizzo v. Town of Mamaroneck* 36 A.D. 3d 162, 165 (2nd Dept. 2005). Unlike the legislation at bar, *Gizzo* involved local legislation that was continuously in effect from 1936 until the Town Board adopted the new, contested local law in 1995. Applying all of the aforementioned concepts, the Second Department held that the municipality retained authority to

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[94] *See Locust Club of Rochester v. City of Rochester*, 29 A.D. 2d 134, 137 (4th Dept. 1968) (noting that the City Council possessed authority to establish a citizen advisory board because of the Legislature's grant of power in the City Charter).
[95] Local Law No. 2-1985, DeBolt 9/23/19 Affirmation, Exhibit B, p. 2 (emphasis added).
[96] Celli 1/10/20 Submission, § 9.
[97] MHRL § 10(1)(i); *see also* Constitution Art. IX § 2 ("every local government shall have the power to adopt . . . local laws not inconsistent with the provisions of this constitution or any general law").

legislate regarding police discipline.[98] The reason the municipality in *Gizzo* could legislate was because the municipality was "grandfathered" in through its 1936, pre-Civil Service Law legislation *which was still in effect*. Therefore, the municipality never lost its "grandfathered" status because the local laws granting it authority were never repealed. This is patently different than the instant matter where the 1985 Rochester City Council explicitly repealed its local legislation in favor of state law.

The second case cited by respondent Council suffers similarly. According to the respondent Council, *Matter of Goshen v. Town of Goshen Police Benevolent Assoc.*, 142 A.D. 3d 1092 (2nd Dept. 2016) held that the "collective bargaining agreement [was] void because 'by enacting L.L. No. 1, the Town Board affirmed that the subject of police discipline resides with it and is a prohibited subject of collective bargaining between the appellant and the PBA.'"[99] However, a key portion of that court's decision: "L.L. No. 1 was enacted by the Town Board pursuant to the authority granted to it by Town Law § 155."[100] Town Law§155 was enacted in 1932 and is yet another statute that was "grandfathered" in and remains in place to this day. Thus, *Goshen* is also distinguished from the case at hand where Rochester surrendered its authority to state governance in1985.

The respondent Council's third case is similarly distinguished. *Carver v. County of Nassau*, 135 A.D. 3d 888 (2nd Dept. 2016) dealt with local legislation from 2007 that was "grandfathered" in by existing legislation from 1925.

Finally, the respondent Council's fourth case is also inapposite. The respondent Council argues that *Town of Harrison Police Benev. Ass'n, Inc. v. Town of Harrison Police Dep't*, 69 A.D.3d 639, 641–42 (2nd Dept. 2010) supports its argument because the Second Department held, "[s]ince disciplinary matters are not a proper subject of collective bargaining as per the Westchester County Police Act, the Supreme Court erred in granting the petition."[101] Again, the Council's argument overlooks the dispositive portion of the decision that contradicts the Council's argument:

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[98] *Matter of Gizzo v. Town of Mamaroneck*, 36 A.D. 3d 162, 165 (2nd Dept. 2005) ("a town is further empowered to adopt local laws with respect to the removal of its employees, *subject to the requirement of consistency with the Constitution and general laws*" [emphasis added]).
[99] Celli 1/10/20 Submission, p. 23, *quoting Matter of Goshen*, 142 A.D. 3d 1092 (2nd Dept. 2016).
[100] *Goshen*, 142 A.D. 3d 1092 at 1093.
[101] Celli 1/10/20 submission, p. 23, *quoting Harrison.*

> "Civil Service Law § 76 (4) provides that sections 75 and 76 of the Civil Service Law shall not 'be construed to repeal or modify any general, special or local law' that 'provide expressly for the control of police discipline by local officials in certain communities.' Since the Westchester County Police Act (L 1936, ch 104) provides that 'proceedings to discipline police officers employed by the towns in Westchester County be conducted by the boards of police commissioners of the towns,' the Westchester County Police Act is a special law and, therefore, 'disciplinary procedures are not a proper subject of collective bargaining for members of town police departments in Westchester County.' Here, the collective bargaining agreement entered into between the Town and the PBA provided that disciplinary matters would be conducted pursuant to Civil Service Law § 75. Since disciplinary matters are not a proper subject of collective bargaining as per the Westchester County Police Act, the Supreme Court erred in granting the petition to the extent of directing the Town Board to determine whether Heisler was entitled to representation pursuant to Civil Service Law § 75 (2)."[102]

This court has been unable to locate any case where a locality did *not* have pre-Taylor/Civil Service Law legislation *still in effect* regarding police discipline, enacted local legislation contradicting state law, and were upheld as properly exercising their authority.[103] Accordingly, this court finds that the Civil Service Law and Unconsolidated Law Section 891 have bound the City of Rochester since 1985, and the Council therefore acted *ultra vires* when it enacted portions of Local Law No. 2 that contradicted the Civil Service Law (including the Taylor Law) and Unconsolidated Law Section 891.

iii. Portions of Local Law No. 2 Are Unconstitutional and Invalid.

The portions of Local Law No. 2 that contradict state law are therefore unconstitutional under Article IX Section 10 of the State Constitution and invalid under Municipal Home Rule Law Section 10.

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[102] *Town of Harrison Police Benev. Ass'n, Inc. v. Town of Harrison Police Dep't*, 69 A.D.3d 639, 641–42 (2nd Dept. 2010) (citations omitted).

[103] *See Town of Orangetown v. Orangetown Policemen's Benevolent Ass'n.*, 18 A.D. 3d 879 (2nd Dept. 2005) (Rockland County Police Act, as amended in 1946, pre-dated the contrary provision of the Civil Service law and "which by its terms preempts all inconsistent legislation" and permitted local legislation regarding police discipline); *Rockland County Patrolmen's Benevolent Ass'n, Inc. v. Town of Clarkstown*, 149 A.D. 2d 516, 517 (2nd Dept. 1989) (Rockland County Police Act of 1936 "rather than Civil Service Law § 75 was the controlling statute for this and similar cases [because] it was a 'special law' which preempted the area of discipline of police officers in Rockland County"); *Matter of Montella v. Bratton*, 93 N.Y. 2d 424 (NY 1999) (local Administrative Code, which "predated the applicable Civil Service Law provisions," was binding because "the Legislature did not intent to supplant the long-established disciplinary provisions of the Administrative Code").

III. Validity of Local Law No. 2 under the City Charter

The respondent Council argues that Local Law No. 2 does not violate the Charter of the City of Rochester because, "if approved, it would amend the City Charter."[104] The only portion of Local Law No. 2 which addresses the Charter is the Preamble, which states: "Chapter 755 of the Laws of 1907, entitled 'An Act Constituting the Charter of the City of Rochester,' as amended, is hereby further amended *by adding* the following new Article XVIII Police Accountability Board."[105] Local Law No. 2 did not explicitly amend or repeal any portions of the City Charter. Thus, if there is irreconcilable conflict between the Charter and Local Law No. 2, the only way to preserve Local Law No. 2 is to find repeal by implication. According to the Court of Appeals:

> "Repeal or modification of legislation by implication is not favored in the law. Absent an express manifestation of intent by the Legislature--either in the statute or the legislative history--the courts should not presume that the Legislature has modified an earlier statutory grant of power to an agency. Generally, a statute is not deemed impliedly modified by a later enactment 'unless the two are in such conflict that both cannot be given effect. If by any fair construction, a reasonable field of operation can be found for [both] statutes, that construction should be adopted.'"[106]

As a general rule of statutory interpretation, "[r]epeals 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."[107] It is an equally recognized canon of construction that:

> "if there be any repugnancy between an amended statute or law and the original, which cannot be so construed as to leave them both to stand and each have a legitimate office to perform, the original enactment must be deemed to have been repealed by the later expression of the legislative will."[108]

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[104] Council's 9/20/19 Memorandum of Law, p. 24.
[105] Local Law No. 2, Preamble.
[106] *Consol. Edison Co. of New York v. Dep't of Envtl. Conservation*, 71 N.Y.2d 186, 195 (NY 1988) (citations omitted).
[107] McKinney's Consolidated Laws of New York § 391.
[108] *People ex rel. Killeen v. Angle*, 109 N.Y. 564, 575, 17 N.E. 413, 418 (NY 1888); *cited by Flushing Nat. Bank v. Mun. Assistance Corp. for City of New York*, 40 N.Y.2d 731, 760 (NY 1976) (in the event of repugnancy between two items of legislation that "cannot be construed so as to leave them both stand, then the amendment must prevail as the latest expression of the constitutional will of the people"); *see also Conrad v. Beneficial Fin. Co. of New York*, 57 A.D.2d 91, 96 (NY 1977) ("A statute should not be deemed repealed by a later enactment which contains no language of repeal, unless the two are in such conflict that they cannot be reconciled").

Chief Judge Cardozo stated nearly one hundred years ago: "What is special or particular in the later of two statutes supersedes as an exception whatever in the earlier statute is unlimited or general."[109]

It appears that the Council has implicitly repealed or amended preexisting provisions of the City Charter. Local Law No. 2 creates an autonomous body which, while not answering to the Mayor, holds powers conflicting with those of the Mayor. However, the City Charter mandates that the Mayor retain full, exclusive control over all aspects of city government, including the police department. Article III of the City Charter sets forth the duties and responsibilities of the Mayor. Charter Section 3-1 states, "The Mayor shall be the head of the executive and administrative branch of City government."[110]

Section 3-3 ("Powers and duties of the Mayor") lays out numerous relevant aspects of the Mayor's powers:

> "The Mayor shall be responsible for the administration of all City affairs. The Mayor shall have the power and it shall be the Mayor's duty:
>
> A. *To be the chief executive officer and administrative head of City government.*
>
> . . .
>
> C. To see that all laws and ordinances are enforced.
>
> D. Subject to confirmation by the Council, ***to appoint the heads of all departments and the members of all boards*** as set forth in this Charter . . . .
>
> E. To exercise supervision and control over all administrative departments, the heads of which the Mayor appoints.
>
> G. *To appoint all subordinate officers and employees and to remove all such officers and employees and department heads and members of boards*, except as otherwise provided in this Charter.[111]

Local Law No. 2 strips the Mayor of the aforementioned powers as it relates to governing both the PAB and RPD. Under Local Law No. 2, the Mayor will not be the head of, nor will she have any control over, the PAB and its operations.[112] Rather than PAB members being appointed

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[109] *Francois v. Dolan*, 95 N.Y.2d 33, 39 (NY 2000) *quoting East End Trust Co. v. Otten*, 255 N.Y. 283, 286 (NY 1931) (Cardozo, Ch. J.).
[110] Rochester City Charter (hereinafter "Charter") § 3-1.
[111] Charter § 3-3 (emphasis added).
[112] *See, e.g.*, Local Law No. 2 §§18-3(B) (providing that the PAB "shall be an autonomous office of the City").

and subject to removal by the Mayor, none of the PAB members can be removed unless a majority of the PAB itself asks[113] for the member to be removed.[114]

Section 18-4(H) states that the Mayor may only appoint one member of the nine-person Board. The Council nominates four members, and the remaining four members are nominated by a non-governmental, non-elected "Alliance." Similarly, the Mayor will no longer have control over discipline of RPD officers as discussed *supra*.[115]

Local Law No. 2 also conflicts with the City Charter by creating a body whose powers conflict with those of the Police Chief. Article VIIIA of the City Charter establishes the powers and responsibilities of the Chief of the Rochester Police Department. Section 8A-1 ("Chief of Police; powers and duties") provides, in relevant part:

> A. The Chief of Police shall be responsible for the operation of the Police Department.
>
> . . .
>
> C. The Chief of Police shall be responsible for the enforcement of penal laws and ordinances, the maintenance of order and the prevention of crime in the City of Rochester.
>
> D. The Chief of Police shall be the head of the Police Department and shall have control of its administration . . . . The Chief of Police shall be the appointing authority for members and employees of the Police Department.
>
> E. 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; to issue subpoenas, administer oaths and take affidavits with respect to all matters pertaining to the

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[113] Though not germane to the Court's decision, the wisdom of this particular provision is questionable because the PAB cannot remove a Board member without exposing themselves to the danger of retaliatory removal. It is easy to foresee a situation wherein a PAB member commits some misconduct, another Board member asks for the wrongdoer's removal, the wrongdoer retaliates by asking for the reporting Board member (or even *all* other Board members) to be removed, and a stalemate ensues leaving the misbehaving Board member in power.

[114] Local Law No. 2 18-4(L) (providing no mechanism for anyone – including the Mayor – to remove a PAB member unless the PAB itself makes that request and the Council grants it).

[115] Local Law §§ 18-2 (stating, "the disciplinary matrix shall determine a range of disciplinary action options for misconduct. The Chief will be required to impose discipline utilizing the disciplinary matrix based on the Board's findings and determination."); 18-3 (stating that the PAB "shall have the power . . . to discipline RPD Officer(s), that the Board shall establish the disciplinary matrix), and 18-5 (stating that "the Board shall decide the final version of the disciplinary matrix to be used;" establishing a hearing process; stating that the PAB's decisions "may include disciplinary sanctions including . . . suspension, demotion, or dismissal;" and that the PAB's "determination of discipline shall be binding on the Chief, who shall impose the discipline determined by the Board . . . within five . . . days.").

> Police Department; and to perform such other duties as may be prescribed by law or ordinance.[116]

The respondent Council has argued that Local Law No. 2 does not actually strip the Chief of discipline powers because the Chief may still impose discipline *beyond* that recommended by the PAB.[117]

Local Law No. 2 diminishes both the Mayor's control of and the Chief of Police's authority over the police department. The Chief will not have control over the investigation or adjudication of police misconduct.[118] The Chief will not have authority over the imposition of officer discipline.[119] The Chief cannot overrule the PAB's determinations by imposing *less* discipline than decided by the PAB.[120]

Given the breadth of changes Local Law No. 2 triggered in the City Charter, it would have been preferable for the City Council to explicitly state its intention to affect City government rather than having a court speculate on substantial inconsistencies between the two laws. Regardless, the court is mindful that the Mayor approved Local Law No. 2, even though it stripped her of control over two important aspects of managing a police department: adjudication of complaints of police misconduct and discipline of offending officers. The Mayor has also foregone governing the Police Accountability Board. Again, it is for the City Council to amend and/or repeal contradictory provisions in the Charter.

A. Mayor's Proposed Legislation

On December 12, 2019, this Court requested additional submissions from the parties on numerous issues. For the first time, on January 10, 2020, the respondent Mayor indicated that Local Law No.2 may violate state law.[121] The Mayor also disclosed that, approximately one year ago, she

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[116] Charter § 8A-1.
[117] [Cite]
[118] Local Law No. 2 § 18-1 ("The Police Accountability Board shall be the mechanism to investigate . . . complaints of police misconduct").
[119] Local Law No. 2 §§ 18-2 (stating that "the disciplinary matrix shall determine a range of disciplinary action options for misconduct. The Chief will be required to impose discipline utilizing the disciplinary matrix based on the Board's findings and determination"); 18-3 (stating that the PAB "shall have the power . . . to discipline RPD Officer(s), that the Board shall establish the disciplinary matrix), and 18-5 (stating that "the Board shall decide the final version of the disciplinary matrix to be used;" establishing a hearing process; stating that the PAB's decisions "may include disciplinary sanctions including . . . suspension, demotion, or dismissal;" and that the PAB's "determination of discipline shall be binding on the Chief, who shall impose the discipline determined by the Board . . . within five . . . days.").
[120] Local Law No. 2 § 18-5(J)(4)
[121] January 10, 2020 Submission by Patrick Beath, pp. 2-5 ("On its face, it is not clear that Local Law No. 2 comports with § 891 of McKinney's Unconsolidated laws;" "issuance of such 'additional discipline' appears to contravene § 891 if it is imposed without first holding a hearing before the Chief or his/her designee;" noting that the

submitted to City Council a proposed Local Law (hereinafter "Introductory 19") that would have established a PAB. Introductory 19 limited the PAB's purview to complaints of excessive force,[122] and it did not permit the PAB to conduct disciplinary hearings of police officers. Under Introductory 19, the PAB could "conduct a supplemental investigation" beyond those investigated internally by the RPD.[123]

Introductory 19 left final authority over officer discipline to the Chief, a subordinate of the Mayor.[124] Unlike Local Law No. 2's compulsory compliance with the PAB's disciplinary determinations, Introductory 19 simply required the Chief to notify the PAB of the Chief's rationale if the Chief rejected PAB's discipline recommendation.[125]

Finally, Introductory 19 left the Mayor in control of the appointment and removal of PAB members.[126]

Since January 2019, the respondent Council has held the Mayor's Introductory 19 in committee and refused to bring it to the floor for a vote.[127]

IV. Severability

Having found portions of Local Law No. 2 unlawful, does any part of Local Law No. 2 survive? In *Hynes v. Tomei,* 92 N.Y.2d 613, 627 (NY 1998), the New York Court of Appeals addressed severability:

> The question remains whether the entire death penalty statute must be invalidated, as defendants urge, or whether the challenged provisions may be severed, leaving the statute otherwise operational. The answer depends on whether 'the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether.' If removing particular

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Mayor's alternative proposed law "would have established a Police Accountability Board consistent with the provisions of § 891" partially because "the Police Chief would remain the final decision maker with regard to discipline").

[122] Beath Exhibit A, §12-43[A][5][g] [emphasis added];§12-43[A][3] ["the Board shall . . . review Complaints of excessive force against RPD or its officers"; "The Board shall have the *limited* power to investigate any and all conduct, acts or omissions by and RPD sworn member *related to an excessive use of force* Complaint after the conclusion of an investigation conduct by the PSS"])

[123] (Patrick Beath 1/10/20 Submission, Exhibit A, p. 73)

[124] Beath Exhibit A, § 12-43[A][3][e] ("the Board shall have the power . . . to *recommend* to the Chief charges and discipline for an RPD sworn member(s)") (emphasis added).

[125] Beath Exhibit A, § 12-43[A][5][h][ii] ["In the event the Chief does not accept the Board's recommendations, this notice shall set forth the rationale for rejecting the recommendation"].

[126] Beath Exhibit A, *Id.*, pp. 73-74;§12-43[A][4][h] ["Appointments to the Board shall be made by the Mayor, subject to Council confirmation"]; §12-43[A][4][k] ["The Mayor may remove any board member"].

[127] *See* Beath 1/10/20 Submission, p. 2.

provisions while leaving the remainder intact would result in a law the Legislature would not have intended, the entire statute must be stricken.[128]

As did the death penalty statute in *Hynes,* Local Law No. 2 Section 18-14 contains a severability clause, to wit: "The invalidity of any provision or provisions of this chapter shall not affect the validity of the remaining provisions thereof, but such remaining provisions shall continue in full force and effect."

The respondent City Council has asked this court to sever the invalid portions of the statute, saving as much of the legislative framework as possible. Contrariwise, despite the fact that the Mayor: (a) approved the law with its severability clause included; (b) moved to dismiss this petition; and then (c) recently conceded the core merits of the petition, the respondent Mayor has asked this court not to sever.[129]

V. Conclusion: City Council Action

This case presented four questions:

First question: Does City Council's 1985 law submitting police discipline to New York State law, preclude the implementation of police discipline by the Police Accountability Board?

Answer: Since the Rochester City Council's explicit submission of police officer discipline to New York State law in 1985, certain portions of Local Law No. 2 conflict with New York State law and the Rochester City Charter:

Second question: Can the City of Rochester enact a local law which transfers from the Chief of Police the discipline of police officers employed by the Rochester Police Department to an appointed, autonomous civilian Police Accountability Board, which is not[130] *the officer or body having the power to remove* the person charged . . . or by a deputy or other employee

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[128] *Hynes v. Tomei,* 92 N.Y.2d 613, 627 (NY 1998) (citations omitted).
[129] "[W]e believe that . . . Local Law No. 2 . . . must stand or fall as a whole" (Beath February 5, 2020 Letter, p. 1).
[130] *Lynch v. Giuliani,* 301 A.D. 2d 351, 355-56 (1st Dept. 2001) (Unconsolidated Law § 891 bars hearings "that may result in *recommendations* for termination against police officers" from being "conducted by a non-employee of the Police Department") (emphasis added).

of such officer or body designated. . . for that purpose?[131] In other words, can only an officer's commander or designee conduct a disciplinary hearing?[132]

Answer: Under New York State law, disciplinary hearings or the imposition of discipline of Rochester Police Department officers are to be conducted by the Mayor and/or her appointee, the Police Chief, or one of their designees. Since the Police Accountability Board is neither a designee of either the Mayor or the Police Chief, nor a police commander, the Police Accountability Board cannot lawfully conduct disciplinary hearings or impose the discipline of RPD officers.

Third question: Does Local Law No. 2's transfer of police discipline to the Police Accountability Board, and resulting divestiture of the Mayor's power over police discipline, violate Civil Service Law Section 200 *et seq.* (known as the "Taylor Law")[133] and New York State Constitution Art. I Section 17 which obligate the Mayor to collectively bargain with a recognized bargaining unit?

Answer: In particular concerning discipline, Local Law No. 2 unlawfully inhibits the Mayor from engaging in collective bargaining with the Locust Club regarding the terms and conditions of RPD officer employment.

Fourth question: What is the import of Local Law No. 2's severability clause?

Answer: Although those unlawful sections of Local Law No. 2 relating to the discipline of RPD officers which conflict with New York State law are hereby severed and stricken, the remaining lawful parts of Local Law No. 2 pertaining to the Police Accountability Board

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[131] Unconsolidated Law § 891; CSL § 75[2].

[132] *Matter of Fraccola v. City of Utica*, 135 A.D. 2d 112 (4th Dept. 1987), *app. den.* 72 N.Y. 2d 807 (NY 1988), *cert. den.* 489 U.S. 1053 (US 1989) (noting that Unconsolidated Law § 891 and CSL § 75 require police removal hearings to be conducted by the employing agency, which was the Department of Public Safety).

"the Taylor Law prevails where no legislation specifically commits police discipline to the discretion of local officials. However, where such legislation is in force, the policy favoring control over the police prevails, and collective bargaining over disciplinary matters is prohibited.

continue in full force and effect. Since Local Law No. 2's conflict with the Rochester City Charter does not render either law wholly invalid, it is for the City Council[134] to amend and/or repeal contradictory provisions in the Charter. Accordingly, Local Law No. 2 is referred back to the Rochester City Council to be reconciled and made compliant with New York State law and the Rochester City Charter.

Based upon the foregoing, it is the decision of this court that the verified petition is GRANTED in that Local Law No. 2 is unlawful only for the purpose of conducting hearings and disciplining officers of the City of Rochester Police Department and any relief requested by respondents to the contrary is DENIED.

Any requested relief not specifically addressed in this decision is denied.

The court appreciates counsels' responsiveness to the court's requests for additional information and briefing and for their patience in the delays caused by the COVID-19 pandemic.

Submit order.

Dated: May 7, 2020
Rochester, New York

John J. Ark, J.S.C.

[134]As set forth above in *Hynes v. Tomei,* as to whether a severed statute must be invalidated, "(t)he answer depends on whether 'the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether.'"