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

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.

BRIEF FOR PLAINTIFF-RESPONDENT

BLITMAN & KING LLP
Nathaniel G. Lambright
Attorneys for Plaintiff-Respondent
443 North Franklin Street, Ste. 300
Syracuse, NY 13204
Tel: (315) 422-7111
nglambright@bklawyers.com

August 10, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

PRELIMINARY STATEMENT

This memorandum of law is submitted by Plaintiff-Respondent Paul Motondo, as President of the Syracuse Fire Fighters Association, IAFF Local 280 ("Union") in response to Defendant-Appellant City of Syracuse's ("Syracuse" or "City") appeal of the May 13, 2020 decision of the October 1, 2021 Appellate Division, Fourth Judicial Department. *Motondo v. City of Syracuse*, 198 A.D.3d 1321 (4th Dep't 2021); R. 1178-1181. The Appellate Division affirmed the opinion of the Supreme Court, County of Onondaga (Hon. Deborah Karalunas, J.). *Motondo v. City of Syracuse*, 68 Misc.3d 398 (Sup. Ct., Onondaga Cty. 2020); R. 4-21.

In affirming the Supreme Court's decision, the Appellate Division correctly decided that the discipline procedures set forth in the Second Class Cities Law ("SCCL") were superseded by the City when it enacted its 1960 City Charter (the "1960 Charter"). Supreme Court correctly distinguished the Court's 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 ("CBA" or "Agreement") discipline procedures. Further, even if the Appellate Division erred

in determining that the SCCL was superseded, the negotiated procedures should still govern firefighter discipline by reasons of public policy.

Thus, the Appellate Division's Order must be affirmed.

QUESTIONS PRESENTED

1. Is firefighter discipline in Syracuse governed by the discipline procedures negotiated pursuant to the Civil Service Law rather than the SCCL where the SCCL has been superseded in Syracuse?

   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.

2. Is there a strong enough public policy of local control over firefighter discipline to justify overcoming the statutory presumption of negotiability of firefighter discipline such that the CBA's discipline procedures are not valid?

   Answer: The CBA's discipline procedures remain valid because there is no public policy strong enough to justify excluding firefighters from being permitted to negotiate discipline procedures pursuant to the Civil Service Law.

STATEMENT OF THE CASE

A. Procedural Background

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. 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. The Appellate Division affirmed the lower court's ruling in its entirety. 198 A.D.3d at 1321.

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). Section 131 of the SCCL gives the commissioner of public safety complete control over the discipline of the fire department. 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." 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. 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 475. 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 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 all pre-existing inconsistent laws and charters, including the SCCL, 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, therefore, 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 this fact. The minutes state: "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, and expressly ended any previous discipline procedures that were previously in effect.

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 grievances. R. at 39-145, 455-467, 481, 509-905. An arbitrator's award is final

[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 at 573 (2006) (where Civil Service Law Sections 75 and 76 apply, as in *Auburn*, discipline may be the subject of collective bargaining).

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 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 MUST FOLLOW 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 antiquated procedures set forth in the SCCL and not the negotiated procedures contained in the parties' CBA. Brief for Defendant-Appellant ("City's Brief"), pp. 12-36. However, *City of Schenectady*, is distinguishable from the facts of this case.

In *City of Schenectady*, the Court relied on its previous holdings *Matter of Patrolmen's Benevolent Association of City of New York v. PERB (NYC PBA)*, 6 N.Y.3d 563 (2006) and *Matter of Wallkill,* 19 N.Y.3d 1066 (2012), for the proposition that discipline of police officers is a prohibited subject of negotiations when a law that existed prior to the enactment of Civil Service Law Section 75 (a "grandfathered" law) and which is still in force, 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*. Supreme

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.

City of Schenectady does not squarely address whether a "Second Class" city, such as Syracuse, may supersede the grandfathered SCCL's disciplinary procedures by adopting alternative discipline procedures pursuant to the former City Home Rule Law or Municipal Home Rule Law. In other words, *City of Schenectady* does not decide whether the negotiated discipline procedures should govern when the SCCL is no longer in force in a Second Class City. 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. R. 906-1000. Schenectady's Charter does not purport to be passed pursuant to the City Home Rule Law or the

Municipal Home Rule Law and it does not indicate that it superseded all grandfathered laws. R.906-1000. In Schenectady, the SCCL remained in force.

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

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 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.[2] As the lower 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.[3]

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

[2] 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.

[3] 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.

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); *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, the Appellate Division's Order must be affirmed.

Section 22 of the Municipal Home Rule Law authorizes municipalities to supersede prior laws under certain conditions. Section 22 provides:

> In adopting a local law changing or superseding any provision of a state statute or of a prior local law or ordinance, the legislative body shall specify the chapter or local law or ordinance, number and year of enactment, section, subsection or subdivision, which it is intended to change or supersede, but the failure so to specify shall not affect the validity of such local law. Such a superseding local law may contain the text of such statute, local law or ordinance, section, subsection or subdivision and may indicate the changes to be effected in its text or application to such local government by enclosing in brackets, or running a line through, the matter to be eliminated therefrom and italicizing or underscoring new matter to be included therein.[4]

"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

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

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 the Court held in *Bareham*:

> The existence of a duty to keep a local law free from ambiguity cannot be denied. Confusion would be intolerable if, in the case of every local law adopted * ** no one could feel confident that local legislatures had intended to feel confident that local legislatures had intended to supersede an entire statute or only part of it.

246 N.Y. at 150. However, technical compliance with Municipal Home Rule Law Section 22 is not required provide an intent to amend or supersede a prior law is shown and there is substantial compliance with the law. *Turnpike*, 70 N.Y.2d. at 737. Finally, Municipal Home Rule Law Section 51 provides that the law's provisions must be liberally construed.

The 1960 Charter was passed 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

[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].

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, 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.

As demonstrated above, the 1960 Charter's repeated supersession provisions and its particularized adoption of the Civil Service Law, which at that time included Sections 75 and 76, established beyond reasonable doubt the City replaced Section 133 of the SCCL. The procedures set forth in Section 75 and 76 provide a true form of due process that are clearly inconsistent with the procedures set forth in the SCCL which gives the Fire Chief unilateral power to create procedures to her liking which quite obviously would not have the same due process protections that Sections 75 and 76 mandate. Hence, Section 5-908 governs the City's discipline procedures, including its incorporation of the Civil Service Law. The City is not entitled to a wholesale reversion to the SCCL's discipline procedures which were no longer in force. The City may not refuse to

follow the CBA's discipline procedures because the City adopted the Civil Service Law's discipline protections which replaced the SCCL. *Miller*, 278 A.D.2d at 648.

The City nonetheless argues that Section 133's discipline procedures found in SCCL were not superseded by Section 5-908. First, the City contends that the supersession clause of the City Home Rule Law should be utilized to determine whether Section 5-908 is effective rather than the supersession clause in the Municipal Home Rule Law because the City Home Rule Law was effective at the time of the 1960 Charter's passage. City's Brief, pp. 18-28. The City then argues, however, that under either supersession clause, because Section 5-908 does not specifically state that it supersedes Section 133, Section 133 of the SCCL remains effective and dispositive of the issues before this Court. City's Brief, pp. 18-28.

Here, the City's argument fails regardless of whether the supersession question is analyzed under the City Home Rule Law or the Municipal Home Rule Law. This is because 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"). There is no ambiguity that the 1960 Charter is in full force and that it replaced the SCCL and all previous inconsistent laws in its entirety.

Furthermore, to adopt the City's position would create the intolerable confusion that both the City Home Rule Law and the Municipal Home Rule Law attempted to avoid as no one would feel confident of the enforceability of any newly enacted charter unless the entire charter specifically stated throughout the entire set of new laws those which the legislature was attempting to supersede. Of course, charters are never written with such absurd and confusing redundancy as the City is advocating this Court adopt.

Therefore, whether this issue is analyzed under the former City Home Rule Law or the Municipal Home Rule Law's supersession provisions, the 1960

Charter's language demonstrates that the SCCL has been explicitly superseded in Syracuse.[6]

The City cites *Rensselaer County v. City of Troy*, 102 A.D.2d 976 (3d Dep't 1984) for the proposition that a general statement of supersession is not enough because the Municipal Home Rule Law does not authorize repeal by implication. In *City of Troy*, the charter stated that the former charter was superseded. However, within Troy's charter itself, Troy specifically stated that some laws were superseding past laws while other laws, including the law at issue in that case, did not state anything about superseding a prior law. The wording in the 1960 Charter is readily distinguishable from the facts and holding of *City of Troy* because there are no laws in the 1960 Charter that specifically repeal some prior laws while other laws such as Section 5-908 do not state that they have been superseded. R. at 325-453. Again, the 1960 Charter superseded

[6] The City argues that the 1960 Charter's repeated reference to superseding all previous laws was not enough. The City's argument would have it that every single section of the 1960 Charter should have specifically stated that it was superseding the SCCL and the City's failure to do so in this case means the SCCL still controls the governing operation of Syracuse. Such a conclusion would act not just to nullify Section 5-908's adoption of Civil Service Law protections, including the negotiated discipline procedures in the Agreement, but also act to nullify much of the 1960 Charter. This would invariably lead to an absurd and ungovernable result which is the opposite of what the legislature wanted. 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 laws and structure.

all prior inconsistent laws and this is stated repeatedly. Thus, there is no "repeal by implication" when the 1960 Charter superseded all prior laws. The 1960 Charter leaves no doubt that it completely superseded the SCCL.

The City further argues that it always provides explicit and specific supersession language whenever it enacts a local law with the intent of superseding a provision of the SCCL. This argument is both wrong and disingenuous. The City offers just two examples of it utilizing explicit supersession language and a diligent review of the laws on the Union's part has revealed no others. Local Law No. 5-1927; Local Law No. 11-1998. City's Brief, p. 9-10. The first, Local Law No. 5-1927, was passed under the 1915 Charter, which, unlike the 1960 Charter, did not contain the repeated expressions of supersession of the SCCL. While the second, Local Law No. 11-1998, 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. In the City's eyes, this Local Law No. 11-1998 must be the only valid law in Syracuse other than the SCCL. R. 326-454. The City's flawed argument makes what is already obvious even more readily apparent to this Court. Because the 1960 Charter's references to supersession are adequate to supersede the prior charters, the 1960 Charter governs Syracuse, not 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 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 also 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. 14 Misc.3d at 893. 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 in a few instances simply 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.

Thus, because the SCCL has been completely superseded by the 1960 Charter, the negotiated discipline procedures remain effective, rather than those set forth in the SCCL.

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

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 the SCCL charter to be superseded.[7] 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, and more importantly, unlike the 1960 Charter, the Schenectady Charter did not supersede all previous laws pursuant to the City Home Rule Law or the Municipal Home Rule Law. The SCCL was still in force in Schenectady, unlike in Syracuse! Hence, *City of Schenectady* and its legal analysis of the import of the modifications to fire department administration do 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 procedures through alternative discipline procedures that

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

include Civil Service protections that are passed pursuant to the City Home Rule Law or 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 firefighter 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. 34. 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 New York's

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. *NYC PBA*, 6 N.Y.3d at 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 also wholly off the mark. City's Brief, p. 35. 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[8] 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 procedures in their subsequent collective bargaining agreements starting in the late 1960s, these collectively negotiated provisions,

[8] Section 76 [4] provides:

> * * * 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 * * *.

rather than Sections 75 and 76, set forth the discipline procedures for bargaining unit members in Syracuse. Civil Service Law §§ 200-215; *NYC PBA*, 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, which included 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 erroneous. City's Brief, pp. 35. 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[9] 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. 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 because the 1960 Charter superseded the SCCL in all respects, including firefighter discipline. The SCCL is not in force in Syracuse and cannot be used to replace the negotiated procedures.

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

POINT II

THE CBA'S DISCIPLINE PROCEDURES REMAIN ENFORCEABLE AS PUBLIC POLICY FAVORS COLLECTIVE BARGAINING FOR FIREFIGHTER DISCIPLINE

The City contends that the Court has expressed a clear preference for municipal control over fire discipline. City's Brief, p. 12-17. Of course, this Court has never indicated this policy preference. As explained below, even if the Court determines that the SCCL was not superseded and that it somehow remains in force in Syracuse, the Agreement's negotiated procedures should govern firefighter discipline because the policy considerations weigh in favor of collective bargaining for fire discipline.

The Taylor Law imposes a broad duty on public employers "to negotiate collectively with [a certified or recognized] employee organization in the determination of, and administration of grievances arising under, the terms and conditions of employment of the public employees as provided in this article." CSL § 204(2). "As [the Court of Appeals] ha[s] recognized, the Taylor Law represents a 'strong and sweeping policy of the State to support collective bargaining.'" *Matter of City of Schenectady v. PERB*, 30 N.Y.3d 109, 114 (2017) (quoting *Matter of Cohoes City School Dist. v. Cohoes Teachers Ass'n*, 40 N.Y.2d 774, 778 (1976)). There is a "presumption … that all terms and conditions of employment are subject to mandatory bargaining [which] cannot easily be

overcome," *Matter of N.Y.C. Transit Auth. v. PERB*, 19 N.Y.3d 876, 809 (2012) (ellipsis in original, internal quotation marks omitted), PERB has long held "that discipline is a mandatory subject of negotiations," *City of Albany v. Helsby*, 56 A.D.2d 976, 977 (3d Dep't 1977). *See also Auburn Police Local 195 v. Helsby*, 62 A.D.2d 12 (3d Dep't 1978), *aff'd*, 46 N.Y.2d 1034 (1979); *City of Mt. Vernon v. Cuevas*, 289 A.D.2d 674, 674-75 (3d Dep't 2001) ("The Taylor Law requires good faith bargaining of all terms and conditions of employment, which include disciplinary procedures, which have been held to be a mandatory subject of collective bargaining.") (citations omitted).

1. *NYC PBA* Holds that Pre-Existing Statutes Governing Police Discipline Reflect an Established Public Policy of Civilian Control Over Police

The statutory presumption of negotiability can be overcome in two ways: (1) by "plain and clear, [even if not] express, prohibitions in the statute or decisional law," or (2) by considerations of "public policy." *NYC PBA*, 6 N.Y.3d at 573 (2006) (quoting *Cohoes*, 40 N.Y.2d at 778); *see Auburn Police*, 62 A.D.2d at 15. In *NYC PBA*, the Court considered whether police disciplinary procedures are a negotiable subject. On the first prong, it recognized that "the relevant statutes and case law are not so simple," and thus provided no "plain and clear… prohibition" for it to rely on. 6 N.Y.3d at 573. Accordingly, it turned to the second prong and

asked whether there is a "public policy strong enough to justify excluding police discipline from collective bargaining." *Id.*

In order to answer this question of public policy, the Court looked to a wide range of statutes and case law. First, it considered Civil Service Law §§ 75-76. Section 75 provides the default hearing procedure in disciplinary cases, and Section 76 governs appeals from those hearings. Those statutes may be "supplemented, modified, or replaced" by collective bargaining agreements. CSL § 76(4); *see Auburn Police*, 62 A.D.2d at 16-17 (holding that statutory language permitting "the state" to supplement § 75-76 does not prohibit other governments from doing the same). At the same time, the statutes contain a "grandfather" clause disavowing any "'repeal or modif[ication]' of pre-existing laws" governing disciplinary procedures. 6 N.Y.3d at 573 (quoting CSL § 76(4)); *see Mt. Vernon*, 289 A.D.2d at 675-76. The *NYC PBA* Court noted that "among the laws thus grandfathered are several that, in contrast to sections 75 and 76, provide expressly for the control of police discipline by local officials in certain communities." *Id.*

After quoting and describing several such laws, *see id.* at 573-74, the Court came to the crux of the matter, to wit, "the relative weight to be given to competing policies," specifically, "the Taylor Law policy favoring collective bargaining . . . [and] the policy favoring the authority of public officials over the police." *Id.* at 575-76. Statutory text alone was insufficient to resolve that policy question.

See id. at 573 ("In none of these cases did a statute exclude a subject from collective bargaining in so many words.").

a. *Public Policy Determinations Require a Broad Inquiry, Not Limited to Any One Statute*

In balancing the policy favoring collective bargaining against the policy favoring the authority of public officials over the police, the Court recognized the historic and current unique nature of the police. It cited *People ex rel. Masterson v. Police Comm'rs*, 110 N.Y. 494, 499 (1888), which held that the "government of a police force assimilates to that required in the control of a military body;" and *Silverman v. McGuire*, 51 N.Y.2d 228, 231 (1980), which relied on the "sensitive nature of the work of the police department." *NYC PBA*, 6 N.Y.3d at 575-76. The Court left no doubt that the statutory text was "obviously" insufficient to decide the case: its resolution turned not on what was "intended by the[] authors," but rather on whether there is "a policy so important that the policy favoring collective bargaining should give way." *Id.* Considering the statutes in the light of a long history of control over police and strong public policy reasons for continuing such control, the Court concluded that the policy favoring collective bargaining would have to yield.

The unique importance of governmental control over police disciplinary procedures has been reinforced in other cases. The Court has made clear that police officers hold a special role among public employees because they are

"[a]rmed . . . with dangerous or deadly weapons." *Pell v. Bd. of Ed.*, 34 N.Y.2d 222, 237 (1974). An employer's substantial discretion in disciplining officers therefore serves both to "protect both the community and the police force from dangers reasonably foreseen and risks which might become serious liabilities, or have grave consequences." *Id.* The Court is especially deferential in police discipline cases "involving criminal conduct by those entrusted to enforce the law." *Berenhaus v. Ward*, 70 N.Y.2d 436, 445 (1987); *see City of New York v. Patrolmen's Benev. Ass'n of the City of N.Y., Inc.* ("*NYC PBA II*"), 14 N.Y.3d 46, 59 (2009) (emphasizing importance of detecting "crimes" within the police department); *see also Alfieri v. Murphy*, 38 N.Y.2d 976 (1976) (emphasizing the "confidence which it is so important for the public to have in its police officers"). Finally, this Court is certainly aware of a number of high-profile interactions between police officers and members of the public, involving alleged civil rights violations, that have led to increased public scrutiny of police discipline. Corresponding allegations against firefighters are conspicuously absent.

Ultimately, the reason that the Court has removed police discipline from collective bargaining and arbitration where there is a "grandfathered" statute which remains in force is not merely to ensure the efficiency of the department's operations. Rather, it is to buttress the legitimacy of government itself, by ensuring effective control over police forces who have a unique authority to use

physical and deadly force against individuals, and a uniquely important duty to obey the rules they enforce against others.

b. *Sections 75-76 and Section 204 Are Logically and Legally Independent; Section 204 Contains No Grandfather Clause*

Although the Court cited §§ 75-76 in two paragraphs of *NYC PBA* in order to introduce other laws that "provide expressly for the control of police discipline by local officials," *see* 6 N.Y.3d at 573, it never cited those sections again in the opinion—except to note that *Montella v. Bratton*, 93 N.Y.2d 424 (1999), did "not involv[e] collective bargaining." *See id.* at 573-77. That is because a public employer's obligation to bargain derives not from §§ 75-76, but rather from the Taylor Law, § 204(2). *Matter of Rochester Police Locust Club v. City of Rochester*, 196 A.D.3d 74, 80-81 (4th Dept. 2021); *see Auburn Police*, 62 A.D.2d at 17 (citing *Binghamton Civ. Serv. Forum v. Binghamton*, 44 N.Y.2d 23, 28 (1978)); *Schenectady*, 30 N.Y.3d at 114-15 (explaining that current law remains in "harmon[y]" with *Auburn Police*).

Accordingly, while section 76(4) was the inspiration for the section 204(2) exception created by the Court, § 76(4)'s "grandfather" clause did *not* dictate the result. As the Fourth Department correctly recognized:

> the question before the Court of Appeals in *PBA*, *Wallkill* and *Schenectady* was not whether the respective municipality's refusal to collectively bargain over police discipline violated either Civil Service Law §§ 75 or 76 *in and of themselves*. Rather, the question in *PBA* and its

> progeny was whether the respective municipality's refusal to collectively bargain over police discipline violated the statutory obligation to collectively bargain over the "terms and conditions of [public] employment" as set forth in section 204(2). To decide *that* question, the Court of Appeals weighed the "tension between the strong and sweeping policy of the State to support collective bargaining under the Taylor Law . . . and a competing policy . . . favoring strong disciplinary authority for those in charge of police forces," and it ultimately crafted a judicial compromise: police discipline would be subject to collective bargaining, except in municipalities with a preexisting law that vested local officials with the sole and exclusive power to discipline police officers.

Rochester, 196 A.D.3d at 80-81 (quoting *NYC PBA*, 6 N.Y.3d at 571) (emphasis and alterations in original; internal citations omitted).

In short, *NYC PBA* "crafted a judicial compromise" that permitted municipalities with pre-existing "grandfathered" laws governing police discipline to continue to operate under those laws. But *NYC PBA* did not hold that all grandfathered laws addressing discipline for all other civil servants, including firefighters, preclude subsequent bargaining after the enactment of the Taylor Law. That would amount to holding that the Legislature, in enacting the Taylor Law, did not really mean to change anything. In reality, *NYC PBA* held only that pre-existing laws addressing police discipline remained in effect. Other public employees, implicating other public policies, such as firefighters, would have to be addressed in another case, on another day.

1. *Schenectady* Relies Entirely on *NYC PBA*'s Recognition of a Public Policy of Control Over Police

City of Schenectady v. PERB, 30 N.Y.3d 109 (2017), was in most respects a straightforward and unsurprising application of *NYC PBA*. About fifteen months after the Court's decision in *NYC PBA*, the Schenectady police department duly enacted a written order "which adopted new police disciplinary procedures different from those contained in the parties' expired collective bargaining agreement." *Id.* at 112-13. The department relied for authority to do so on the SCCL, under which the commissioner of public safety "is authorized and empowered to make, adopt, promulgate and enforce reasonable rules, orders and regulations for the . . . discipline . . . of [police] officers" and is given "cognizance, jurisdiction, supervision and control of the government, administration, disposition and discipline of the police department." *Id.* at 113 (quoting SCCL § 131, 133).

The Court held that, like the statutes at issue in *NYC PBA*, the SCCL "specifically commits police discipline to the commissioner" and thus "our decisions in *Matter of Patrolmen's Benevolent Assn.* and *Matter of Town of Wallkill* [19 N.Y.3d 1066 (2012)] control, and police discipline is a prohibited subject of bargaining in Schenectady." *Id.* at 115-16. The Court reaffirmed that those decisions relied on a "policy favoring strong disciplinary authority for those in charge of police forces." *Id.* at 114 (quoting *NYC PBA*, 6 N.Y.3d at 571). The Court emphasized that "[t]here is no express statutory conflict between" the SCCL

and the Taylor Law. *Id.* at 117. It explained that "the only conflict is in the policies that they represent, and this Court has already [in *NYC PBA*] resolved that policy conflict in favor of local control over police discipline." *Id.* The *Schenectady* Court had no occasion to re-examine the underlying policies, which had been already been authoritatively weighed by it in *NYC PBA*, because that case involved the same policy considerations involving police that this Court had already addressed.

2. *NYC PBA* and *Schenectady* Cannot Reasonably Be Extended to Firefighters Who Do Not Carry Weapons or Enforce Criminal Laws

NYC PBA and *Schenectady* stand for the proposition that, as a matter of public policy, statutes which predate the Taylor Law and specifically "govern[] disciplinary procedures for police officers" will be interpreted as representing a public policy of "local control over police discipline" that prevails over the Taylor Law. *Schenectady*, 30 N.Y.3d at 117; *see Wallkill*, 19 N.Y.3d at 1069; *Rochester*, 196 A.D.3d at 80-81. But neither *NYC PBA*, *Schenectady*, nor any other case from the Court holds that such pre-existing statutes will prevail over the Taylor Law in cases *not* concerning police officers.

a. *The Court Has Never Identified a Public Policy of Civilian Control Over Firefighter Discipline*

The Court has repeatedly affirmed that the exclusion of police discipline from collective bargaining is a "matter of policy," *NYC PBA*, 6 N.Y.3d at 572, that

turns on the Court's resolution of a "policy conflict in favor of local control over police discipline," *Schenectady*, 30 N.Y.3d at 117. Here, the City argues that this case is directly controlled by *Schenectady*, even though it obviously does not implicate a policy of local control over police discipline. Undeniably, if read in a vacuum, the text of SCCL §§ 131, 133 and 137 does not distinguish firefighters from police. But this Court has held that these statutes *cannot* be read in a vacuum.[10] "There is no express statutory conflict between" the SCCL and the Taylor Law that would require the same result for police and firefighters based on shared statutory language, independent of a careful policy consideration. *See Schenectady*, 30 N.Y.3d at 117.

b. *An Agency's Quasi-Military Nature Turns on the Weapons it Carries, Not the Clothes it Wears*

A more careful analysis of public policy shows that no public policy requires control over a fire department's disciplinary procedures in the same manner as police. The policy of control over police is derived from "the quasi-military nature of a police force" and "the sensitive nature of the work of the police department." *Id.* at 576. Firefighters do an extremely important job, at least as important as the

[10] As discussed above, if the text were all that mattered, the Court would not have looked beyond § 204's unambiguous command to negotiate "terms and conditions of employment" and its absence of any grandfather clause.

job performed by the police, but they do not carry military-style weapons or enforce criminal laws.

NYC PBA does not stand for the proposition that a uniform alone is the relevant policy factor. It is, of course, true that fire departments are organized in a hierarchical structure, modeled after the military, in which subordinates report to commanders. And, of course, firefighters do wear uniforms. But those details do nothing to explain why there is a public policy of control over fire department discipline that is so important as to overcome the express words of Taylor Law § 204(2) requiring public employers to negotiate over all "terms and conditions of employment." What justifies an additional level of civilian control over police officers—the removal of their disciplinary matters from both Section 75 and collective bargaining—cannot be merely their titles as "chiefs", "captains" and "lieutenants," or the fact that they wear uniforms which differentiate these ranks. Rather, it is the unique level of accountability and civilian control which the public is entitled to demand of those who are "entrusted to enforce the law," *see Berenhaus*, 70 N.Y.2d at 445, and who carry "deadly weapons" to do so, *see Pell*, 32 N.Y.2d at 237. A common-sense understanding of history shows that the power wielded by an armed force that patrols domestic streets can, unfortunately, be abused. But history is notably devoid of any example of a "banana republic" ruled with an iron fist by firefighters or alleged civil rights violations committed by

firefighters responding to a fire or other emergency. Quite obviously, quasi-military forces such as the police draw their power from weapons—not from uniforms, civil service titles and fire hoses.

It is true that firefighters, like police officers, are "important to the safety of the community." *See NYC PBA*, 6 N.Y.3d at 576 (quoting *Buffalo Police Benev. Ass'n v. City of Buffalo*, 4 N.Y.3d 660, 664 (2005)). But their position remains sharply different from that of police officers, for the simple reasons that firefighters are not "[a]rmed . . . with dangerous or deadly weapons," *Pell*, 32 N.Y.2d at 237, and are not "entrusted to enforce the law," *Berenhaus*, 70 N.Y.2d at 445. Ultimately, *most* public employees are "important to the safety of the community" in one way or another. Sanitation workers protect us from filth and disease; bus and train operators move us safely from place to place; health department workers help stem the spread of viruses and employees of this Court help ensure that justice is dispensed fairly and efficiently, as it must be in a safe and free society. Yet all these employees should have the right to negotiate issues related to their disciplinary procedures.

Recognizing that disciplinary procedures are a mandatory subject of negotiations has not stopped firefighters from being held accountable on the rare occasions that they commit misconduct. This Court should hold that the City be bound by its negotiated CBA with the Union concerning disciplinary procedures.

c. Von Essen *and* Roberts *Are Readily Distinguishable*

Two cases in which "grandfathered" statutes predating the Taylor Law have been held to affect the rights of firefighters are readily distinguishable. The first is *Von Essen v. N.Y.C. Civil Service Commission*, 4 N.Y.3d 220 (2005). There, the Court directly applied Civil Service Law § 76(4)'s savings clause to determine whether the Civil Service Commission had jurisdiction over a firefighter's appeal from discipline imposed pursuant to the New York City Administrative Code. *Id.* at 222-23. The Court concluded it did not, because Civil Service Law § 76(4) does not "repeal or modify any general, special, or local law or charter provision relating to the removal or suspension of officers or employees," and in particular did not repeal or modify the Administrative Code, under which discipline was "subject only to review by the courts under article 78." *Id.* at 223; *see* N.Y.C. Admin. Code § 15-113.

Unlike *NYC PBA*, *Schenectady*, and this case, *Von Essen* did *not* address the Taylor Law, CSL § 204(2), or the duty to negotiate. Rather, the *Von Essen* Court considered the jurisdiction of the Civil Service Commission to hear a disciplinary appeal under CSL § 76, when the underlying discipline was imposed not pursuant to § 75, but instead pursuant to N.Y.C. Admin. Code §14-115. *See Montella v. Bratton*, 93 N.Y.2d 424 (1999) ("the New York City Police Commissioner's power to discipline members of the force is governed by the Administrative Code, 'not by

section 75 of the Civil Service Law'") (quoting *Scornavacca v. Leary*, 38 N.Y.2d 583, 585 (1976)). That issue simply does "not involv[e] collective bargaining." *See NYC PBA*, 6 N.Y.3d at 575 (citing *Montella*, 93 N.Y.2d at 430).

The case before the Court does not present any question concerning the scope of the Civil Service Commission's jurisdiction.[11] Rather, this case presents a question concerning the scope of CSL § 204's bargaining obligation. And "[t]o decide *that* question," a court must engage in a careful balancing of conflicting policies: the policy favoring collective bargaining, and a purportedly competing policy favoring control over firefighters. *Rochester*, 196 A.D.3d at 80; *see NYC PBA*, 6 N.Y.3d at 574-76. The *Von Essen* court, operating within the literal confines of CSL § 76, had no occasion to balance those public policies.

The next case, *Roberts v. N.Y.C. Office of Collective Bargaining*, 113 A.D.3d 97 (1st Dep't 2013), held that New York City firefighters have no right to negotiate over a "zero tolerance" policy requiring immediate termination upon a positive drug test. But that case was decided under the New York City Collective Bargaining Law, which—unlike the Taylor Law—expressly states that a public employer's right to "take disciplinary action" is "not within the scope of collective

[11] Because the Union and City have "supplemented, modified, or replaced" Section 75 by agreeing to "final, conclusive, and binding" arbitration, no appeal to the Civil Service Commission would lie from an arbitral decision. Rather, such arbitration could only be challenged in a CPLR Article 75 proceeding.

bargaining." N.Y.C. Admin. Code § 12-307(b); *see Roberts*, 113 A.D.3d at 104-05 (relying on statutory text alone without policy considerations).

To the extent the First Department unnecessarily attempted to balance policies, its balancing test was flawed. It reasoned that a fire department, "like the police department, is a quasi-military organization demanding strict discipline of its workforce." *Id.* at 103; *see* R. 66. But the sole case it cited to support its treatment of firefighters as "quasi-military" not only predated *NYC PBA*, but had nothing to do with collective bargaining at all. *See id.* (citing *Gallagher v. City of N.Y.*, 307 A.D.2d 76, 82 (1st Dep't 2003) (holding that decision to promote EMTs to firefighters before considering outside applicants was not arbitrary or capricious, and did not violate state Constitution)). *Roberts* thus failed to seriously analyze the FDNY's "quasi-military" nature in light of the policy significance that term was given in *NYC PBA* by this Court.

The difference between police officers and firefighters is further underscored by *Roberts*' citation of *NYC PBA II*, 14 N.Y.3d 46, 59 (2009), which held that drug testing methodologies within the NYPD are not subject to collective bargaining. The Court emphasized the importance of deterring "wrongdoing within the NYPD—particularly crimes, such as illegal drug use." *Id.* That shows the peculiar public interest in ensuring that individuals "entrusted to enforce the law," *see Berenhaus*, 70 N.Y.2d at 445, are following the laws which they themselves

enforce. While it goes without saying that firefighters (like everyone else) ought to follow the law, their failure to do so does not implicate the same concerns of governmental legitimacy that arise when police commit crimes such that the policy in favor of collective negotiations should give way to local control over firefighter discipline.

In sum, *NYC PBA* and *Schenectady* rely on unique features of police that overcome the otherwise "strong and sweeping policy of the State to support collective bargaining under the Taylor Law." *See Schenectady*, 30 N.Y.3d at 114. Those cases have emphasized that, whatever pre-existing law provides authority over police—be it N.Y.C. Charter § 434(a), *see NYC PBA*, 6 N.Y.3d at 574; the Rockland County Police Act, *see id.*; Town Law § 155, *see Wallkill*, 19 N.Y.3d at 1069; or the Second Class Cities Law, *see Schenectady*, 30 N.Y.3d at 115-16—that law is not in "express statutory conflict" with the Taylor Law. *See id.* at 117. The conflict arises from the "policies that [those laws] represent," and with respect to police, the Court "has already resolved that policy conflict in favor of local control over police discipline." *Id.* The Court should now hold that there is no "public policy strong enough to justify excluding [firefighter] discipline from collective bargaining." *Cf. id.* at 115 (quoting *NYC PBA*, 6 N.Y.3d at 573).

CONCLUSION

For the above-stated reasons and authorities, it is respectfully submitted that the Appellate Division's Order be affirmed. The provisions of the CBA between the Union and City remain valid and the discipline procedures of the SCCL do not govern the parties in this case.

DATED: August 10, 2022
Syracuse, New York

BLITMAN & KING LLP

By: _____

Nathaniel G. Lambright, Of Counsel
Attorneys for Plaintiff-Respondent
Franklin Center, Suite 300
443 North Franklin Street
Syracuse, New York 13204
Telephone: (315) 422-7111
Email: nglambright@bklawyers.com

NEW YORK STATE COURT OF APPEALS
PRINTING SPECIFICATIONS STATEMENT

Pursuant to 22 NYCRR Part 500.13

The foregoing brief was prepared on a computer using Microsoft Word. A proportionally spaced typeface was used, as follows:

Name of typeface:	Times New Roman
Point size:	14
Line spacing:	Double

The total number of words in the 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, or any authorized addendum containing statutes, rules, regulations, etc. is 11,551.

Dated: August 10, 2022

Signed: _____

Nathaniel G. Lambright, Of Counsel
BLITMAN & KING LLP
Attorneys for Plaintiff-Respondent
443 North Franklin Street, Ste. 300
Syracuse, NY 13204
Tel: (315) 422-7111
nglambright@bklawyers.com