*To be argued by:*
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(Time requested: 20 minutes)

APL No. APL-2022-00045
Appellate Division, Fourth Department Docket No. CA 20-00739
Onondaga County Clerk's Index No. 008031/19

# Court of Appeals

*of the*

# State of New York

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

*Plaintiff-Respondent,*

– against –

CITY OF SYRACUSE,

*Defendant-Appellant.*

## REPLY BRIEF FOR DEFENDANT-APPELLANT

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August 25, 2022

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## PRELIMINARY STATEMENT

As discussed in Defendant-Appellant City of Syracuse's (the "City") original brief, the primary issue for this Court's determination is whether the City superseded the Second Class Cities Law ("SCCL") provisions relating to police and fire discipline when it enacted its 1960 Charter. Plaintiff-Respondent Paul Motondo, As President of the Syracuse Fire Fighters Association, IAFF Local 280 (the "Union") fails to establish that supersession was achieved.

## ARGUMENT

### POINT I

### THE SCCL PROVISIONS REGARDING POLICE AND FIRE DISCIPLINE HAVE NOT BEEN SUPERSEDED

#### A. A general statement that the 1960 Charter supersedes prior charters is not sufficient to supersede the SCCL's specific provisions regarding police and fire discipline

In its brief, the Union essentially concedes that the City did not supersede the provisions of the SCCL relating to police and fire discipline under the City Home Rule Law, which was in effect when the 1960 Charter was enacted. (Union Brief, p. 24, n. 7). Indeed, the Union cannot dispute that the 1960 Charter does not include any specific statement that the SCCL provisions relating to police and fire discipline were superseded.

Instead, the Union repeatedly argues that the 1960 Charter's general statement that it supersedes laws that are "inconsistent" is sufficient to satisfy the City Home Rule Law (or Municipal Home Rule Law) requirements regarding supersession.

This Court has made it clear that general statements regarding supersession are not sufficient. For example, in Turnpike Woods, Inc. v. Town of Stony Point, 70 N.Y.2d 735, 737 (1987), this Court held that a local law did not supersede N.Y. Town Law Section 276(4). In its analysis of supersession, the Court explained,

> Nowhere does [the local law] define by reference to chapter and section number, or by reference to title, or by replication of actual text, the particular provisions of the Town Law to which it purports to apply. *Notably, while section VII of Local Law 7 – entitled "Repeal of Other Laws" – declares the supersession of all prior ordinances in conflict with the moratorium, any reference to the Town Law, or more specifically to Town Law § 276(4) is conspicuously absent*. Indeed, one reading the entire text of Local Law No. 7 is unable to perceive with reasonable certainty which provisions of the Town Law, if any, it seeks to supersede." Id. (emphasis added).

Similarly, 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." (emphasis added). The City of Schenectady charter therefore also contained general language stating that any law inconsistent with the charter was superseded.

Just as the general statement in Turnpike Woods was insufficient to achieve supersession, the City of Schenectady's general statement in its charter was likewise not sufficient for the Court to find supersession in the City of Schenectady case. See also Rensselaer County v. City of Troy, 102 A.D.2d 976 (3d Dep't 1984) (holding that general provision entitled "Former Charter Superseded" not sufficient to effect supersession of specific statute).

Accordingly, it is clear and well-established that general statements regarding supersession are not sufficient, and the Union's argument on this point should be rejected.

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

In its brief, the Union also 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 (Union Brief, p. 18). As discussed above, because the City did not specifically and unequivocally state that those provisions of the SCCL were being superseded within the text of the statute, there was no supersession under the City Home Rule Law (or Municipal Home Rule Law). But even assuming the Union could avoid the City Home Rule Law or Municipal Home Rule Law requirements, its arguments relating to the Civil Service Law and Common Council minutes are inapposite.

Indeed, the Union ignores the fact that the ultimate power to promulgate disciplinary rules has, at all times, remained with the Chief of Fire. 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 courts and demonstrates that the City did not intend to supersede the SCCL.

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 –

[1] It is important to note that neither the Union, nor the Courts below, claim 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 courts') focus is solely on the changes to the City 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 courts because it is clear that this rationale fails.

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).

It is apparent from the plain text of the 1960 Charter that the Chief of Fire has, at all times, retained the power to promulgate disciplinary rules, and the 1960 Charter's reference to the Civil Service Law does not change this fact.

### C. 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.

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.

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

This Court's analysis 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 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 the government. The City of Schenectady, like the City in this case, altered the provisions of its laws related to police discipline.

This Court 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 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 this Court 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

In its brief, the Union also 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) the Court of Appeals has not invalidated contractually

agreed-to discipline procedures as it relates to firefighters. Neither argument is persuasive.

As an initial matter, the First Department addressed this issue 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 that "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).

The Union argues that the Matter of Roberts decision is incorrect because the First Department did not adequately consider whether fire departments are quasi-

military organizations. Contrary to the Union's argument, the court's analysis in Mater of Roberts is sound.

Indeed, many courts have held that fire departments are "quasi-military" organizations. See 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"); Ware v. Board of Fire Com'rs of Roosevelt Fire Dist., 32 Misc.3d 781, 787 (Sup. Ct. Nassau Cty. June 1, 2011) ("Firefighting units operate as a quasi-military organization and are trained accordingly.").

The Union attempts to argue that firefighters are not part of a "quasi-military" organization because they do not carry weapons. However, the Union cites to no cases or authority for this argument. Further, the Union ignores decisions such as Gallagher and Austin, which have already considered and determined that fire departments are quasi-military organizations. In Gallagher, for example, the court found that firefighters were part of a quasi-military organization based on the training they received, including training in "the use and operation of emergency vehicles and emergency communications equipment," and training with "the incident command system, the process by which emergencies are divided into

specific units for action by the appropriate agency." 307 A.D.2d at 82. The Union's claim that firefighters are not part of a quasi-military organization therefore fails.

Finally, it is worth noting that at least one trial level court has specifically considered whether this Court's decision in Matter of Schenectady applies to firefighters. See Local 32 International Association of Firefighters v. New York State Public Employment Relations Board, Index No. 908413-21 (Sup. Ct. Albany Cty, February 9, 2022). A copy of the Local 32 decision is attached as Exhibit A. Although not controlling, the court's analysis in Local 32 is instructive.

In that case, the court considered, among other things, whether the City of Utica, which is a city of the second class, like the City in this case, could bargain over firefighter discipline following the City of Schenectady decision. The court held that because "[a] plain reading of the [SCCL] manifests a legislative intent that the disciplinary provisions of the Second Class Cities Law apply with equal force and effect to both police officers and firefighters," "[f]irefighter discipline is prohibited from collective bargaining." Id., p. 11. This rationale is persuasive. The SCCL addresses firefighter discipline together with police discipline, which is a clear legislative indication that they should be treated together.

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 courts 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: August 25, 2022

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**NEW YORK STATE COURT OF APPEALS**
**CERTIFICATE OF COMPLIANCE**

I hereby certify pursuant to 22 NYCRR PART 500.13 that the foregoing brief was prepared on a computer using Microsoft Word.

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*Word Count.* The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service certificate of compliance, corporate disclosure statement, questions presented, statement of related cases, or any authorized addendum containing statutes, rules, regulations, etc. is 3,373 words.

Dated: August 25, 2022

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Exhibit A

SUPREME COURT
STATE OF NEW YORK COUNTY OF ALBANY

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LOCAL 32 INTERNATIONAL ASSOCIATION OF FIREFIGHTERS[1], AFL-CIO, UTICA PROFESSIONAL FIREFIGHTERS ASSOCIATION,[2]

Petitioners,

for a Judgment pursuant to Article 78 of the Civil Practice Law and Rules

-against-

NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD[3] AND CITY OF UTICA,

Respondents.

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DECISION, ORDER And JUDGMENT
Index No. 908413-21-21
RJI No. 01-21-ST1955
(Hon. Lynch, J.)

## INTRODUCTION

In this Article 78 proceeding, Petitioner's challenge PERB's Decision and Order dated August 23, 2021, finding, inter alia, that Firefighter disciplinary hearings conducted by the City of Utica, a Second Class City, were not subject to collective bargaining.

Oral argument was held on the record on February 9, 2022.

## FACTS

The Rules and Regulations governing the City of Utica Fire Department (hereinafter "Rules") were adopted in 1959 pursuant to Second Class Cities Law § 133.[4] Section 131 of the

[1] Hereinafter referred to as Local 32.
[2] Hereinafter referred to as UPFA.
[3] Hereinafter referred to as PERB.
[4] NYSEF Doc. No. 8 – Joint Exhibit "1".

Rules gave the Commissioner of Public Safety jurisdiction over disciplinary matters concerning police officers and firefighters. All "Supplements" to the Rules were rescinded December 1, 1963.[5]

Plaintiffs and the City of Utica entered into a collective Bargaining Agreement for the period April 2013 to March 2018.[6] Notable, Article V § 3 provides:

> "The CITY agrees that the proposed changes in the "Book of Rules" of the Bureau of Fire shall be submitted to the Labor Management Committee for review and recommendations and the proposed changes shall be effective only after being reduced to writing."

Clearly, the Agreement encompassed the Book of Rules. The Grievance/Arbitration procedure is set forth in Article VIII § 4.

On March 28, 2016, the Mayor directed the Fire Chief to submit information concerning potential illegal drug usage by a firefighter.[7] On March 29, 2016, the Fire Chief responded that a "dollar bill filled with a white powdered substance" was found at Engine Co. 3, but Fire Fighter (hereinafter FF) Reeves, with FF Taurisani present, flushed it down the toilet.[8] **The outgoing crew at Engine Co. 3 were Lt. Andrade, FF Thomas Carcone, and FF Tinker.**[9] (Emphasis added)

Upon the commencement of a police investigation, a dispute arose as to whether UFD President Carcone (also the subject of the investigation) interfered.[10] City of Utica Internal Affairs Sgt. Rios and/or Investigator Joe Trevisani interviewed FF Reeves and FF Taurisani.[11]

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[5] NYSEF Doc. No. 8. Joint Exhibit "1".
[6] NYSEF Doc. No. 8 – Joint Exhibit "22".
[7] NYSEF Doc. No. 8 – Joint Exhibit "2".
[8] NYSEF Doc. No. 8 – Joint Exhibit "3".
[9] NYSEF Doc. No. 8 – Joint Exhibit "3".
[10] NYSEF Doc. No. 8 – Joint Exhibit "4"- e-mail exchange between counsel.
[11] NYSEF Doc. No. 8 – Joint Exhibit "10", "13", "14", "20".

Internal Affairs Sgt. Rios and Investigator Trevisani also interviewed Captain Noon,[12] Chief Russell Brooks,[13] FF Thomas Carcone (FF and Union President),[14] FF Russ Tinker (FF and Union Secretary),[15] Lt. Andrade,[16] Lt. Canndella,[17]Captain Noon,[18]and FF Ryan Quinn.[19] Sgt. Rios explained to FF Carcone,

> "Right, what they have to realize is that you [Carcone] are in this and so is Tinker. So both of you are out of it. You can't represent them."[20]

Sgt. Rios determined that FF Reeves and Taurisani acted unprofessionally.[21]

The Mayor, as acting Public Safety Commissioner, issued a Notice of Charges of Conduct Unbecoming an Officer/Dereliction of Duty against FF Reeves and FF Taurisani on August 23, 2016.[22] On June 13, 2017, the Arbitrator issued an opinion finding FF Reeves and FF Taurisani guilty of the charge.[23]

Meanwhile, on June 1, 2016, Plaintiffs filed an improper practice charge with PERB, claiming the City of Utica violated §§ 209-a.1 (a) (b) (c) (d) and (g) of the Public Employee's Fair Employment Act (Act) by altering the disciplinary interrogation procedures and excluding the Union President and Secretary (i.e., Carcone and Tinker) from representing its members

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[12] NYSEF Doc. No. 8 – Joint Exhibit "11".
[13] NYSEF Doc. No. 8 – Joint Exhibit "12".
[14] NYSEF Doc. No. 8 – Joint Exhibit "15".
[15] NYSEF Doc. No. 8 – Joint Exhibit "16".
[16] NYSEF Doc. No. 8 – Joint Exhibit "17".
[17] NYSEF Doc. No. 8 – Joint Exhibit "18".
[18] NYSEF Doc. No. 8 – Joint Exhibit "19".
[19] NYSEF Doc. No. 8 – Joint Exhibit "21".
[20] NYSEF Doc. No. 8 – Joint Exhibit "15". Carcone Interview Part 3, p. 8
[21] NYSEF Doc. No. 8 – Joint Exhibit "7".
[22] NYSEF Doc. No. 8 – Joint Exhibit "8".
[23] NYSEF Doc. No. 8 – Joint Exhibit "23" - PERB Case No. A20 16-202 (DISCIPLINE - MILTON REEVES AND DANIEL TAURISANI).

during the interrogation process.[24] PERB held "formal" hearings on December 15, 2016, July 11 and 12, 2017.[25]

By Decision dated November 25, 2020, PERB ALJ Burritt held,

> "I find that the City violated § 209-a.1(a) when it excluded Carcone and Tinker from representing bargaining unit members during disciplinary interrogations and that it also **violated § 209-a.1(d)** when it **unilaterally** altered the past practices of providing 24-hours' notice to the Association before disciplinary interrogations at the Fire Department and conducting disciplinary interrogations in a civil manner, **without negotiation with the Association**."[26] (emphasis added)

The ALJ dismissed the remaining charges §§ 209-a.1 (b) (c) and (g).[27]

By Board Decision and Order dated August 23, 2021, the PERB Board held,

> "we are bound **to reverse the ALJ's** findings that the City's unilateral changes to past practices regarding procedures with respect to disciplinary interrogations for firefighters in the City affected a mandatory subject of bargaining, and thus violated § 209-a.1(d) of the Act." [28](emphasis added)

Respondent PERB affirmed the ALJ's finding that the City violated § 209-a.1(a), and the ALJ's finding dismissing claimed violations of § 209-a.1(b) and (c).[29] The Board also issued an order that the City of Utica not interfere with Thomas Carcone, Russell Tinker, or other members in the exercise of their rights under § 202 of the Act.[30]

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[24] PERB case No. U-35101.
[25] NYSEF Doc. No. 4, p. 5.
[26] NYSEF Doc. No. 11 Decision of Administrative Law Judge p. 46-47.
[27] The ALJ refused to consider Matter of City of Schenectady v. New York State Pub. Empl. Relations Bd., 30 N.Y. 3d 109 [2017], under a claim that case involved police, not firefighters. (NYSEF Doc. No. 11, p. 46, Fn. 166) That was error.
[28] NYSEF Doc. No. 3 PERB Decision and Order p. 16.
[29] NYSEF Doc. No. 3 PERB Decision and Order p. 16 -19.
[30] NYSEF Doc. No. 3 PERB Decision and Order p. 19.

**PETITION**

Petitioners seek Judgment vacating Respondent PERB's Decision and Order dated August 23, 2021, to the extent that PERB held Respondent City of Utica did not violate § 209-a. l (d) the Public Employees' Fair Employment Act,[31] as irrational, unreasonable, affected by error of law and not based on substantial evidence, and in violation of the Open Meetings Law.[32]

**MOTION TO DISMISS**

Respondents moved to dismiss pursuant to CPLR § 7804 (f) on the grounds that Petitioner has failed to state a cause of action.[33]

The review standard requires that a Court "must give the pleadings a liberal construction, accept the allegations as true and accord the plaintiffs every possible favorable inference." (see Chanko v. Am. Broad Companies, Inc., 27 N.Y. 3d 46, 52 [2016]; Conklin v Laxen, 180 A.D.3d 1358, 1362 [4th Dept. 2020]; Piller v Tribeca Dev. Group LLC, 156 A.D.3d 1257, 1261 [3d Dept. 2017]).

In Wedgewood Care Ctr. v. Kravitz, 198 A.D.3d 124, 130 [2d Dept. 2021], the court held, however,

> "On a motion to dismiss for failure to state a cause of action, the pleading is to be afforded a liberal construction. The facts alleged in the complaint must be accepted as true, and the plaintiff is entitled to receive the benefit of every possible favorable inference. Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of **an element** of the claim, **or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery**.

[31] Codified in Civil Service Law ("CSL") Article 14 and commonly known as the 'Taylor Law",
[32] With respect to the substantial evidence claim, the Court notes that Petitioner has focused its attention on the applicability of Matter of City of Schenectady v. New York State Pub. Empl. Relations Bd., 30 N.Y. 3d 109 [2017] to Firefighters; this is a question of law, not substantial evidence. See NYSEF Doc. No. 1 Petition ¶ 27,
[33] NYSEF Doc. Nos. 23 and 28.

> However, allegations consisting of bare legal conclusions as well as factual claims **flatly contradicted by documentary evidence** are not entitled to any such consideration, nor to that arguendo advantage." (emphasis added; internal quotations and citations omitted)

Here, as more fully appears below, the allegations in the Petition do not allow for an enforceable right of recovery, and thus fails to state a cause of action (see Berrian v. Carpenter, 19 A.D.3d 769 [3d Dept. 2005]; Meer v. Bugliarello, 147 A.D.2d 568 [2d Dept. 1989]).

**TRANSFER ISSUE**

Petitioner claims that this matter should be transferred to the Appellate Division pursuant to CPLR § 7804 (g), since PERB conducted a "formal" evidentiary hearing, and Petitioner alleged a substantial evidence claim. (CPLR § 7804 (3)) Respondents claim the hearing was discretionary, not directed by law, and transfer is not appropriate.

CPLR § 7803 (4) provides:

> "The only questions that may be raised in a proceeding under this article are:
>
> (4) whether a determination made as a result of a **hearing** held, and at which evidence was taken, **pursuant to direction by law** is, on the entire record, supported **by substantial evidence."** **(emphasis added)**

Was the formal hearing "pursuant to direction by law?" Yes.

In Matter of Uniformed Fire Officers Assn. of the City of Yonkers v. New York State Pub. Empl. Relations Bd., 197 A.D.3d 1470, 1472 [3d Dept. 2021], the Court held,

> "With that framework in mind, and mindful that our review of a PERB determination **following a hearing** "is limited to whether it is supported by **substantial evidence**, that is, whether there is a basis in the record allowing for the conclusion that PERB's decision was legally permissible [and] rational." (emphasis added)

(see Matter of Town of Islip v. New York State Pub. Empl. Relations Bd., 23 N.Y.3d 482, 492 [2014], where the Court held,

> "Our scope of review in this case is limited to whether PERB's determination that the Town engaged in an improper practice was "affected by an error of law" or was "arbitrary and capricious or an abuse of discretion" (CPLR 7803 [3]). "PERB is accorded deference in matters falling within its area of expertise" such as "cases involving the issue of mandatory or prohibited bargaining subjects". **Additionally, an administrative determination made after a hearing required by law, such as PERB's determination here, must be supported by substantial evidence.**" (emphasis added)

; see also, Matter of State of New York v. New York State Pub. Empl. Relations Bd., 183 A.D. 3d 1172 [3d Dept. 2020].)

Respondent's reliance upon Matter of Kent v. Lefkowitz, 27 N.Y. 3d 499 [2016] for the proposition that an Article 78 proceeding to challenge a PERB decision is not subject to the substantial evidence standard, but rather solely to a determination of whether the decision was affected by an error of law or arbitrary and capricious or an abuse of discretion, and thus not transferrable, is misplaced.[34] While there were "administrative hearings" and PERB's Assistant Director found a violation of Civil Service Law 209-a (1) (d), PERB dismissed the improper practice charge based on its interpretation of a side letter agreement between the parties. The issue distilled to whether that interpretation was affected by an error of law or arbitrary and capricious or an abuse of discretion. Kent is limited to its facts. In fine, this case is transferrable. (see Civil Service Law § 213 (c))

[34] NYSEF Doc. No. 34 Memo of Law p. 1-2.

CPLR § 7804 (g) provides:

> "**Hearing and determination; transfer to appellate division**. Where the **substantial evidence issue specified in question four of section 7803** is not raised, the court in which the proceeding is commenced shall itself dispose of the issues in the proceeding. **Where such an issue is raised, the court shall first dispose of such other objections as could terminate the proceeding,** including but not limited to lack of jurisdiction, statute of limitations and res judicata, without reaching the substantial evidence issue. If the determination of the other objections does not terminate the proceeding, the court shall make an order directing that it be transferred for disposition to a term of the appellate division held within the judicial department embracing the county in which the proceeding was commenced. When the proceeding comes before it, whether by appeal or transfer, the appellate division shall dispose of all issues in the proceeding, or, if the papers are insufficient, it may remit the proceeding." (emphasis added)

Petitioners' claims rest on their assertion that PERB erroneously determined that firefighter disciplinary proceedings are not subject to collective bargaining under Second Class Cities Law § 131, 133 and 137. Since resolution of this issue is governed by Matter of City of Schenectady v. New York State Pub. Empl. Relations Bd., 30 N.Y. 3d 109 [2017], and issue determination is dispositive as a matter of law, transfer to the Appellate Division is not appropriate (see e.g., State v. New York State Public Employment Relations Bd., 181 A.D.2d 391, 394 [3d Dept. 1992] where the Court held, "the issue raised being not one of substantial evidence, but rather a challenge to the legality of the test employed, this matter should have been disposed of by Supreme Court (CPLR 7804 [g]…").

## STATEMENT OF LAW

Civil Service Law § 209-a provides, inter alia:

> **"1. Improper employer practices. It shall be an improper practice for a public employer or its agents deliberately** (a) to interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in section two hundred two of this article for the purpose of depriving them of such rights; (b) to dominate or interfere with the formation or administration of any employee organization for the purpose of depriving them of such rights; (c) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any employee organization; **(d) to refuse to negotiate in good faith with the duly recognized or certified representatives of its public employees;** (e) to refuse to continue all the terms of an expired agreement until a new agreement is negotiated, unless the employee organization which is a party to such agreement has, during such negotiations or prior to such resolution of such negotiations, engaged in conduct violative of subdivision one of section two hundred ten of this article; (f) to utilize any state funds appropriated for any purpose to train managers, supervisors or other administrative personnel regarding methods to discourage union organization or to discourage an employee from participating in a union organizing drive; (g) to fail to permit or refuse to afford a public employee the right, upon the employee's demand, to representation by a representative of the employee organization, or the designee of such organization, which has been certified or recognized under this article when at the time of questioning by the employer of such employee it reasonably appears that he or she may be the subject of a potential disciplinary action." (emphasis added)

Civil Service Law § 209-a exists separate and distinct from the provisions of the Second Cities Law.

Second Class Cities Law § 131 provides, inter alia:

> "The **commissioner of public safety** shall have cognizance, jurisdiction, supervision and control of the government, administration, **disposition and discipline of the police department, fire department, buildings department** and health department, and of the officers and members of said departments…" (emphasis added)

Second Class Cities Law § 133 provides, inter alia:

> "The **commissioner of public safety shall make, adopt and enforce such reasonable rules**, orders and regulations, not inconsistent with law, as may be reasonably necessary to effect a prompt and efficient exercise of all the powers conferred and the performance of all duties imposed by law upon him or the department under his jurisdiction. He is authorized and empowered to make, adopt, promulgate and enforce reasonable rules, orders and regulations for the government, **discipline**, administration and disposition 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 or member of said departments for neglect of official duty or incompetency or incapacity to perform his official duties or some delinquency seriously affecting his general character or fitness for the office, and may, in his discretion, punish any such officer or member found guilty thereof by reprimand, forfeiting and withholding pay for a specified time, [suspension] during a fixed period or dismissal from office..."

General jurisdiction over the police department, fire department, buildings department and health departments are established under Second Class Cities Law § 131, but § 133 and 137 are limited to police and fire departments (see Matter of Civil Serv. Empls. Assn., Inc., Local 1000, AFSCME, AFL-CIO v. City of Schenectady, 178 A.D. 3d 1329 [3d Dept. 2019], where the court held that building department claims were not prohibited from collective bargaining as a matter of law).

Second Class Cities Law § 137 provides, inter alia:

> "If a charge may be made by any person against any officer or **member of the police or fire departments** that he has been negligent or derelict in the performance of his official duties, or is incompetent or without capacity to perform the same or is guilty of some delinquency seriously affecting his general character or fitness for the office, the charge must be in writing, in the form prescribed by the rules and regulations of the commissioner of public safety, and a copy thereof must be served upon the accused officer or member. The commissioner shall then proceed to hear, try and determine the charge..."

A plain reading of the statutes manifests a legislative intent that the disciplinary provisions of the Second Class Cities Law apply with equal force and effect to both police officers and firefighters (see People v. Aragon, 28 N.Y. 3d 125, 128 [2016]; People v. Ocasio, 28 N.Y. 3d 178, 181 [2016]; Morgenthau v. Avion Resources Ltd., 11 N.Y.3d 383, 389 [2008]); see Hernandez v State of New York, 173 A.D.3d 105, 111 [3d Dept. 2019]).

In Matter of City of Schenectady v. New York State Pub. Empl. Relations Bd., 30 N.Y. 3d 109 [2017], the Court recognized that police discipline matters were under the jurisdiction of the Public Safety Commissioner pursuant to Second Class Cities Law§ 131, not subject to collective bargaining under the Taylor Law (Civil Service Law 204 (2)).[35] Clearly, the provisions of Second-Class Cities Law § 131 was in full force before and after the enactment of the Taylor Law, and thus prohibits police discipline from collective bargaining (c.f. Matter of Rochester Police Locust Club v. City of Rochester, 196 A.D. 3d 74 [4th Dept. 2021]).

Since the discipline of Firefighters pursuant to Second Class Cities Law §§ 131, 133, and 137 must be treated in the same manner as police, it is manifest that Firefighter discipline is prohibited from collective bargaining. (see Matter of Roberts v. New York City Off. of Collective Bargaining, 113 A.D.3d 97 [1st Dept. 2013], where the Court held, inter alia:

> "...mandate a conclusion that **FDNY's** implementation of a policy of terminating EMS workers after failing or refusing to take a drug test is **not subject to collective bargaining**. New York City Charter § 487 (a) gives the fire commissioner the sole and exclusive power to perform all duties for the government, discipline, management, maintenance and direction of the fire

[35] The Court held, "This case is controlled by our prior decisions in *Matter of Patrolmen's Benevolent Assn. of City of N.Y., Inc. v New York State Pub. Empl. Relations Bd.* (6 NY3d 563, 848 NE2d 448, 815 NYS2d 1 [2006]) and *Matter of Town of Wallkill v Civil Serv. Empls. Assn., Inc. (Local 1000, AFSCME, AFL-CIO, Town of Wallkill Police Dept. Unit, Orange County Local 836)* (19 NY3d 1066, 979 NE2d 1147, 955 NYS2d 821 [2012]), which held that the statutory grants of local control over police discipline in New York City and Wallkill—substantively similar to the statutory provisions relevant here—rendered discipline a prohibited subject for collective bargaining." (id at 112)

> department. There is **no discernable difference** between this Charter provision and the parallel Charter provision governing **police discipline**. In fact, section 487 (a), which refers to sole and exclusive power over fire department discipline, is even more strongly worded than the section on police discipline, which refers to cognizance and control"). (internal case citations omitted; emphasis added)

PERB held, "We are therefore constrained to apply these decisions, and find that the holding in Schenectady v. PERB must apply to prohibit the negotiation of discipline of firefighters as well as that of police officers."[36] For the reasons more fully set forth above, I agree.

## OPEN MEETINGS LAW

In Matter of McCrory v Village of Mamaroneck Bd. of Trustees, 181 A.D.3d 67, 70 [2d Dept. 2020], the court denied the motion to dismiss, holding,

> "The Open Meetings Law was intended, as its very name suggests, to **open the decision-making process of elected officials to the public** while simultaneously striking a balance in protecting the ability of government to carry out its functions and responsibilities. In enacting the Open Meetings Law, the Legislature sought to ensure that "public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy" (Public Officers Law § 100). The provisions of the Open Meetings Law are to be given broad and liberal construction so as to achieve the purpose for which it was enacted.
>
> The statute provides generally that "[e]very meeting of a **public body shall be open to the general public**," except for executive sessions that may be called for specified reasons (Public Officers Law § 103[a]; *see* Public Officers Law § 105). Moreover, **public notice of the time and place of a meeting scheduled shall be given, minutes shall be taken at all open meetings of a public body, and the minutes shall be made available to the public** (*see* Public Officers Law §§ 104, 106)." (Caselaw citations omitted; emphasis added)

[36] NYSEF doc. No. 3, p. 14.

Here, the meeting notices for the July 8, 2021 @ 10:00 a.m. and August 23, 2021 @ 10:00 a.m. meetings in Albany via ZOOM were published.[37]

Public Officer Law § 108 provides:

> Nothing contained in this article shall be construed as extending the provisions hereof to:
> **1.** judicial or quasi-judicial proceedings..."

Respondent contends that PERB conducted a quasi-judicial proceeding and is exempt from the Open Meetings Law.[38]

In Sanna v. Lindenhurst Bd. of Education, 85 A.D.2d 157, 161 [2d Dept. 1982], the Court identified the characteristics of a quasi-judicial proceeding, holding,

> "Judicial or quasi-judicial determinations, unlike administrative and even more unlike legislative or executive determinations, implicate substantial ***participatory*** rights as a matter of due process of law in recognizing the government threat to private entitlement (e.g., hearing on notice, counsel, cross-examination, determination on the record alone based on legal evidence)." (emphasis added)

Respondents did conduct a participatory hearing, yet they claim a history of complying with the Open Meetings Law.[39] I am not persuaded that PERB is exempt from the Open Meetings Law.

Petitioner claims "The Notice did not comply with the requirements set forth in the Open Meetings Law that the locations for each Board member participating in the meeting be set forth and that the public be advised that the public has a right to attend at any of those locations."[40] In any event, the claimed violations are technical in nature, and arose during the trying times of the pandemic, with no showing of bad faith. The point made is that the failure to specify the exact

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[37] NYSEF Doc. Nos. 15 and 16.
[38] NYSEF Doc. No. 24 – Memo of Law p. 14, 21/32.
[39] NYSEF Doc. No. 24 – Memo of Law p. 19, 26/32.

[40] NYSEF doc. No. 17 – Memo of Law p. 21, 25/29. It is manifest that Petitioner has taken the Open Meeting Law mandate to an unnecessary extreme. There is simply no point to identify the exact location of each Board Member, nor specifying that the public can attend at each location, where, as here, the meeting is virtual via Zoom.

address or right to attend the meeting is academic, since participation is not in person, but, rather, readily accessible via Zoom. Accordingly, I decline to nullify Respondent's actions. (see Delgado v. N.Y., 194 A.D.3d 98, 107 [3d Dept. 2021], where the Court held, "The purported violations identified by plaintiffs were technical in nature, did not amount to "good cause" for nullifying the Committee's actions, and there was no showing that any such violations were intentional."; see also, Phillips v Town of Glenville, 160 A.D.3d 1264, 1267-1268 [3d Dept. 2018]).

**CONCLUSION**

For the reasons more fully stated above, the motions to dismiss the Petition are granted, and the Petition is dismissed.

This memorandum constitutes the decision, order, and judgment of the Court.

Dated: Albany, New York
February 9, 2022

Peter A Lynch
PETER A. LYNCH, J.S.C.

PAPERS CONSIDERED:

All e-filed Pleadings and exhibits.

02/09/2022

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STATE OF NEW YORK )
) ss.:
COUNTY OF MONROE )

**AFFIDAVIT OF SERVICE BY OVERNIGHT FEDERAL EXPRESS DELIVERY**

I, **Jason Wilder**, of Rochester, New York, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above.

**On** August 25, 2022

deponent served the within: **REPLY BRIEF FOR DEFENDANT-APPELLANT**

**Upon:**

BLITMAN & KING, LLP
*Attorneys for Plaintiff-Respondent*
443 North Franklin Street, Suite 300
Syracuse, New York 13204
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the address(es) designated by said attorney(s) for that purpose by depositing **three (3)** true copy of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

**Sworn to before me on** August 25, 2022

Andrea P. Chamberlain
Notary Public, State of New York
No. 01CH6346502
Qualified in Monroe County
Commission Expires August 15, 2024

Jason Wilder

Job #511570