To be argued by Nathaniel G. Lambright, Esq.
15 minutes of argument is requested

NEW YORK SUPREME COURT
APPELLATE DIVISION – FOURTH DEPARTMENT

Docket No.
CA 20-00739

In the Matter of the Application of the

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

Plaintiff-Respondent,

– against –

CITY OF SYRACUSE,

Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

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PRELIMINARY STATEMENT

This memorandum of law is submitted by Plaintiff-Respondent Paul Motondo, as President of the Syracuse Fire Fighters Association, Local 280 ("Union") in response to Defendant-Appellant City of Syracuse's ("Syracuse" or "City") appeal of the May 13, 2020 Order of the Supreme Court, County of Onondaga (Hon. Deborah Karalunas, J.).

Supreme Court correctly decided that the discipline procedures set forth in the New York State Second Class Cities Law ("SCCL") were superseded by the City when it enacted its 1960 City Charter (the "1960 Charter"). *Motondo v. City of Syracuse*, 68 Misc.3d 398 (Sup. Ct., Onondaga Cty. 2020). Supreme Court correctly distinguished the Court of Appeals decision in *Matter of City of Schenectady v. N.Y. State Pub. Empl. Relations Bd.*, 30 N.Y.3d 109 (2017) and held that the 1960 Charter evidenced an intent to supersede the SCCL's discipline provisions, and that the City must comply with the Civil Service Law and the lawfully negotiated collective bargaining agreement's discipline procedures.

For these reasons, Supreme Court's Order should be affirmed.

COUNTERSTATEMENT OF QUESTION INVOLVED

Question: Is firefighter discipline in Syracuse governed by the SCCL rather than the procedures negotiated pursuant to the Civil Service Law?

Answer: Supreme Court correctly held that discipline must be administered consistent with the Municipal Home Rule Law, the 1960 Charter and the current collective bargaining agreement between the City and the Union.

COUNTERSTATEMENT OF THE NATURE OF THE FACTS

A. Procedural Background

In this declaratory judgment action, the Union filed its amended verified complaint on September 17, 2019, seeking a declaration that "the Second Class Cities Law does not apply to discipline involving bargaining unit members that make up the Union and instead discipline must be administered pursuant to the [2018-2020] Collective Bargaining Agreement agreed to by the City and the Union." *Motondo*, 68 Misc. 3d at 399. The City's verified answer contained a counterclaim seeking a declaration that "(a) [the City is] no longer permitted to collectively bargain issues of discipline with the Union; (b) the provisions of the current Collective Bargaining Agreement between the City and the Union relating to discipline are no longer valid; and (c) . . . the disciplinary procedures set forth in the Second Class Cities Law applies to the Fire Department." *Id*.

By decision dated May 11, 2020, Supreme Court (Hon. Deborah Karalunas, Justice) granted summary judgment to the Union, finding that:

> the Second Class Cities Law does not apply to discipline involving firefighters in the City of Syracuse and instead discipline must be administered consistent with the Municipal Home Rule Law, the 1960 City Charter and the [2018-2020] Collective Bargaining Agreement agreed to by the City and the Union, including the right to arbitration.

68 Misc. 3d at 411.

B. Legal Framework

In 1906, the New York State Legislature enacted the SCCL. Second Class Cities Law §§ 1-253, L. 1906 ch. 473, as amended; R. at 474. This provided a standard uniform city charter for all cities of the "Second Class" which was defined as a city with a population of 50,000. *Id.* Syracuse is a "Second Class" city under the SCCL's criteria. *See House v. Bodour*, 256 A.D. 1037 (4th Dep't 1939), *affd,* 281 N.Y. 749 (1939); R. at 474. Section 131 of the SCCL gives the commissioner of public safety control over the discipline of the fire department. R. at 474. Section 133 authorizes the commissioner to "make, adopt, promulgate and enforce reasonable rules, orders and regulations for the . . . discipline . . . of [members of the fire department]. . . , and for the hearing, examination, investigation, trial and determination of charges made or prepared against any [member of the fire department]. . . and may, in his discretion, punish any such officer or member found guilty thereof." R. at 474. In 1915, the City adopted a charter that was consistent with the SCCL and which included the SCCL's discipline procedures set forth in Sections 131 and 133. R. at 157-244.

In 1924, the New York State Legislature enacted the City Home Rule Law. L. 1924 ch. 363; R. at 475. Unlike the SCCL that provided a standard uniform charter for "Second Class" cities, the City Home Rule Law authorized New York State's cities to adopt their own charters subject to their own needs and wants. R.

at 474. The legislation allowed cities to establish their own governing structures, rather than being mandated a charter as the SCCL had done. R. at 475.

In 1925, the Legislature amended Section 4 of the SCCL to provide a supersession clause. R. at 475. This clause provided: "A provision of this chapter shall apply, according to its term, only to a city of the state which on the thirty-first day of December, nineteen hundred and twenty-three was a city of the second class, until such provision is superseded *pursuant to the city home rule law* or was otherwise changed, repealed or superseded pursuant to law." L. 1925 ch. 392 (emphasis added); R. at 475.

In 1935, the City took advantage of the 1924 City Home Rule Law to adopt a new charter (the "1935 Charter"). R. at 246-324, 475-476. The 1935 Charter provided, *inter alia*, that, "subject to the provisions of the City Home Rule Law, any provisions of law, local law or ordinance including all laws, local laws or ordinances creating, providing for or continuing any office, officers, department, board, body, commission or other city agency, inconsistent with this Charter are hereby repealed." R. at 246-324, 476. Sections 221, 226, and 227 of the 1935 Charter set forth new discipline procedures for firefighters. R. at 246-324, 476.

In 1958, the Legislature enacted Civil Service Law Sections 75 and 76, providing due process and other procedural rights to certain civil service employees in disciplinary matters. R. at 476-477. Preexisting laws that expressly

provided for control of fire discipline were "grandfathered" under Civil Service Law Section 76(4). Section 76(4) provides that nothing in Sections 75 and 76 "shall be construed to repeal or modify any general, special or local laws or charters." Civil Service Law § 76(4); L. 1958 ch. 790, as amended; R. at 476-477.

Pursuant to the City Home Rule Law, the City replaced the 1935 Charter with the 1960 Charter, which remains in effect. R. at 326-453, 477. Section 5-908, "Chief of Fire," details that discipline proceedings must be conducted in accordance with Civil Service Law. R. at 377, 478. Section 5-908 provides:

> The chief of fire shall appoint a first deputy and such other deputies and subordinates as may be prescribed by the board of estimate, except as otherwise prescribed by law. In the case of absence or disability of the chief or a vacancy in the office, the first deputy chief shall discharge the duties of the office until the chief returns, his disability ceases or the vacancy is filled. The chief of fire, with the approval of the mayor, shall make, adopt, promulgate and enforce such reasonable rules, orders and regulations for the government, discipline, administration and disposition of the officers and members of the department of fire as may be necessary to carry out the functions of the department. 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* (emphasis added).

R. at 377, 478.

It was the City's intent to replace all pre-existing laws dealing with discipline with the procedures set forth in the Civil Service Law. R. at 1096. The

Common Council minutes describing the 1960 Charter unambiguously indicate: "The charter eliminates special disciplinary provisions for all Departments of Police and Fire. All employees will be disciplined in accordance with the procedures prescribed by the State Civil Service Law. The city will thereby operate under a uniform disciplinary policy for all departments." R. at 1096. Thus, in adopting the Civil Service Law through the 1960 Charter for firefighter discipline, the City successfully granted bargaining unit members Civil Service Law Section 75 and 76 rights.

In 1965, the Legislature again amended Section 4 of the Second Class Cities Law after the Municipal Home Rule Law replaced the City Home Rule Law. L. 1965 ch. 755; R. at 479. The amended Section 4 provided:

> A provision of this chapter shall apply, according to its term, only to a city of the state which on the thirty-first day of December, nineteen hundred and twenty-three was a city of the second class, until such provision is superseded pursuant to the municipal home rule law, was superseded pursuant to the former city home rule law is or was otherwise changed, repealed or superseded pursuant to law.

Id.; R. at 479.

In 1967, the New York State Legislature added Article 14 to the Civil Service Law (the "Taylor Law"). R. at 479. The Taylor Law provides that "[w]here 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 the public employees." Civil Service Law § 204 (2); R. at 479.

C. Statement of Facts

The Syracuse Fire Department provides firefighting, fire prevention and emergency medical services to Syracuse. R. at 468-469. For decades, the City has recognized the Union, and the parties have negotiated and entered into successive collective bargaining agreements. R. at 39-145, 455-467, 469-472, 480-481, 509-905. When the parties have not reached an agreement, wages and other terms and conditions have been specified in compulsory interest arbitration awards issued pursuant to the dispute resolution procedures of the Taylor Law. R. at 39-145, 455-467, 480-481, 509-905.

For the past 50 years, the parties have followed their negotiated discipline procedures allowing for discipline disputes to be resolved through the grievance and arbitration process.[1] R. at 39-145, 455-467, 480-481, 509-905. Since the 1970s, the parties have agreed to utilize a neutral arbitrator to resolve discipline

[1] Except where otherwise provided by law, disciplinary procedures for public employees are mandatorily negotiable under the Taylor Law. *Auburn Police Local 195, Council 82, AFSCME v. Helsby*, 46 N.Y.2d 1034 (1979) (bargaining proposal seeking to negotiate a different procedure from that specified in Civil Service Law Section 75 was mandatorily negotiable); *see also Patrolmen's Benevolent Ass'n of City of New York, Inc. v. New York State Pub. Empl. Relations Bd.*, 6 N.Y.3d 563, 573 (2006) (where Civil Service Law Sections 75 and 76 apply, as in *Auburn*, discipline may be the subject of collective bargaining).

grievances. R. at 39-145, 455-467, 481, 509-905. An arbitrator's award is final and binding and may not be reversed by the City unilaterally. R. at 39-145, 455-467, 509-905. Rather, the decision may only be challenged pursuant to Article 75 of the CPLR. R. at 39-145, 455-467, 509-905. At various times, the parties have modified their agreed-upon contractual procedures governing discipline. R. at 39-145, 455-467, 481, 509-905. During the last round of collective negotiations for the current Collective Bargaining Agreement ("CBA"), the parties modified the discipline procedure language. R. at 39-145, 481. Article 20 of the CBA, "Disciplinary Disputes," currently secures for the Union the right to resolve disciplinary disputes involving its members either through Section 75 of the Civil Service Law or through arbitration before a mutually selected neutral arbitrator. 39-145, 481.

ARGUMENT

POINT I

THE CITY IS NOT PROHIBITED BY THE SCCL FROM FOLLOWING THE NEGOTIATED DISCIPLINE PROCEDURES

A. *City of Schenectady* is not dispositive on the SCCL's control over Syracuse's discipline procedures.

Relying on *City of Schenectady,* 30 N.Y.3d at 109, the City avers in its appeal that fire discipline disputes must be resolved through the procedures set forth in the SCCL and not the negotiated procedures contained in the parties' CBA. Brief for Defendant-Appellant ("City's Brief"), pp. 15-18. As Justice Karalunas properly found, however, *City of Schenectady*, is distinguishable from the facts of this case.

In *City of Schenectady*, the Court of Appeals relied on its previous holdings *Matter of Patrolmen's Benevolent Ass'n*., 6 N.Y.3d 563 (2006) and *Matter of Wallkill,* 19 N.Y.3d 1066 (2012), for the proposition that discipline is a prohibited subject of negotiations when a law that existed prior to the enactment of Civil Service Law Section 75 gives a body of government the power to make rules and regulations to discipline police officers. *Id.*, at 115. The Court stated that the SCCL, which was enacted prior to both the Taylor Law and Civil Service Law Section 75, "specifically commits police discipline to the commissioner and details the relevant procedures [for discipline]...." *Id*. The Court rejected PERB's

argument that Section 4 of the SCCL demonstrated the Legislature's "statutorily planned obsolescence" of that law and held that it had not been implicitly repealed or superseded by the Taylor Law. *Id.* at 4. The Court explained:

> Article 9 of the Second Class Cities Law governs disciplinary procedures for police officers in cities of the second class, whereas the Taylor Law generally requires public employers to negotiate but does not specifically require police disciplinary procedures to be a mandatory subject of collective bargaining. There is no express statutory conflict between the two laws; the only conflict is in the policies that they represent, and this Court has already resolved that policy conflict in favor of local control over police discipline.

Id. at 117. Thus, because the SCCL was enacted prior to Section 75 of the Civil Service Law and Schenectady's Charter had not been superseded by the Taylor Law, the Court found the SCCL's discipline procedures were "grandfathered" and the parties' contract procedures did not apply.

City of Schenectady does not, however, address whether a "Second Class" city may supersede the SCCL's disciplinary procedures by adopting alternative discipline procedures that are authorized pursuant to the former City Home Rule Law or Municipal Home Rule Law. Indeed, such an argument could not have even been made in that case because the City of Schenectady's Charter, unlike the 1960 Charter at issue here, does not materially deviate from the SCCL's discipline procedures and does not purport to be passed pursuant to, or state clearly that it

completely supersedes, the City Home Rule Law or the Municipal Home Rule Law. R. 906-1000.[2]

B. The SCCL authorized the City of Syracuse to supersede its provisions through the City Home Rule Law and the Municipal Home Rule Law.

Section 4 of the SCCL allows for it to be superseded by the Municipal Home Rule Law and the former City Home Rule Law. First, in 1925, the Legislature amended Section 4 of the SCCL to provide a supersession clause that specifically authorized the law to be superseded pursuant to the City Home Rule Law. 1924 ch. 363; L. 1925 ch. 392. This amendment was intended to authorize the "Second Class" cities to amend their charters "pursuant to" the then-extant City Home Rule Law. Notably, Section 36 of the City Home Rule Law provided that, "[a]ll existing charters and other laws relating to the property, affairs and government of cities, and other laws relating to the property, affairs and government of cities, and other laws which are subject to amendment or change . . . shall continue in force until repealed, amended, modified or superseded, in accordance with the provisions of this chapter and of the constitution." Former City Home Rule Law § 36.

Similarly, the 1965 amendment to Section 4 of the Second Class Cities Law provided: "A provision of this chapter shall apply, according to its term, only to a

[2] Various provisions of Schenectady's charter specifically state that they are superseding or amending the original provisions of the SCCL. R. at 906-1000. The entire statutory Charter, however, was not superseded. R. at 906-1000.

city of the state which on the thirty-first day of December, nineteen hundred and twenty-three was a city of the second class, until such provision is superseded pursuant to the municipal home rule law, was superseded pursuant to the former city home rule law or is or was otherwise changed, repealed or superseded pursuant to law." L. 1965 ch. 755. The Legislature's usage of the phrase "was superseded pursuant to the former city home rule law" clearly demonstrated its continued understanding that, prior to 1965, Second Class cities had the right to supersede the SCCL's standard charter through local charters passed pursuant to the former City Home Rule Law.[3] As the Court properly below found: "From this language, there can be no dispute 'that the Legislature did not intend to put any of its provisions beyond supersession by city home rule.'" *Motondo*, 68 Misc. 3d at 409.

Thus, unlike *City of Schenectady* where the Court reasoned that the Taylor Law did not explicitly or implicitly supersede the SCCL, Section 4 of the Second Class Cities law unambiguously authorized municipalities to amend their charters pursuant to both the Municipal Home Rule Law and the former City Home Rule Law to supersede the SCCL's discipline procedures.[4]

[3] Section 56 of the Municipal Home Rule Law provided that, "[a]ll existing provision of laws, charters, and local laws not specifically repealed by this chapter shall continue in force until lawfully repealed, amended, modified or superseded." Municipal Home Rule Law § 56.

[4] The Court in *City of Schenectady* acknowledged that the SCCL could be changed or repealed pursuant to law but that the Taylor Law did not do so explicitly or implicitly. 30 N.Y.3d at 116.

Finally, the case law interpreting Section 4 supports that a Second Class city is authorized pursuant to both the former City Home Rule Law and the Municipal Home Rule Law to supersede individual provisions of the Second Class Cities Law. *Carlino v. City of Albany*, 118 A.D.2d 928 (3d Dep't 1986) (finding the local law was constitutional and superseded Section 244 of the Second Class Cities Law); *Fullerton v. City of Schenectady*, 258 A.D. 545 (3d Dep't 1955), *aff'd,* 309 N.Y. 701 (1955) (same); *see also Attorney General Opinion* 83-84 (1983).

C. <u>The 1960 Charter superseded the SCCL discipline provisions</u>.

As explained below, the 1960 Charter supersedes the SCCL. Hence, Supreme Court's Order must be affirmed.

In 1960, the City passed the 1960 Charter pursuant to the City Home Rule Law.[5] R. 326-454. The 1960 Charter unequivocally supersedes the City's prior charters, including the 1915 Charter which had incorporated the SCCL. R. 326-454. The 1960 Charter initially states that it is a "local law of the city of Syracuse providing a new charter for the city of Syracuse, and ***generally superseding*** acts and local laws inconsistent therewith" (emphasis added). R. at 326. Section 1-102 of the 1960 Charter goes on to state that: "Subject to the provisions of the City Home Rule Law, ***any provisions of law***, local law or ordinance including all laws,

[5] The revision of the 1960 Charter was by local law adopted by its legislative body pursuant to the provisions of the City Home Rule Law. City Home Rule Law, 10[1][ii][c][1].

local laws or ordinances creating, providing for or continuing any office, officer, department, board, body, commission or other city agency, ***inconsistent with this charter are hereby repealed***." R. 327-328. Finally, Section 9-106 provides: "All laws and parts of laws in force when this charter shall take effect are hereby ***superseded*** so far as they affect the city of Syracuse, to the extent that the same are inconsistent with the provisions of this charter, and no further" (emphasis added). R. at 436.

The City nonetheless argues that the discipline procedures found in SCCL, Section 133, were not superseded by Section 5-908 which contains the discipline procedures in the 1960 Charter, contending that because Section 5-908 does not specifically state that it supersedes Section 133, the SCCL's procedures remain effective. City's Brief, pp. 25-28. The City's argument ignores the essential point that the 1960 Charter repeatedly states that the *entire* charter supersedes previous inconsistent laws. And, given the 1960 Charter's discipline language incorporating the Civil Service Law and the Common Council meeting minutes specifically stating that this was the City's intent, there can be no reasonable doubt as to the SCCL's discipline procedures being superseded. *Motondo*, 68 Misc. 3d at 409-410; *see also Miller v. City of Albany*, 278 A.D.2d 647, 648 (3d Dep't 2000) (although local law failed to explicitly state which statute was being superseded, there could be "no reasonable doubt as to what statute was intended to be

superseded"); *Taylor Tree, Inc. v. Town of Montgomery*, 251 A.D.2d 673 (2d Dep't 1998) (absence of specific reference to superseded default provision was not fatal because "a reading of the moratorium indicates that it satisfies the 'reasonable certainty' test").

Further, even if the Court finds that the 1960 Charter's discipline procedures found in Section 5-908 did not explicitly reference the discipline procedures found in the SCCL, Section 22 of the Municipal Home Rule Law provides that this does not affect the validity of Section 5-908. N.Y. Mun. Home Rule L. § 22. Municipal Home Rule Law Section 22 (1) expressly provides that a failure to specify that a former law has been superseded shall not affect the validity of a Local Law.[6] "The purpose of section 22 is to compel definiteness and explicitness, to avoid confusion that would result if one could not disclose whether the local legislature intended to supersede an entire State statute, or only part of one—and, if only a part, which part[.]" *Turnpike Woods, Inc. v. Town of Stony Point*, 70 N.Y.2d 735, 738 (1987) (citing *Bareham v. City of Rochester,* 246 N.Y.2d 140, 150 (1927)).

As demonstrated above, the 1960 Charter's repeated generalized supersession provisions and its particularized adoption of the Civil Service Law,

[6] Municipal Home Rule Law § 22 changed the supersession clause in the City Home Rule Law § 12.1 by adding the language that "the failure to specify shall not affect the validity of such local law."

which includes the obvious inconsistent Sections 75 and 76, established beyond reasonable doubt the intent to replace Section 133 of the SCCL. Hence, Section 5-908 continues to be part of the City's discipline procedures, including its incorporation of the Civil Service Law. Thus, the City is not entitled to a wholesale reversion to the SCCL's discipline procedures and it may not refuse to follow the CBA's discipline procedures because the City adopted the Civil Service Law's discipline protections and intended to replace the SCCL.[7] *Miller*, 278 A.D.2d at 648.

The City argues that it always provides explicit specific supersession language whenever it enacts a local law with the intent of superseding a provision of the SCCL. This simply is not the case is it offers just two examples of it utilizing explicit supersession language. L.L. No. 5-1927; L.L. No. 11-1998. City's Brief, p. 27. The first, Local Law 5-1927, was passed under the 1915 Charter, which, unlike the 1960 Charter, did not contain the repeated general expressions of supersession of the SCCL. While the second, Local Law 11-1998,

[7] A conclusion that Section 5-908's Civil Service Law protections are not part of the City's discipline procedures because they did not supersede the SCCL discipline procedures, would also act to nullify much of the 1960 Charter and would invariably lead to an absurd and ungovernable result. This is because much of the governing structure of the City was changed by the 1960 Charter without additional references to the supersession of previous laws and charters. Comparing the SCCL to the 1960 Charter demonstrates that they have different term limits for the council members and the mayor, the number of council members needed to override a veto, the City's fiscal year, appointment of council vacancies, and who sets salaries. Hence, a ruling in favor of the City would bring into legal question a majority of the City's actions for the last 60 years as well as the City's current governing structure.

did state that it was superseding the SCCL, it was in fact amending Section 8-118 of the 1960 Charter, not the SCCL. Since 1960, no other announcement of supersession of the SCCL has been made in any of the amendments to the 1960 Charter. R. 326-454. The obvious reason for this is the 1960 Charter's references to supersession are adequate to supersede the prior charters, including the SCCL.

The City cites four additional cases for the proposition that the SCCL determines the powers and obligations of the City and that it has not generally been superseded by the 1960 Charter. City's Brief, p. 18. *See Tupper v. City of Syracuse*, 93 A.D. 3d 1277 (4th Dep't 2012); *Board of Educ. v. Common Council of Syracuse,* 50 A.D.2d 138 (4th Dep't 1975); *Berman v. Syracuse,* 14 Misc. 2d 893 (Sup. Ct. Onondaga Cty. 1958); *Langan v. Syracuse,* 12 Misc. 2d 392 (Sup. Ct. Onondaga Cty. 1958). The two cases decided since the 1960 Charter became effective did not analyze the SCCL in terms of it being superseded by the 1960 Charter or its substantive applicability to Syracuse's governing structure or discipline procedures. Rather, the cases discussed the 1960 Charter in tandem with the SCCL as the provisions of law at issue were the same and the plaintiffs were seeking to establish violations of both. Section 35 of the SCCL and Section 4-103(2) of the 1960 Charter, cited in both *Tupper* and *Board of Education*, are nearly identical in form and in substance, which rendered the Court's citation to

SCCL all but superfluous. Presumably, the court cited the SCCL simply because the state law violations were alleged by the plaintiffs and not to affirm their continued validity.

The two pre-1960 cases are inapplicable as they, of course, indicate nothing about the 1960 Charter. In any case, the plaintiff in *Langan* alleged the City had violated both the SCCL and the 1935 Charter, although only the 1935 Charter provided for the specific procedure by which the City collected the at-issue unpaid water taxes. Again, this was presumably due to how the complaint was framed, and the reference ought not be construed as an implicit holding as to the primacy of the SCCL. Finally, in *Berman*, the plaintiff alleged violations of both Section 244 of the SCCL and Local Law No. 13 of the Laws of 1954 of the City of Syracuse which, again, were identical in substance. The Local Law cited therein in fact repealed Section 244 of the SCCL. Local Law No. 13–1954.

In sum, the fact that the courts have cited the SCCL should have no precedential import on the issue of whether the SCCL's discipline procedures have been superseded by the 1960 Charter. Indeed, these cases have no bearing on this case because the SCCL's substantive applicability to discipline procedures was not subject to specific judicial scrutiny in any of the cases relied on by the City.

D. The changes made to the 1960 Charter are distinguishable from the changes that were made to Schenectady's Charter.

Basing its argument on *City of Schenectady,* the City argues that the SCCL discipline procedures are fully applicable in Syracuse because governmental changes were made in Schenectady that were similar to changes that were done to Syracuse's government structure under the 1960 Charter. City's Brief, pp. 18-25. As discussed below, the changes to the 1960 Charter are readily distinguishable from those in Schenectady.

In *City of Schenectady,* the Court of Appeal's held that certain organizational changes to Schenectady's Charter alone did not cause this SCCL charter to be superseded.[8] However, while Schenectady's Charter has not mirrored the SCCL's standard charter since 1934, Schenectady's Charter and the SCCL were entirely consistent in the most important respect to this case, to wit, both gave authority to Schenectady to discipline police and firefighters without it being conducted in accordance with the Civil Service Law. Further, unlike the 1960 Charter, the Schenectady Charter did not specifically state that it was superseding all laws pursuant to the Municipal Home Rule Law. Hence, *City of Schenectady* does not control the outcome of this case because it simply does not address whether a "Second Class" city may supersede or modify the SCCL's disciplinary

[8] These administrative changes in the Charter were directed at the office of the commissioner of public safety, the City Manager and the mayor.

procedures through alternative discipline procedures that include Civil Service protections that are passed pursuant to the Municipal Home Rule Law.

E. <u>The City is required by its Charter to follow the Civil Service Law</u>.

The City contends that the 1960 Charter does not require the City to follow Civil Service Law, including the Taylor Law, when it comes to Union member discipline and that its specific reference to the Civil Service Law within the discipline procedures was meant merely to be a "guide." City's Brief, p. 29. As explained below, the 1960 Charter requires that the City follow the Civil Service Law's discipline procedures and it also authorized the parties to negotiate procedures which must be adhered to.

The 1960 Charter unambiguously requires that Civil Service Law be followed. Section 5-908 of the 1960 Charter specifically provides that "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"*** (emphasis added). Plainly, the 1960 Charter's dictates are not just "guidance" that can be ignored whenever convenient for the City. Rather, the City incorporated a detailed and specific set of discipline procedures that the City must follow pursuant to the Civil Service Law. When the 1960 Charter became law, Civil Service Law Sections 75 and 76 were extant after being recently passed by the Legislature and

these sections were explicitly incorporated into the discipline procedures as the wording of the 1960 Charter states and the Common Council's minutes illustrate. Thereafter, the Taylor Law authorized the City and the Union to negotiate much more detailed discipline procedures which now include a neutral arbitrator resolving disputes pursuant to the CBA. *Patrolmen's Benevolent Ass'n of City of New York, Inc.*, 6 N.Y.3d 563; Civil Service Law § 76(4), §§ 200-215.

The City's contention that the negotiated discipline procedures are inapplicable because the 1960 Charter was enacted prior to adoption of the Taylor Law is wholly off the mark. City's Brief, p. 29. In adopting the Civil Service Law through the 1960 Charter for firefighter discipline, the City granted bargaining unit members Civil Service Law Sections 75 and 76 rights and due process protections. Further, Civil Service Law Section 76[9] and the Taylor Law authorized the Union and the City to negotiate different due process discipline procedures. With the Taylor Law's passage in 1967 and the parties thereafter agreeing to discipline

[9] Section 76 provides:

> 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 or employees in the competitive class of the civil service of the state or any civil division. Such sections may be supplemented, modified or replaced by agreements negotiated between the state and an employee organization pursuant to article fourteen of this chapter. …

CSL § 76[4]

procedures in their subsequent collective bargaining agreements starting in the late1960s, these negotiated provisions, rather than Sections 75 and 76, thereafter set forth the discipline procedures for bargaining unit members in Syracuse. Civil Service Law §§ 200-215; *Patrolmen's Benevolent Ass'n of City of New York, Inc.*, 6 N.Y.3d at 573; *Auburn Police Local 195, Council 82, AFSCME*, 46 N.Y.2d at 1035-1036. All of this flows perforce from the 1960 Charter's wholesale adoption of the Civil Service Law, including the already-extant Sections 75 and 76.

Finally, the City's contention that the negotiated discipline procedures are inapplicable because Section 135 of the SCCL mentions the Civil Service Law is not controlling. City's Brief, pp. 29-30. Section 135 provides that:

> *Membership.*—No person shall be appointed to membership in the police, or fire departments of the city, or continue to hold membership therein, who is not a citizen of good moral character, who has ever been convicted of a felony, who cannot understandingly read and write the English language, and who shall not have resided in the city during the two years next preceding his appointment. The commissioner shall make all appointments, promotions and changes of status of the officers and members of the police and fire departments in accordance with the provisions of the civil service law of the state, except as otherwise provided herein. In making promotions, seniority and meritorious service in the department, as well as superior capacity, as shown by competitive examination, shall be taken into account. Individual acts of bravery may be treated as acts of meritorious service, and the relative weight therefore shall be fixed by the municipal civil service commission. No member of the police or fire departments shall hold

> any other office nor be employed in any other department of the city government.

SSCL § 135. Manifestly, Section 135 addresses only the appointment, promotion, and civil service status changes[10] of members of the Fire Department; it does not address discipline. In contrast to that section, SCCL Section 137 entitled "Discipline," makes no reference to the Civil Service Law. Indeed, Civil Service Law Sections 75 and 76 were not passed until 1958, decades after enactment of the SCCL in 1906. Civil Service Law Sections 75 and 76 were, however, in effect at the time the 1960 Charter was passed by referendum and the drafters acknowledged its desire for the necessity for these due process protections at the time of its inception when the Council members stated in their Minutes that "All employees will be disciplined in accordance with the procedures prescribed by the State Civil Service Law." R. at 1092-1098.

Therefore, the Order must be affirmed.

POINT II

THE SECOND CLASS CITIES LAW DOES NOT APPLY TO FIREFIGHTER DISCIPLINE

Even if the Court determines that the SCCL was not superseded, as explained below, the negotiated procedures should govern firefighter discipline.

[10] A change of Civil Service status would be a change from probationary status to a temporary or permanent appointment within the department.

Matter of Patrolmen's Benevolent Association was the first and most expansive case that balanced the policy considerations of the authority of governing officials over police forces with the importance of collective bargaining between unions and municipalities as established under the Taylor Law. The Court of Appeals held that the "policy favoring strong disciplinary authority for those in charge of police forces" prevails over the strong public policy favoring collective bargaining. 6 N.Y.3d at 572. The Court relied upon the "quasi-military nature" of police, stating that the "general government and discipline of the force . . . must, from, the nature of things, rest wholly in the discretion of the commissioners." *Id*. at 575-76 (internal citations omitted). The Court also referenced the "sensitive nature of the work of the police department and the importance of maintaining both discipline and morale." *Id*. at 576. Similarly, in *City of Schenectady*, after balancing the Taylor Law's policy of encouraging collective negotiations with the employer's unique need to supervise and discipline police, the Court concluded that the SCCL governed police discipline rather than their existing discipline procedures.

In contrast to the public policy balancing test used in these cases, the Union does not provide law enforcement police work to Syracuse's community. The rationale repeatedly utilized by the Court of Appeals over the past 17 years has relied on the importance of regulating police operations and the specific work law

enforcement officers undertake in protecting and serving the public. The Union's members do not partake in any of these "quasi-military" law enforcement duties, rendering the Court's analysis wholly inapplicable to members of the fire department. As this is the first instance in which any municipality has challenged the applicability of this 114-year old statute to firefighters, a new balancing test must be performed by the Court. It is clear that because firefighters' work does not involve unique law enforcement functions and responsibilities, the same policy considerations that the high court relied on in must not govern here.

Further, no case invalidating contractually agreed-to discipline procedures decided by either the Court of Appeals or any Appellate Division has been applied to firefighters; every Court of Appeals decision which overturned the Taylor Law's strong public policy in favor of collective negotiations involved members of a police department. *See, City of Schenectady*, 30 N.Y.3d at 109; *Town of Wallkill*, 19 N.Y.3d at 1066 (2012); *Matter of Patrolmen's Benevolent Association,* 6 N.Y.3d at 563. Similarly, the policy has almost uniformly been applied to police units by the Appellate Divisions. *Matter of City of New York v. MacDonald*, 201 A.D.2d 258 (1st Dep't 1994); *Matter of City of Mount Vernon v. Cuevas*, 289 A.D.2d 674 (3d Dep't 2001); *Matter of Rockland County Patrolmen's Benevolent Assn. v. Town of Clarkstown*, 149 A.D.2d 516 (2d Dep't 1989); *Matter of Town of*

Greenburgh (Police Assn. of Town of Greenburgh), 94 A.D.2d 771 (2d Dep't 1983).[11]

Thus, Supreme Court's Order must be affirmed.

[11] The one exception to these cases only applying to police officers appears to be a decision decided by the First Department in *Matter of Roberts v. New York City Off. of Collective Bargaining*., 113 A.D.3d 97 (1st Dep't 2013). Even *Roberts*, however, did not involve firefighters. Moreover, the employees in that case did not fall under the SCCL.

CONCLUSION

For the above-stated reasons and authorities, it is respectfully submitted that the May 13, 2020 Order of the Supreme Court be affirmed.

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