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State of New York Public Employment Relations Board Decisions from August 23, 2013

New York State Public Employment Relations Board

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46 PERB ¶3025
B/R 44-4566

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SCHENECTADY POLICE BENEVOLENT ASSOCIATION,

Charging Party,

-and-

CASE NO. U-27887

CITY OF SCHENECTADY,

Respondent.

CITY OF SCHENECTADY,

Charging Party,

-and-

CASE NO. U-27980

SCHENECTADY POLICE BENEVOLENT ASSOCIATION,

Respondent.

GLEASON, DUNN, WALSH & O'SHEA (MICHAEL P. RAVALLI of counsel), for Schenectady Police Benevolent Association

GIRVIN & FERLAZZO, P.C. (JAMES E. GIRVIN and CHRISTOPHER P. LANGLOIS of counsel), for City of Schenectady

BOARD DECISION AND ORDER

These cases come to the Board on exceptions by the City of Schenectady (City) to a decision by the Administrative Law Judge (ALJ) with respect to an improper practice charge, as amended, filed by the Schenectady Police Benevolent Association (PBA) (Case No. U-27887) and an improper practice charge filed by the City (Case No.

U-27890).[1] In Case No. U-27887, the PBA alleges that the City violated §§209-a.1(d) and (e) of the Public Employees' Fair Employment Act (Act) when it announced it would no longer apply the disciplinary procedures in Article VIII of the parties' expired collectively negotiated agreement (agreement) and Civ Serv Law §75, and when it unilaterally issued General Order 0-43 outlining a new disciplinary procedure for PBA unit members. The City alleges in Case No. U-27890 that the PBA violated §209-a.2(b) of the Act when it submitted proposals relating to police discipline for consideration by a public arbitration panel on the ground that certain provisions of the Second Class Cities Law render the subject matter a prohibited subject of negotiations under the Act.

Forgoing presentation of witnesses at a hearing, the parties submitted the case to the ALJ on stipulated facts, along with a five volume stipulated record containing joint exhibits, PBA exhibits and City exhibits. Following consideration of the record, and the parties' respective legal arguments, the ALJ issued a decision sustaining PBA's charge that the City violated §209-a.1(d) of the Act, and dismissing the City's charge. In reaching his decision, however, the ALJ did not address PBA's allegation that the City's conduct also violated §209-a.1(e) of the Act.[2]

EXCEPTIONS

In its exceptions, the City contends that the ALJ erred in sustaining PBA's charge and dismissing its charge because the subject of police discipline is a prohibited subject of negotiations based upon Second Class Cities Law, Article 9 and the Court of

[1] 44 PERB ¶4566 (2011). Following the ALJ's decision, the parties were granted over a dozen extensions on consent to file exceptions and responses. In addition, the Board granted the parties additional extensions to brief the relevancy of the Court of Appeals' decision in *Matter of Town of Wallkill v CSEA*, 19 NY3d 1066, 45 PERB ¶7508 (2012) to their respective arguments. The need for the requested extensions reflects the complexity of the legal issues presented.

[2] 44 PERB ¶4566 at 4741, n. 96.

Appeals' decisions in *Matter of Patrolmen's Benevolent Association of the City of New York, Inc, v New York State Public Employment Relations Board* (hereinafter, *NYCPBA*)[3] and *Matter of Town of Wallkill v Civil Service Employees Association, Local 1000, AFSCME, AFL-CIO*[4] (hereinafter *Wallkill*). According to the City, police discipline is a prohibited subject because the Second Class Cities Law, Article 9 commits police disciplinary authority to City officials and that law pre-dates the enactment of Civ Serv Law §§75 and 76. Furthermore, it asserts that the ALJ erred in failing to determine whether the Second Class Cities Law, Article 9 governs police discipline in the City and whether *NYCPBA* is applicable to a general law such as the Second Class Cities Law. Finally, it challenges the ALJ's conclusion that the Act is a superseding law under Second Class Cities Law, §4 following our decision in *City of Albany*.[5]

PBA supports the ALJ's decision finding that the City violated §209-a.1(d) of the Act, and dismissing the City's charge. It asserts that the ALJ correctly concluded that the Act constitutes a superseding law pursuant to Second Class Cities Law, §4. In the alternative, it contends that the Second Class Cities Law was superseded when the City adopted a structure of government pursuant to the Optional City Government Law,[6] and

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[3] 6 NY3d 563, 39 PERB ¶7006 (2006).

[4] *Supra* note 1.

[5] 42 PERB ¶3005 (2009).

[6] L 1914, c 444. Stipulated Record, Joint Exhibit 18.The Optional City Government Law was repealed in 1939. L 1939, c 765. The legislation provided, however, that an adopted plan by a city prior to January 1, 1940 "will be in force in whole or in part, in such city, such plan and all portions of said statute applicable to said plan are hereby continued in full force and to the same effect as to such city until repealed or superseded by a local law enacted pursuant to the city home rule law. L 1939, c 765, §1. Stipulated Record, Joint Exhibit 20.

when the Legislature enacted Unconsolidated Law §891.[7] It also asserts that City police officers are subject to discipline under Civ Serv Law §§75 and 76, and that alternatives to those procedures are mandatorily negotiable under the Court of Appeals' decision in *Auburn Police Local 195 v Helsby* (hereinafter *Auburn*).[8]

FACTS

The City and the PBA were parties to a negotiated agreement for the period January 1, 1969-December 31, 1970, which included an article entitled "Disciplinary Action" that stated:

> A. In the event that an investigation results in the institution of disciplinary action, the Association shall be free to participate at all stages of the proceedings if it so elects, and shall be provided with copies of the charges and specifications, recommendations, and decisions.
>
> B. In the event the Association concludes that an employee has been unjustly punished or dismissed by the City Manager, it may appeal such judgment to arbitration as provided below. The Board of Arbitrators shall review the justness of the punishment imposed, upon the record made before the hearing officer.
>
> C. No new testimony or evidence shall be received by the Board of

[7] L 1940, c 834.

[8] 46 NY2d 1034, 12 PERB ¶7006 (1979). We deny the PBA's request in its response that we determine its allegation that the City's actions also violated §209-a.1(e) of the Act, which the ALJ declined to rule on. Under §213.3 of our Rules of Procedure (Rules), a party that receives exceptions from an ALJ's decision has the right to serve and file a response and/or cross-exceptions within the stated timeframe. In the present case, the PBA did not file cross-exceptions to the ALJ's declination to rule on the allegation that the City's conduct violated §209-a.1(e) of the Act. By failing to file cross-exceptions with respect to that issue, it has not been preserved. Rules, §213.2(b)(4); *Town of Orangetown*, 40 PERB ¶3008 (2007), *confirmed sub nom. Matter of Town of Orangetown v New York State Pub Empl Rel Bd*, 40 PERB ¶7008 (Sup Ct Albany Co 2007); *County of Sullivan and Sullivan County Sheriff*, 41 PERB ¶3006 (2008); *Town of Wallkill*, 42 PERB ¶3006 (2009).

> Arbitrators. If the Board of Arbitrators decides that new evidence or testimony should be heard, it shall refer the case back to the City Manager. If the Board of Arbitrators decides that the determination was erroneous or that the punishment imposed was unduly harsh or severe under all the circumstances, it may modify the finding and punishment accordingly. Nothing herein contained shall be deemed to limit the rights of the employee provided for in Article 5 of the Civil Service Law.[9]

Over the next three decades, the parties entered into a series of successor agreements that included slight modifications to the disciplinary article. The negotiated disciplinary provisions, however, have remained essentially unchanged since 1969.[10]

The PBA and the City are parties to an expired agreement for the period January 1, 1997-December 31, 1999.[11] The parties have stipulated that the terms of the expired agreement remain in effect pursuant to §209-a.1(e) of the Act.[12] The disciplinary article of that agreement states:

DISCIPLINARY ACTION

> A. In the event that an investigation results in the institution of disciplinary action, the Association shall be free to participate at all stages of the proceedings if it so elects, and shall be provided with copies of the charges and specifications, recommendations, and decisions.
>
> B. In the event the Association concludes that an employee has been unjustly punished or dismissed by the Mayor, it may appeal such judgment to arbitration as provided below. The Arbitrator shall review the justness of the punishment imposed, upon the record made before the hearing officer. Either party shall be entitled to file briefs with the Arbitrator.

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[9] Stipulated Record, PBA Exhibit 1.

[10] Stipulated Facts, ¶7, PBA Exhibits 3, 5, 7, 9, 11, 13 and 14; Stipulated Record, Joint Exhibit 8.

[11] Stipulated Record, Joint Exhibit 8.

[12] Stipulated Facts, ¶4.

> C. No new testimony or evidence shall be received by the Arbitrator. If the Arbitrator decides that new evidence or testimony should be heard, he shall refer the case back to the Mayor. If the Arbitrator decides that the determination was erroneous or that the punishment imposed was unduly harsh or severe under all the circumstances, he may modify the finding and punishment accordingly. Nothing herein contained shall be deemed to limit the rights of the employee provided for in Article 5 of the Civil Service Law.[13]

Since the expiration of the January 1, 1997-December 31, 1999 agreement, the City and PBA have been parties to an interest arbitration for the period January 1, 2000-December 31, 2001, a memorandum of agreement for the period January 1, 2002-December 31, 2005, and an interest arbitration award for the period January 1, 2006-December 31, 2007.[14]

During the course of negotiations between the parties in 2000 and 2002, the City was unsuccessful in persuading PBA to agree to modify the disciplinary article through inclusion of the following:

> All members of the bargaining unit shall only be disciplined in accordance with Sections 75 and 76 of the New York State Civil Service Law.[15]

Between 1969 and its unilateral action in 2007, the City issued disciplinary charges against PBA unit employees and imposed discipline pursuant to Civ Serv Law §75 and the disciplinary article of the parties' agreements.[16] Disciplinary hearings were conducted by individuals designated by the City and the City issued disciplinary

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[13] Stipulated Record, Joint Exhibit 8, R. 40-41.

[14] Stipulated Facts, ¶3; Stipulated Record, Joint Exhibits 8, 9 and 10.

[15] Stipulated Record, PBA Exhibits 24-A and 24-B.

[16] Stipulated Facts, ¶¶10, 12; Stipulated Record, PBA Exhibits 17, 19 and 20.

determinations pursuant to Civ Serv Law §75.[17] During the same period, a City disciplinary determination was challenged through the filing of a demand for arbitration and the submission of the issues to an arbitrator consistent with the negotiated disciplinary article.[18]

In a press release dated June 4, 2007, the City unilaterally announced the implementation of significant changes in police disciplinary procedures based upon the Court of Appeals' decision in *NYCPBA*.[19] Those changes included replacing the negotiated disciplinary procedures for PBA unit employees and designating the Public Safety Commissioner as the trier of fact with the authority to issue final disciplinary determinations on behalf of the City, which would be subject to judicial review.

In the most recent round of negotiations, the PBA proposed replacing the disciplinary article of the expired agreement with a new set of disciplinary provisions.[20] Under the PBA proposals, the City would need just cause to discipline a unit employee and an arbitrator would determine the employee's guilt or innocence and the appropriateness of the City's proposed penalty. Following an impasse in their negotiations, the PBA filed a petition for interest arbitration on November 2, 2007.[21]

On November 30, 2007, the City issued its first notice of discipline against a PBA unit member premised upon Second Class Cities Law, §137 and the City of

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[17] Stipulated Facts, ¶11 and 13; Stipulated Record, PBA Exhibits 18 and 20.

[18] Stipulated Facts, ¶14; Stipulated Record, PBA Exhibits 21 and 22.

[19] Stipulated Record, R.19.

[20] Stipulated Facts, ¶20; Stipulated Record, Joint Exhibit 3.

[21] Stipulated Record, Joint Exhibit 1, ¶5; Joint Exhibit 2, ¶5.

Schenectady Charter, §C4-1(C).[22] On April 4, 2008, the City imposed Police Department General Order 0-43, which stated that all disciplinary proceedings against sworn police officers would be subject to Second Class Cities Law, §137. In addition, General Order 0-43 outlined new procedures for the investigation and determination of alleged acts of misconduct and incompetence by police personnel.[23] It is undisputed that the City imposed the changes to the police disciplinary procedure without negotiations with the PBA.[24]

DISCUSSION

We begin with the legal issues presented by the City in its exceptions, and the PBA in its response, concerning whether the subject of discipline of PBA unit members is a prohibited subject of negotiations under *NYCPBA* and *Wallkill*. To determine that issue requires an examination of state and local legislative history external to the Act to determine whether the subject of disciplinary procedures for City police officers is a prohibited subject of negotiations. The City contends that the Second Class Cities Law, Article 9 is a law, which under the Court of Appeals' decisions in *NYCPBA* and *Wallkill*, demonstrates a New York public policy concerning police discipline that outweighs any obligation under §209-a.1(d) of the Act to negotiate the subject with the PBA. In its response, the PBA asserts that the Second Class Cities Law has been superseded by the Act as well as subsequent state and local legislation.

In *NYCPBA*, the Court found certain special state laws enacted prior to Civ Serv Law §§75 and 76 granting police disciplinary authority to local officials demonstrated a

[22] Stipulated Facts, ¶17, Stipulated Record, PBA Exhibit 23.

[23] Stipulated Record, R.20-22.

[24] Stipulated Facts, ¶18.

state public policy favoring strong disciplinary authority over police officers that outweighs New York's strong and sweeping policy supporting collective negotiations under the Act. At the same time, the Court reaffirmed its holding in *Auburn*[25] that where Civ Serv Law §§75 and 76 disciplinary procedures are applicable to police officers, a proposal to negotiate a grievance/arbitration provision for police discipline is a mandatory subject of negotiations under the Act.

In *Wallkill*, the Court concluded that a general law, Town Law §155, which commits police disciplinary authority to local officials and pre-dates Civ Serv Law §§75 and 76, prohibits negotiations concerning police discipline in localities covered by that general law.[26] In reaching its decision in *Wallkill,* the Court implicitly rejected our analysis of the text and legislative history of the Act directly related to the negotiability of police disciplinary procedures delineated in our related decision,[27] and presented to the Court in our *amicus curiae* brief. In our decision and *amicus curiae* brief, we set forth the text and history of a series of enacted amendments to §209.4 of the Act that we believe are directly relevant to determining legislative intent concerning the negotiability

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[25] *Supra* note 8.

[26] Prior to *Wallkill*, we had incorrectly interpreted *NYCPBA* as being limited to special laws concerning police discipline that had been enacted prior to Civil Service Law §§75 and 76. *See Tarrytown PBA*, 40 PERB ¶3024 (2007); *City of Albany*, 42 PERB ¶3005 (2009). In light of *Wallkill*, it is clear that a general law can make police discipline a prohibited subject of negotiations in a particular jurisdiction under the reasoning set forth in *NYCPBA*.

[27] *Town of Wallkill* 42 PERB ¶3017 (2009) *confirmed sub nom. Matter of Town of Wallkill v New York State Pub Empl Rel Bd*, 43 PERB ¶7005 (Sup Ct Albany County 2010). *See also*, *City of Albany*, *supra* note 5.

of police disciplinary procedures.[28] In light of the Court's decision in *Wallkill*, repeating the relevant text and applicable legislative history of the Act in this decision would be superfluous.

The holdings in *NYCPBA* and *Wallkill* were not premised upon the text and history of the Act. Instead, they were based upon pre-existing statutes concerning police discipline in local governments, enacted prior to the advent of public sector collective bargaining in New York, and Civ Serv Law §76.4, which states, in part,"[n]othing contained in section seventy-five or seventy-six of this chapter shall be construed to repeal or modify any general, special or local law or charter provision relating to the removal or suspension of officers or employees in the competitive class of the civil service of the state or any civil division."

The enactment of Civil Service Law §76.4 was part of a 1958 recodification wherein the provisions of former Civ Serv Law §22 were renumbered as Civ Serv Law §§75 and 76.[29] Although the recodification took place following issuance of an executive order by New York City Mayor Robert F. Wagner, Jr. granting collective bargaining rights to municipal employees in mayoral departments and agencies, the 1958 legislation did not address the issue of negotiations.[30]

The language from Civ Serv Law §76.4 relied upon in *NYCPBA* and *Wallkill* derives from former Civ Serv Law §22.3, which was added in 1941 by legislation that

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[28] *See* L 1995, c 432; L 1995, c 447; L 2001, c 586; L 2002, c 220; L 2002, c 232; L 2003, c 641; L 2003, c 696; L 2004, c 63; L 2005, c 737; L 2007, c 190; L 2008, c 179; L 2008, c 234; §§209.4(e), (f), (g), (h) and (i) of the Act.

[29] L 1958, c 790.

[30] *See* Exec Order. No 49 (Mar. 31, 1958), reprinted in *Labor Relations Program for Employees of the City of New York,* 12 Indus. & Lab Rel Rev 371, 618-25 (1959).

extended to all competitive class employees working for the "state, or any civil division or city thereof," the identical procedural protections against discipline in public employment that previously existed only for employees who were honorably discharged veterans and volunteer firefighters.[31]

In 1941, former Civ Serv Law §22.3 stated:

> Nothing herein contained shall be construed to repeal or modify any general or special law relating to the removal or suspension of officers or employees in the competitive class of the civil service.[32]

The existence of Civ Serv Law §22.3 prior to the 1958 recodification raises an unresolved issue regarding the precise chronological borderline intended by the Court in *NYCPBA* and *Wallkill* in determining police discipline negotiability. The precise location of that borderline is further complicated by the fact that police officers who are honorably discharged veterans and volunteer firefighters have been entitled to Civ Serv Law disciplinary procedures since 1909, well before the enactment of many general and special police disciplinary laws. The role that this century-old public policy choice, restricting the right of local governments to discipline police officers who are honorably discharged veterans and volunteer firefighters, should play in determining negotiability

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[31] L 1941, c 853. The grant of procedural protections against discharge and discipline of veterans and volunteer firefighters was first enacted as part of the Civil Service Law of 1909, L 1909, c 15. In 1924, the Legislature granted competitive class employees a right to written disciplinary notice and the opportunity to respond in writing. L 1924, c 612.

[32] L 1941, c 853, §§1and 3.

of police discipline under the Act was not addressed in *NYCPBA* and *Wallkill.* [33]

Another general law applicable to police discipline in existence at the time of the 1941 amendment to Civ Serv Law §22.3 is Unconsolidated Law §891, which states:

> A policeman serving in the competitive class of civil service in any city, county, town or village of the state, *any provision of law, rule or regulation to the contrary notwithstanding,* shall not be removed from his position except for incompetency or misconduct shown after a hearing upon due notice upon stated charges, and with the right to such policeman to be represented by counsel at such hearing and to a judicial review in accordance with the provisions of article seventy-eight of the civil practice act. The burden of proving incompetency or misconduct shall be upon the person alleging the same. Hearings upon charges pursuant to this act shall be held by the officer or body having the power to remove the person charged with incompetency or misconduct or by a deputy or other employee of such officer or body designated in writing for that purpose. In case a deputy or other employee is so designated, he shall, for the purpose of such hearing, be vested with all the powers of such officer or body, and shall make a record of such hearing which shall, with his recommendations, be referred to such officer or body for review and decision.[34] (Emphasis added).

A third law that pre-dates the amendment to former Civ Serv Law §22.3 is the Second Class Cities Law, enacted in 1906[35] and amended in 1909.[36] The Second Class Cities Law grants police disciplinary authority to the Commissioner of Public

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[33] Nevertheless, in *City of Middletown*, 42 PERB ¶3022 (2009), *reversed sub nom. Matter of City of Middletown v City of Middletown PBA*, 43 PERB ¶7002 (Sup Ct, Albany County 2010), 81 AD3d 1238, 44 PERB ¶7003 (3d Dept 2011) the Appellate Division, Third Department rejected our analysis that negotiations to replace Civ Serv Law §75 disciplinary procedures for honorably discharged veterans and volunteer firefighters in a unit of municipal police officers were mandatorily negotiable.

[34] L 1940, c 834.

[35] L 1906, c 473.

[36] L 1909, c 55, Stipulated Record, Joint Exhibit 15.

Safety of a city of the second class. Those powers include the power to adopt and enforce police departmental rules, to hold hearings and determine disciplinary charges against police officers, and to impose punishments.[37] The law also codifies a judicial appeal procedure from disciplinary determinations by a Commissioner of Public Safety substantially at variance with the appeal procedure set forth in Civ Serv Law §§76.1-76.3.[38]

The City contends in the present case that it did not violate §209-a.1(d) of the Act because it had a right to unilaterally revert to the provisions of the Second Class Cities Law, which the City asserts meets the criteria under *NYCPBA* and *Wallkill* for rendering the subject of police disciplinary procedures a prohibited subject of negotiations: the law grants police disciplinary authority to City officials and it pre-dates the enactment of Civ Serv Law §§75 and 76. While we agree with the City that the Second Class Cities Law is a general law subject to Civ Serv Law §76.4 and former Civ Serv Law §22.3, we are not persuaded that the Second Class Cities Law renders police discipline a prohibited subject under the Act.

A. The Second Class Cities Law Has Been Superseded by the Act

Second Class Cities Law §4 states:

> 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.* (Emphasis added).

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[37] Second Class Cities law §§2, 131, 137.

[38] Second Class Cities Law, §138.

In *City of Albany*,[39] we concluded that the enactment of the Act in 1967 and its subsequent amendments superseded the Second Class Cities Law by requiring police discipline to be subject to collective negotiations and the impasse procedures under the Act. Fundamentally, the mandate of §204.1 of the Act requiring an employer to negotiate with an employee organization over terms and conditions of employment is inconsistent with the power and unilateral authority granted the Commissioner of Public Safety under the Second Class Cities Law.[40]

We are not persuaded by the City's argument that we should reverse *City of Albany* based upon *NYCPBA* and *Wallkill*. Neither *NYCPBA* nor *Wallkill* presented the Court with a pre-existing law with a broad supersession provision or a law, as the City argues, granting a City police officer "greater protection" against discipline than under the Civil Service Law.[41] Furthermore, in the City of Albany, which is a city of the second class,[42] and where Civ Serv Law §75 is the applicable disciplinary procedure,[43] police discipline has been found to be mandatorily negotiable under the Act.[44] Police

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[39] *Supra* note 5.

[40] *See Duci v Roberts*, 65 AD2d 56 (3d Dept 1978).

[41] Supplemental Brief in Support of the Exceptions filed by the City of Schenectady, p. 24.

[42] *People ex rel Folk v McNulty*, 279 NY 563 (1939).

[43] *See Matter of Marsh v Hanley*, 50 AD2d 687 (3d Dept 1975); *Matter of DeMarco v City of Albany*, 75 AD2d 674 (3d Dept 1980).

[44] *City of Albany*, 9 PERB ¶3009 (1976), *confirmed sub nom., City of Albany v Helsby* 56 AD2d 976, 10 PERB ¶7006 (3d Dept 1977); *City of Albany*, 7 PERB ¶3078 (1974), 7 PERB ¶3079 (1974), *confirmed sub nom., City of Albany v Helsby*, 48 AD2d 998, 8 PERB ¶7012 (3d Dept 1975), *affd* 38 NY2d 778, 9 PERB ¶7005 (1975). *See also, De Paulo v City of Albany*, 49 NY2d 994 (1980)(rejecting the City of Albany's effort to vacate a police disciplinary arbitrator's decision and award on public policy grounds).

discipline in the City of Troy was also once subject to the Second Class Cities Law,[45] and is now subject to Civ Serv Law §75 procedures.[46]

In its brief, the City does not direct us to any relevant authority for interpreting the phrase "or otherwise changed, repealed superseded pursuant to law" in Second Class Cities Law §4. The wording of that phrase demonstrates that "superseded" was intended to mean something other than "changed" or "repealed" and it anticipated supersession by state and local laws. Simply stated, the text of Second Class Cities Law §4 reveals a statutorily planned obsolescence for that law resulting from subsequent enactment of state or local legislation. Finally, we note that adoption of the City's argument would require us to treat as a nullity decades-old judicial precedent under the Act finding that police discipline in a second class city is a mandatory subject, a result we cannot reach without a contrary judicial interpretation of the interplay between the Second Class Cities Law §4 and the Act.

B. The Applicability of Civ Serv Law §§75 and 76 to PBA Unit Members

The subject of police discipline might also be mandatorily negotiable under *Auburn* because Civ Serv Law §§75 and 76 appear applicable to PBA unit members based upon the City's prior adoption of a form of government under the Optional City Government Law[47] and precedent from the Appellate Division, Third Department.

The Optional City Government Law granted a second class city the choice of

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[45] *In re O'Rourke*, 254 AD 917 (3d Dept 1938).

[46] *City of Troy v Troy Police Benev and Protective Assn*, 78 AD2d 925 (3d Dept 1980); *Nuttall v City of Troy*, 99 AD2d 916 (3d Dept 1984).

[47] Stipulated Facts, ¶27; L 1914, c 444, Stipulated Record, Joint Exhibit 18.

adopting as its charter one of seven plans of local government structure.[48] In 1934, the City adopted, effective January 1, 1936, a form of city government known as Plan C under the Optional City Government Law.[49] The legal effect of the City's adoption of Plan C was that the plan became the City's new charter.[50] Optional City Government Law §46, which is applicable to a City that adopts Plan C,[51] states:

> Civil Service. All appointments, promotions, removals and changes in status in the civil service of the city shall be made in accordance with the provisions of the civil service law. The Legislative employees of the city shall be the city clerk and the sergeant-at-arms of the council.

In *Matter of Mountain v City of Schenectady (Mountain),*[52] the court concluded that a City police officer's entitlement to back wages was subject to the limitation set forth in Civ Serv Law §75.3 after the City's disciplinary action under that statute was judicially vacated on the merits.[53] The court's holding in *Mountain* strongly suggests that Civ Serv Law §75, and not the Second Class Cities Law, is applicable to the City's police force. Although firefighters, like police officers, are also subject to the Second

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[48] *Johnson v Etkin*, 279 NY 1 (1938).

[49] Stipulated Facts, ¶27; L 1914, c 444, Stipulated Record, Joint Exhibit 18.

[50] *Cleveland v City of Watertown*, 222 NY 159 (1917).

[51] *See Matter of Cary v Council of City of Binghamton*, 290 NY 247 (1943)(harmonizing Optional Government Law §47 and the Civil Service Law concerning the removal of city civil service commissioners).

[52] 100 AD2d 718 (3d Dept 1984), *app dismissed* 63 NY2d 603 (1984), *lv app dismissed*, 63 NY2d 769 (1984), *app denied*, 64 NY2d 607 (1985).

[53] *Cf. Matter of Doe v City of Schenectady*, 84 AD3d 1455 (3d Dept 2011) (where the Appellate Division, Third Department stated in dicta "[i]ndeed, the City of Schenectady already has the right to conduct public police disciplinary hearings under Second Class Cities Law ¶137."). We are not able to harmonize that sentence with the decision in *Matter of Mountain v City of Schenectady, supra* note 52, because Second Class Cities Law ¶137 does not include a back pay provision.

Class Cities Law §137, the same court in *Matter of Thomas v City of Schenectady (Thomas)*[54] sustained Civ Serv Law §75 misconduct charges against a City firefighter but found that he was entitled to back pay for the period of his suspension that exceeded 30 days, the maximum pre-determination suspension permitted under Civ Serv Law §75.3. Our tentative conclusion that Civ Serv Law §§75 and 76 are applicable to PBA unit members is tempered by earlier appellate precedent applying Second Class Cities Law §§137 and 138 to City police discipline.[55] Those decisions, however, pre-date the Legislature's grant to us of improper practice jurisdiction under the Act.[56]

We note that the parties' agreements and practices since 1969 indicate their understanding that Civ Serv Law §75 applies to the discipline of City police officers. Their agreements have consistently stated that PBA unit members have rights "provided for in Article 5 of the Civil Service Law" which includes Civ Serv Law §§75 and 76, and the City has consistently followed those procedures and the disciplinary article of the agreements when disciplining PBA unit members prior to the City's unilateral action in the present case. Nevertheless, an arguably decades-old mutual legal mistake by the parties is not binding upon us or the courts. [57]

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[54] 161 AD2d 940 (3d Dept 1990).

[55] *See Matter of Stisser v Roan*, 26 AD2d 199 (3d Dept 1966) *affirmed Matter of Stisser v. Shapiro* 23 NY2d 715 (1968); *Matter of Semerad v City of Schenectady*, 27 AD2d 673 (3d Dept 1967); *In re Caputo*, 3 AD2d 484 (3d Dept 1957). *See also*, *Matter of Doe v. City of Schenectady*, *supra* note 55 (where the Appellate Division stated in *dicta* "[i]ndeed, the City of Schenectady already has the right to conduct public police disciplinary hearings under Second Class Cities Law §137."); *In re Skinkle*, 249 NY 172 (1928)(holding that Second Class Cities Law §138 is the sole mechanism for judicial review of police discipline in a second class city, which excludes a certiorari review).

[56] L 1969, c 24, §3.

[57] *City of Middletown*, *supra* note 33.

A final determination concerning whether Civ Serv Law §§75 and 76 is applicable to the entire PBA unit will have to await judicial clarification of the relationship between the Second Class Cities Law §§137 and 138 and Optional City Government Law §46, and judicial harmonization of appellate precedent concerning the statutory disciplinary procedures applicable to the City police force.

C. Supersession of the Second Class Cities Law by Other Laws

Next, we turn to the PBA's alternative arguments that the Second Class Cities Law was superseded by other laws. Our analysis starts with the PBA's reliance upon Unconsolidated Law §891. The primary purpose of Unconsolidated Law §891 was to ensure uniformity regarding police discipline in all cities, counties, towns and villages. In *Matter of Healey v Bazinet (Bazinet)*[58] the Court of Appeals held that the law superseded the police disciplinary provisions of the City of Glens Falls charter, enacted by the Legislature in 1908.[59]

The legislative history of Unconsolidated Law §891 reveals that it was introduced at the request of the New York State Police Conference for the purpose of creating a uniform police disciplinary system for the entire State.[60] The fact that a police officer employee organization spearheaded legislation to protect its members against discipline was not unique. Prior to the enactment of the Act, employee associations "sought to

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[58] 291 NY 430 (1943).

[59] L 1908, c 29.

[60] Mem. of Nathan R. Sobel., Bill Jacket, L 1940, c 834, at 31-32; Mem. of New York State Pol Conf, Bill Jacket at 24-27.

protect and improve the status of their members primarily through legislation.... "[61]

The bill was signed into law by Governor Lehman despite the recommendation of his Counsel, Nathan R. Sobel, that it be vetoed. Mr. Sobel's memorandum stated, in part:

> Although I believe that there is a great distinction between policemen and other civil service employees, I nevertheless, recommend that the bill be vetoed. I feel that each municipality should have the right to determine just what review the policemen is entitled to and that there is no urgency for a uniform law. [62]

The New York State Civil Service Commission also recommended a veto contending that: police officers do not deserve the "special reward" of statutory protections against discipline that already existed only for honorably discharged veterans and volunteer firefighters under Civ Serv Law §22; the proper administration of police departments may be impaired by the undermining of discipline and efficiency; there are pre-existing statutes with respect to police discipline for certain city, village and town police departments; and "[l]ocal conditions should be treated by local remedies and not by a general law. It is advisable to maintain this policy."[63] Employer organizations and others urged disapproval of the legislation because of pre-existing police discipline statutes for particular localities, concerns that the law would impair

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[61] 1971-72 Report, The Joint Legislative Committee on the Taylor Law (Public Employees' Fair Employment Act), State of New York Legislative Document (1972) – Number 25, p. 8.

[62] Mem. of Nathan R. Sobel., Bill Jacket, L 1940, c 834, at 32.

[63] Approved Mem from New York State Civ Serv Comm, L 1940, c 834, at 30.

police discipline, and that police officers should not be granted the same procedural protections as veterans and firefighters.[64]

Based upon the Court of Appeals decision in *Bazinet*, and the text and legislative history of Unconsolidated Law §891, we would be hard pressed to conclude that the Second Class Cities Law was not superseded by that 1940 law or that it is not relevant to determining whether police discipline is a mandatory subject between the City and the PBA. Such conclusions, however, would be in error because the law is equally applicable to police departments in all cities, counties, towns and village including those involved in *NYCPBA,*[65] and *Wallkill.* In those decisions, the Court of Appeals did not discuss the text, legislative history and precedent regarding Unconsolidated Law §891 in discerning New York public policy with respect to the negotiability of police discipline. Moreover, the Court implicitly overruled *Bazinet* by relying on special and general police discipline statutes that pre-date Unconsolidated Law §891 in finding that those laws preempted the negotiability of police discipline. Based upon the foregoing, we are compelled to reject the PBA's arguments centered on Unconsolidated Law §891 until there is final judicial resolution of whether its text, legislative history and purpose demonstrate a public policy consistent with police discipline being a mandatory subject under the Act.

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[64] Mem of Conf of Mayors, Bill Jacket L 1940, c 834, at 9; Mem of Westchester Co Vill Officials' Assn, Bill Jacket at 17-18; Mem of Civ Serv Reform Assn, Bill Jacket at 19.

[65] Prior to deciding *NYCPBA*, the Court had ruled that Unconsolidated Law §891 is applicable to the New York City police force along with the police disciplinary provisions in the New York City Administrative Code. *See Matter of Wallace v Murphy*, 21 NY2d 433 (1968); *Matter of Foley v Bratton*, 92 NY2d 781 (1999). The applicability of Unconsolidated Law §891 did not, however, affect the Court's reasoning in *NYCPBA*.

Finally, we consider the PBA's argument that the legislative measures taken by the City supersede the applicability of the Second Class Cities Law. As noted, the City adopted a form of city government known as Plan C under the Optional City Government Law, effective January 1, 1936.[66] Upon adoption of that plan, the laws regulating the powers and duties of City officers and employees continued in full force and effect until the City council enacted ordinances concerning those matters.[67] Pursuant to Optional City Government Law, §8, such ordinances constitute a superseding law.[68] In addition, Optional City Government Law, §37 states, in part:

> The council under any of the plans of government defined in this act as plan A, B, C, D, E or F shall, subject to the provisions of this act, have power to regulate by ordinance the exercise of any power and the performance of any duty by any officer or employee of the city; *and upon the passing of any such ordinance every provision of the charter or of the second class cities law, applicable to such city, regulating the matter, or any of them, provide for in such ordinance shall cease to have any force or effect in such city.*[69] (Emphasis added).

On January 4, 1936, the City adopted Ordinance No. 8110, expressly abolishing the office of Commissioner of Public Safety under the Second Class Cities Law and transferring the powers and duties of that office to the City Manager, subject to the limitations of the Optional City Government Law.[70] Consistent with Optional City Government Law §37, the enactment of Ordinance No. 8110 rendered Second Class

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[66] Stipulated Facts, ¶27; L 1914, c 444, Stipulated Record, Joint Exhibit 18.

[67] Optional City Government Law, §§8 and 37. Joint Exhibit 18, R.921, 928-929.

[68] Stipulated Record, Joint Exhibit 18, R.921. *See Duci v Roberts*, *supra* note 40.

[69] Stipulated Record, Joint Exhibit 18, R.928-929.

[70] Stipulated Record, Joint Exhibit 19, R.938.

Cities Law §§130, 131, 132, 133 and 137 inoperable but only to the extent that those provisions reference a Commissioner of Public Safety.[71] The ordinance cannot be construed as invalidating or superseding the municipal police disciplinary powers granted under the Second Class Cities Law because those powers and duties were transferred to the City Manager under the ordinance. Therefore, we reject the PBA's contention that the City's adoption of the plan and the enactment of the ordinance adversely affected the City's police disciplinary powers under the Second Class Cities Law.[72]

Following a 1978 referendum adopting City Local Law No. 4 of 1978, the City's charter was changed so that the office of City Manager was replaced by an elected Mayor, effective January 1, 1980.[73] Under the charter revision, the elected Mayor was granted executive powers including the "power of appointment of officers and employees" and the power to remove "any such officer or employee." [74] Section 4 of City Local No. 4 of 1978 stated:

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[71] *See Jones v City of Binghamton*, 256 AD 41 (3d Dept 1939).

[72] *Cf Application of Grenfell*, 269 AD 600, 603-604 (3d Dept 1945), *affirmed in part*, 294 NY 610 (1945), where the Appellate Division, Third Department stated: "We agree with the contention of proponent that despite this there is no constitutional or legislative prohibition against the adoption of any or all of the provisions of the Second Class Cities Law as a city charter, but if such provisions are to be adopted under section 19–a of the City Home Rule Law they must be designated specifically in the proposed local law, and otherwise in accordance with the statute. Mere blanket references to the Second Class Cities Law are not sufficient. Voters are entitled to know from the language of the proposal itself precisely what they are called to pass upon, and should not be required by reference to examine the provisions of any statute. The fact that the city of Schenectady was governed under Second Class Cities Law prior to 1934 in no way alters this proposition. It cannot be assumed that because of this fact the voters generally are familiar with all of the pertinent provisions of such statute."

[73] Stipulated Record, Joint Exhibit 21, R.943.

[74] Stipulated Record, Joint Exhibit 21, §§90, 92, R.943.

> All provisions of L. 1914, Ch. 444 (Optional City Government Law) or any other law, charter provision, local law or ordinance not inconsistent herewith shall continue in full force and effect.[75]

While the 1978 charter revision demonstrates the continued applicability of the Optional City Government Law to the City's governing structure, we find nothing in its provisions to demonstrate explicitly or implicitly that it was intended to supersede the police disciplinary powers granted under the Second Class Cities Law. We reach the same conclusion with respect to the subsequent local laws revising the specific City officer with police disciplinary authority.[76]

Based upon the foregoing, we deny the City's exceptions and affirm the decision of the ALJ finding in Case No. U-27887 that the City violated §209-a.1(d) of the Act when it announced it would no longer apply the negotiated disciplinary procedures in the parties' expired agreement and Civ Serv Law §75, and when it unilaterally issued General Order 0-43 outlining a new disciplinary procedure for PBA unit members. In addition, we dismiss the City's charge in Case No. U-27980.

IT IS, THEREFORE, ORDERED that the City of Schenectady will forthwith:

1. Rescind any disciplinary action initiated against PBA unit members on or after November 30, 2007, to the extent that such disciplinary action was not in conformity with Article VIII of the parties' agreement and Civil Service Law §75, and will make such PBA unit members whole including reinstatement with back wages and benefits with interest at the maximum legal rate;

2. Remove any documents from the personnel files of PBA unit employees relating to and resulting from discipline

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[75] Stipulated Record, Joint Exhibit 21, §§90, R.943.

[76] See Local Law No. 2 of 1986, Stipulated Record, Joint Exhibit 22, R. 948; Local Law No. of 1990, Stipulated Record, Joint Exhibit 23, R.955; Local Law No. 3 of 2002, Stipulated Record, Joint Exhibit 24, R. 959-960.

initiated and imposed under procedures not in conformity with Article VIII of the parties' agreement and Civil Service Law §75;

3. Rescind General Order No. 0-43 and not process any disciplinary actions pursuant to that General Order;

4. Sign, post and distribute the attached notice at all physical and electronic locations customarily used to post and distribute notices to unit employees.

DATED: August 23, 2013
Albany, New York

Jerome Lefkowitz, Chairperson

Sheila S. Cole, Member

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the City of Schenectady, in the unit represented by the Schenectady Police Benevolent Association, that the City of Schenectady will:

1. Rescind any disciplinary action initiated against PBA unit members on or after November 30, 2007, to the extent that such disciplinary action was not in conformity with Article VIII of the parties' agreement and Civil Service Law §75, and will make such PBA unit members whole including reinstatement with back wages and benefits with interest at the maximum legal rate;

2. Remove any documents from the personnel files of PBA unit employees relating to and resulting from discipline initiated and imposed under procedures not in conformity with Article VIII of the parties' agreement and Civil Service Law §75;

3. Rescind General Order No. 0-43 and not process any disciplinary actions pursuant to that General Order.

Dated . . . . . **By** . . . . . .
on behalf of the City of Schenectady

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.