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New York Supreme Court

Appellate Division—Fourth Department

PAUL MOTONDO, as President of The Syracuse Fire Fighters Association, IAFF Local 280,

Plaintiff-Respondent,

– against –

CITY OF SYRACUSE,

Defendant-Appellant.

Docket No.: CA 20-00739

REPLY BRIEF FOR DEFENDANT-APPELLANT

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PRELIMINARY STATEMENT

Defendant-Appellant, City of Syracuse (the "City") submits this reply brief in further support of its appeal from the Order of the New York State Supreme Court, Onondaga County (Honorable Deborah H. Karalunas, J.S.C.), dated May 13, 2020, and entered on May 15, 2020 (the "Order"), which granted the motion for summary judgment by Plaintiff-Respondent Paul Motondo, As President of the Syracuse Fire Fighters Association, IAFF Local 280 (the "Union"), issued a declaration regarding the rights of the parties, and denied the City's cross-motion for summary judgment.

ARGUMENT

POINT I

THE SCCL PROVISIONS REGARDING POLICE AND FIRE DISCIPLINE HAVE NOT BEEN SUPERSEDED

A. The power to promulgate disciplinary rules for the fire department has remained with the Chief of Fire since 1935

When the City adopted its 1935 Charter, it eliminated the Department of Public Safety and created separate Departments of Police, Fire and Public Health. In so doing, the City eliminated the "commissioner of public safety" position that was prescribed by the New York Second Class Cities Law ("SCCL"), and transferred the powers of that office to, among others, the Chief of Fire. (R. 300 – 301). According to the 1935 Charter, the Chief of Fire (like the commissioner of

public safety before) possessed the power to promulgate rules relating to the discipline of the members of the fire department. (R. 301).

When the City adopted the 1960 Charter, it did not modify the authority of the Chief of Fire to promulgate disciplinary rules, and in fact confirmed this power. In relevant part, the 1960 Charter states: "The chief of fire, with the approval of the mayor, shall make, adopt, promulgate and enforce such reasonable rules, orders and regulations for the . . . discipline . . . of the officers and members of the department of fire[.] . . . Disciplinary proceedings against any member of the department shall be conducted in accordance with the rules and regulations of the department and the provisions of law applicable thereto, including the Civil Service Law." (R. 377).

The Union argues that the 1960 Charter's reference to the Civil Service Law, together with minutes from the Common Council, indicate that the City intended to supersede the SCCL's provisions regarding police and fire discipline.

However, the Union ignores the fact that the ultimate power to promulgate disciplinary rules remained with the Chief of Fire. Indeed, the crucial, common thread that runs through the various iterations of the City's charters as they relate to fire discipline is that the Chief of Fire retains the authority to promulgate disciplinary rules. This has not changed since 1935 when the City split the Department of Public Safety into the Department of Police, Department of Fire and

Department of Public Health.[1] The 1960 Charter's reference to the Civil Service Law does not change this fact. Under the 1960 Charter, the Chief of Fire is responsible for promulgating disciplinary rules and the Union cannot argue otherwise. (R. 377). This critical fact was overlooked by both the Union and the lower court, and demonstrates that the City did not intend to supersede the SCCL.

B. The City did not agree to bargain over fire discipline when it enacted the 1960 Charter

Ultimately, the question in this case, like the question in Matter of Patrolmen's Benevolent Ass'n, Town of Wallkill, and City of Schenectady, is whether the City is able to bargain over fire discipline. See Matter of Patrolmen's Benevolent Assn. of City of N.Y., Inc. v. N.Y. State Pub. Empl. Relations Bd., 6 N.Y.3d 563 (N.Y. 2006); Matter of Town of Wallkill v. Civil Serv. Empls. Assn., Inc., 19 N.Y.3d 1066 (N.Y. 2012); Matter of the City of Schenectady v. N.Y. State Pub. Empl. Relations Bd., 30 N.Y.3d 109 (N.Y. 2017). Following the City of Schenectady case, it is now clear that the SCCL prohibits bargaining over police and fire discipline in cities of the second class, like the City in this case.

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[1] It is important to note that neither the Union, nor the Court below, claims that the City's 1935 Charter, which eliminated the Department of Public Safety and created separate Departments of Police, Fire, and Public Health, superseded the SCCL. The Union's (and lower court's) focus is solely on the changes to the Charter in 1960. This reasoning is inconsistent and contradictory. If any change to the terms of the 1960 Charter's provisions regarding police or fire discipline superseded the SCCL, then the SCCL should have been superseded in 1935. However, this argument is not made by either the Union or the lower court, because it is clear from the City of Schenectady case that this rationale fails.

The Union argues that the City superseded the SCCL's provisions regarding fire discipline when it enacted the 1960 Charter, thereby implicitly agreeing to bargain over fire discipline into the future. However, the 1960 Charter does not reference bargaining over fire discipline nor does it acknowledge any agreement by the City to bargain over fire discipline. In fact, the Taylor Law, which creates an obligation for public entities to bargain over certain subjects, and on which the Union relies for its authority to bargain, was not enacted until 1967. The City's reference to the Civil Service Law in the 1960 Charter did not, and could not, contemplate any obligation to bargain, because the Taylor Law was not yet in effect. As a result, it is clear that the City did not agree to bargain over fire discipline when it enacted the 1960 Charter. The lower court's conclusion that the City somehow agreed to abide by a law that had not yet been enacted is erroneous and should be overturned.

C. The Court of Appeals' analysis in City of Schenectady is directly applicable and cannot be distinguished.

The Court of Appeals' analysis of a nearly identical set of facts in City of Schenectady is applicable and controlling in this case. 30 N.Y.3d 109 (N.Y. 2017). Notwithstanding the Union's attempts to distinguish City of Schenectady, the Union cannot dispute that in that case, the Court of Appeals considered whether changes to the City of Schenectady charter impacted whether the SCCL governed

police discipline in that city. Id. at 115, n.1. Those changes included the elimination of the "commissioner of public safety" position, and other transfers of disciplinary authority to various officials within government. The City of Schenectady, like the City in this case, altered the provisions of its laws related to police discipline.

The Court of Appeals considered these changes and held that they did not impact whether the SCCL controlled police discipline in the City of Schenectady. The Court explicitly stated, "Subsequent changes to Schenectady's form of government have eliminated the office of the commissioner and transferred that office's powers and responsibilities to others, which is irrelevant for the purpose of our decision in this case." Id.

In its brief, the Union attempts to distinguish the City of Schenectady decision by arguing: (1) the City of Schenectady's charter does not materially deviate from the SCCL's disciplinary procedures, and (2) the City of Schenectady's changes to its charter were merely "administrative" and therefore not analogous to the changes to the City's charter in this case. The Union's attempts to distinguish City of Schenectady fail.

First, the City of Schenectady's charter does materially deviate from the SCCL. In fact, the City of Schenectady abolished the commissioner of public safety altogether in 1936 and then transferred that position's powers between several different offices before re-establishing it in 2002. (R. 1032 – 1035).

In addition, even as written today, the City of Schenectady's charter does not explicitly follow the SCCL. The current charter states, "The Public Safety Commissioner shall have the authority to discipline the officers and members of the Schenectady Police and Fire Departments." (R. 1064 – 1067). However, the SCCL provides a much different recitation of the public safety commissioner's authority, including his/her power to promulgate rules for discipline. See N.Y. SECOND CLASS CITIES LAW §§ 133 – 137. The SCCL also provides a specific and detailed recitation of the disciplinary procedures to be followed by the commissioner of public safety. Id. Those procedures are also not included in the City of Schenectady's Charter. The Union's argument that the City of Schenectady's charter does not materially deviate from the SCCL is simply wrong.

Second, as discussed in detail in the City's original Brief, the SCCL contains specific and detailed disciplinary procedures for police and fire departments, and vests control over the disciplinary procedures in a local official – the commissioner of public safety. The exact language of the SCCL as it related to discipline was initially incorporated in both the City of Syracuse and City of Schenectady charters.

The Union cannot dispute that in 1934, the City of Schenectady adopted a new form of government pursuant to the Optional City Government Law ("OCGL"). (R. 1032). In conjunction with this change in the form of its

government, on January 4, 1936, the City of Schenectady adopted an ordinance that expressly abolished the office of the commissioner of public safety and transferred the powers and duties of that office to a "City Manager." Id. The City of Schenectady then made additional changes to its charter pursuant to the City Home Rule Law and Municipal Home Rule Law, which abolished departments and positions created by the SCCL relating to police and fire discipline. (R. 1028 – 1047; 1051 – 1055; 1057 – 1062).

The Union argues in its Brief that these changes were simply "administrative" and distinguishable from the changes to the City's charter in this case. However, the Union ignores several key facts. First, the OCGL, like the City Home Rule Law and Municipal Home Rule Law, stated that "inconsistent" laws would be superseded. (R. 1163). Specifically, section 8 of the OCGL stated, "*Except insofar as any of its provisions shall be inconsistent with this act*, the charter of the city, and all special or general laws applicable thereto, shall continue in full force and effect, until and unless superseded by the passing of ordinances regulating the matters therein provided for; *but to the extent that any provision thereof shall be inconsistent with this act, the same are hereby superseded*." Id. (emphasis added). Accordingly, the OCGL contained the same type of "inconsistent" language as the City Home Rule Law and Municipal Home Rule Law, which the Union relies on in its Brief.

Second, amendments to the City of Schenectady charter, including the amendment in 1978 that eliminated the position of City Manager in favor of a mayor, stated, "[a]ll provisions of L. 1914, Ch. 444 [the Optional City Government Law] or any other law, charter provision, local law or ordinance *not inconsistent herewith* shall continue to be in full force and effect. (R. 1034) (emphasis added). The City of Schenectady charter therefore also stated that any law that was inconsistent with the charter was superseded.

The basic core of the Union's argument is that the SCCL is "inconsistent" with the City's 1960 Charter and that this equates to the SCCL being "superseded." However, under the Union's definition of "inconsistent," the Court of Appeals should have held that the City of Schenectady charter, which eliminated the position of commissioner of public safety altogether, deleted any reference to the SCCL provisions relating to discipline, and transferred the authority of the commissioner of public safety to others within the government, was also "inconsistent" with the SCCL and, therefore, superseded its provisions relating to discipline. But that is not what the Court of Appeals did.

Just as in the City of Schenectady, here, the powers granted to the commissioner of public safety in the SCCL have been transferred to the Chief of Police and Chief of Fire by the City's 1935 and 1960 charters. This Court should

therefore follow City of Schenectady and hold that the SCCL provisions relating to discipline apply to the Union and its bargaining members.

POINT II

THE SCCL PROVISIONS REGARDING DISCIPLINE APPLY TO THE CITY'S POLICE *AND* FIRE DEPARTMENTS

The Union argues that the provisions of the SCCL relating to discipline should not be applied to fire departments. As an initial matter, this argument must be rejected based upon the plain language of the statute. Indeed, the Union cannot escape the fact that the disciplinary provisions contained in the SCCL are specifically applicable to both fire and police. See N.Y. SECOND CLASS CITIES LAW § 133 (the commissioner of public safety "is authorized and empowered to make, adopt, promulgate and enforce reasonable rules, orders and regulations for the . . . discipline . . . of the officers and members of the *police and fire* departments, and for the hearing, examination, investigation, trial and determination of charges made or prepared against any officer of member of said departments . . .") (emphasis added).

However, even if the Court ignores the plain language of the statute, the Union's claim still fails. The Union makes two arguments: (1) the fire department is not a "quasi-military" organization, and is therefore distinguishable from the police department, and (2) neither the Court of Appeals nor any Appellate

Division has invalidated contractually agreed-to discipline procedures as it relates to firefighters. Both of the Union's arguments were refuted by the First Department's holding in Matter of Roberts v. New York City Off. of Collective Bargaining, 113 A.D.3d 97 (1st Dep't 2013). In that case, the court considered whether a New York City Charter provision that gave the fire commissioner the power to "perform all duties for the government, discipline, management, maintenance and direction of the fire department" superseded the Taylor Law's obligation to collectively bargain the terms and conditions of employment, including department discipline. Matter of Roberts, 113 A.D.3d at 103.

The Court held that the New York City charter did negate the Taylor law as it related to fire department discipline. In reaching its decision the court reasoned, "the same policy concerns that guided the Court of Appeals' decisions in Matter of Patrolmen's Benevolent Assn., and Matter of City of New York apply with equal force here. FDNY [the Fire Department of the City of New York], like the police department, is a quasi-military organization, demanding strict discipline of its workforce." Id. (citations omitted).

Other courts have also held that fire departments, like police departments, are "quasi-military" organizations. Gallagher v. City of New York, 307 A.D.2d 76, 82 (1st Dep't 2003) ("Both Fire Department EMS personnel and firefighting units operate as a quasi-military organization and are trained

accordingly."); Austin v. Howard, 39 A.D.2d 76, 79 (4th Dep't 1972), *rev'd on other grounds*, 33 N.Y.2d 733 (1973) (acknowledging that the Buffalo Fire Department was a "large quasi-military organization").

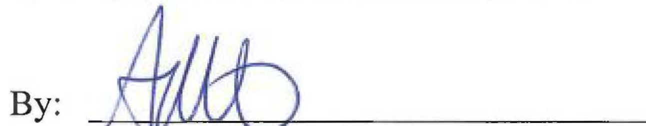
Accordingly, the Union's argument that the SCCL disciplinary provisions could apply to police departments but not fire departments fails.

CONCLUSION

For the reasons set forth herein, together with the reasons articulated in the City's original Brief, this Court should reverse the lower court and issue an Order declaring that (a) the City is no longer permitted to collectively bargain issues of discipline with the Union, (b) the provisions of the current CBA between the City and the Union relating to discipline are no longer valid; and (c) pursuant to the Court of Appeals decision in City of Schenectady, the disciplinary procedures set forth in the SCCL apply to the Fire Department.

Dated: April 12, 2021

BOND, SCHOENECK & KING, PLLC

By: 

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