Concurrent Four

Taylor Law at 50
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Police Officers and Collective Bargaining: How Limited Should Bargaining Be About Discipline?

Including:
Negotiability of Police Disciplinary Procedure

NEGOTIABILITY OF POLICE

DISCIPLINARY PROCEDURES

PUBLIC POLICY UNDERLYING THE TAYLOR LAW

The Taylor Law (Civil Service Law Article 14 [hereinafter "CSL"]) provides an unambiguous statement of public policy in CSL § 200:

> The legislature of the state of New York declares that it is the public policy of the state and the purpose of this act to promote harmonious and cooperative relationships between government and its employees and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government.

With equal clarity, the Legislature expressly declared that those public policies are "best effectuated" by, among other means, "encouraging such public employers and such employee organizations to agree upon procedures for resolving disputes" (CSL § 200 [c]).

Accordingly, the Court of Appeals has held that collective negotiations concerning procedures to resolve labor disputes, including disciplinary disputes, effectuate the policies of the Taylor Law and are, thus, mandatorily negotiable and enforceable. *See New York City Trans Auth v Transport Workers Union of*

America, Local 100, AFL–CIO, 99 NY2d 1 (2002); *Binghamton Civ. Serv. Forum v City of Binghamton*, 44 NY2d 23 (1978); *Board of Educ of Yonkers City School Dist v Yonkers Fedn of Teachers*, 40 NY2d 268 (1976); *Board of Educ of Union Free Sch Dist No. 3 of Town of Huntington v Associated Teachers of Huntington*, 30 NY2d 122 (1972). Indeed, the Court of Appeals has observed that the public policies favoring collective negotiations concerning dispute resolution procedures are "strong and sweeping." *See, e.g., City of Watertown v New York State Pub Empl Relations Bd,* 95 NY2d 73, 78 (2000).

PERB AND COURT DECISIONS

***City of Albany*, 9 7 PERB ¶ 3078 (1974), 7 PERB ¶ 3079 (1974), *confirmed on other grounds sub nom. Matter of City of Albany v Helsby*, 48 AD2d 998 (3d Dept 1975), *affd* 38 NY2d 778 (1975)**

PERB held: that procedures associated with discipline and discharge is a mandatory subject of negotiations so long as the proposal does not deny employees an opportunity to utilize CSL Sections 75 and 76.

***Matter of Auburn Police Local 195, Council 82, AFSCME v Helsby*, 62 AD2d 12 (3d Dept 1978), *affd on opinion below* 46 NY2d 1034 (1979)**

Rejecting PERB's limitations on the negotiability of alternatives to § 75 disciplinary procedures under *Albany, supra*, Court held that alternatives to procedures specified in CSL §§ 75 and 76 are mandatorily negotiable without limitations. Noting that individual unrepresented employees may

waive such rights, the Court reasoned that they may do so collectively under the strong and sweeping policies favoring collective bargaining under the Taylor Law.

***Amherst Police Club, Inc.*, 12 PERB ¶ 3071 (1979).**

Relying on *Auburn*, *supra*, the Board held that a negotiation demand seeking a contractual disciplinary procedure for town police officers are mandatorily negotiable. The Board rejected the employer's argument that such procedures are rendered non-mandatory by Town Law §155.

***Matter of Patrolmen's Benevolent Assn of the City of New York, Inc. v New York State Pub Empl Relations Bd*, 6 NY3d 563 (2006) (hereinafter "*NYCPBA*")**

Nearly three decades after *Auburn*, the Court of Appeals considered the negotiability of disciplinary procedures for New York City police officers, and whether to stay the disciplinary arbitration of a Town of Orangetown police officer under a collectively negotiated disciplinary procedure. In contrast to *Auburn*, the Court held that the disciplinary procedures for New York City police officers and officers employed by the Town of Orangetown are "prohibited" subjects; that is, they are foreclosed from negotiations under the Taylor Law, and any such negotiated procedures are unenforceable.

In an unambiguous declaration, the Court stated: "We hold that police discipline may not be a subject of collective bargaining under the Taylor

Law when the Legislature has expressly committed disciplinary authority over a police department to local officials." *NYCPBA* at 570.

As relevant to the matter before it, the Court reasoned:

> Section 434 (a) of the New York City Charter provides: "The [police] commissioner shall have cognizance and control of the government, administration, disposition and discipline of the department, and of the police force of the department." New York City Administrative Code § 14-115 (a) provides that, in cases of police misconduct: "The commissioner shall have power, in his or her discretion, . . . to punish the offending party." Though these two provisions are now New York City legislation, both were originally enacted as state statutes; the Charter provision was adopted by the State Legislature in 1897 (L 1897, ch 378, enacting NY City Charter § 271), and the Code provision in 1873 (L 1873, ch 335, §§ 41, 55). Thus, they reflect the policy of the State that police discipline in New York City is subject to the Commissioner's authority.
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> The Legislature has provided similarly for the discipline of town and village police forces, including those in Rockland County, where Orangetown is located. Section 7 of the Rockland County Police Act (L 1936, ch 526), similar in its wording to more general statutes, Town Law § 155 and Village Law § 8-804, provides in part:
>
> > The town board shall have the power and authority to adopt and make rules and regulations for the examination, hearing, investigation and determination of charges, made or preferred against any member or members of such police department. Except as otherwise provided by law, no member or members of such police department shall be fined, reprimanded, removed or dismissed until written charges shall have been examined, heard and investigated in such manner or by such procedure, practice, examination and investigation as the board,

> by rules and regulations from time to time, may prescribe.
>
> Thus, the Legislature has committed police discipline in Orangetown to the "power and authority" of the Orangetown Town Board. *NYCPBA* at 573–74.

Thus, the Court concluded in *NYCPBA* that the disciplinary procedures for the at-issue police officers are "prohibited" subjects. In reaching that conclusion, the Court emphasized that the new York City Charter and Administrative Code governing New York City police departments, as well as the Rockland County Police Act governing the officers employed by the Town of Orangetown, survived the procedures in CSL §§ 75 and 76, a general law enacted in 1958, because of the grandfathering provision in CSL § 76.4.[1] Nevertheless, the Court observed that "where CSL §§ 75 and 76 apply, as in *Auburn*, police discipline may be the subject of collective bargaining." *NYCPBA* at 573. In that regard, the Court emphasized: "In general, the procedures for disciplining public employees, including police officers, are governed by Civil Service Law §§ 75 and 76."

***See also Matter of the City of New York v Patrolmen's Benevolent Assn.*, 14 NY3d 46 (2009)**

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[1] CSL § 76.4 states, in relevant part: "Nothing contained in section seventy-five or seventy-six of this chapter shall be construed to repeal or modify any general, special or local law or charter provision relating to the removal or suspension of officers or employees in the competitive class of the civil service of the state or any civil division."

Reaffirming that where CSL § 75 applies, disciplinary procedures are mandatorily negotiable (id., at n. 13), the Court of Appeals held that procedures to determine drug use by police officers are prohibited subjects.

***Tarrytown Patrolmen's Benevolent Association*, 40 PERB ¶ 3024 (2007)**

PERB construed *NYCPBA* to reflect the Court of Appeals' intent that the holding was the exception to the general rule that disciplinary procedures for municipal police officers are mandatorily negotiable under the Taylor Law. At issue there was whether Unconsolidated Law § 5711-q (9), a special law applicable to villages in Westchester County, prohibits negotiations concerning disciplinary procedures for police officers employed by such villages. Because the law was a "special law" the Board held that negotiations for alternative procedures were prohibited, as in *NYCPBA*.

***Matter of City of Middletown v City of Middletown PBA*, 43 PERB ¶ 7002 (Sup Ct Albany County 2010), *affd* 81 AD3d 1238 (3d Dept 2011)**

Appellate Division confirmed PERB's determination that the Legislature's pre-1958 adoption of the City's charter, a special law, rendered disciplinary procedures for police officers prohibited subjects. However, it annulled PERB's determination that disciplinary procedures are mandatorily negotiable for City police officers who are honorably

discharged veterans or volunteer firefighters, rejecting PERB's opinion that because they, unlike other City police officers, are entitled to the disciplinary procedures specified in CSL §§ 75 and 76, alternatives to which are mandatorily negotiable under *Auburn* and *NYCPBA*.

-- Volunteer Firefighters and Honorably Discharged Veterans --

> Notwithstanding the Legislature's adoption of the City's charter in 1942 containing disciplinary procedures for police officers, City police officers who are honorably discharged veterans or volunteer firefighters have a statutory preference which grants them disciplinary procedures under CSL §§ 75 and 76 (*see*, CSL § 75 [1] [b]). Indeed, as with the policies underlying *NYCPBA*, the policies giving rise to the grant of the special preference for honorably discharged veterans and volunteer firefighters have their genesis in the 19th century, and they have been consistently reaffirmed by the Legislature ever since (*see*, General Laws, L. 1899, c. 370; L 1909, c. 15, later codified as CSL § 22; L. 1923, c. 177 [regarding honorably discharged veterans], extended to volunteer firefighters in 1930 pursuant to L 1930, c. 214; both preferences later codified in CSL § 75 [1] [b] pursuant to L. 1958, c. 790, § 1). Thus, in *Matter of Morris v Neider*, 259 AD 49 (4th Dept 1940), a chief of police, an honorably discharged veteran, was entitled to the CSL procedures, not the procedures contained in the Geneva City Charter, which had been adopted by the Legislature in 1897. Likewise, in *Matter of Eisle v Woodin*, 205 AD 452 (4th Dept 1923), *affd* 238 NY 551 (1924), the Court held that a police officer who was a volunteer fireman was entitled to the disciplinary procedures provided in CSL § 22, not the procedures specified in the Dunkirk City Charter, which had been adopted by the Legislature in 1909. Indeed, in *People ex rel. Reilly v Hoffman*, 98 AD 4 (1st Dept 1904), the Court held that an honorably discharged veteran was entitled to the preference, notwithstanding inconsistent provisions in the New York City

Charter. *See also*, *Town Bd of Town of Wallkill v Owen*, 127 AD2d 589 (2d Dept 1987); *Matter of Owen v Town of Wallkill*, 94 AD2d 768 (2d Dept) *lv denied* 60 NY2d 560 (1983); *Rizzo v Town of Hempstead*, 1 AD2d 906 (2d Dept 1956); *O'Brien v Hughes*, 270 AD 1072 (4th Dept 1946); *Matter of Dickinson v Monroe*, 180 Misc 714 (Sup Ct Wayne County, 1943). Comparable preferences under the NYS Military Law have also been upheld, notwithstanding express conflicts under the New York City Administrative Code. *See, Peterson v City of New York*, nor., 1998 WL 247530 (S.D. N.Y. 1998) (maximum age limit for police officer candidates under the NYC Administrative Code does not trump Military Law § 243 which extends the maximum age for such candidates up to 5 years for honorably discharged veterans).

The Appellate Division declined to accept PERB's determination that volunteer firefighters and honorably discharged veterans have negotiable disciplinary procedures while others in the same bargaining unit do not.

***Town of Wallkill (Town of Wallkill Police Benev Assn, Inc.)*, 42 PERB ¶ 3017 (2009), *confd sub nom. Matter of Town of Wallkill v New York State Pub Empl Relations Bd*, 43 PERB ¶ 7005 (Albany County Supreme Court 2010) (hereinafter, "*PERB-Wallkill*")**

In an improper practice proceeding before PERB, PERB held that Town Law§§ 155, a general law enacted in the mid-twentieth century did not foreclose negotiations under the Taylor Law, a later enacted general law. Although the Town Law commits the establishment of disciplinary procedures to local officials, PERB held that, unlike the public policies reflected in the special laws at issue in *NYCPBA*, the public policies favoring

negotiations under the Taylor Law permitted negotiations concerning disciplinary procedures for town police officers. There, PERB analyzed the legislative history of CSL § 209.4 as it relates to the general duty to negotiate concerning police disciplinary procedures under the Taylor Law. PERB concluded that the Legislative history of CSL § 209.4 supported its conclusion that Town Law § 155 does not override the duty to negotiate concerning police disciplinary procedures under the Taylor Law.

--- Legislative history of CSL § 209.4 --

Until 1995, New York state troopers were not entitled to the compulsory interest arbitration procedures available to municipal police officers under CSL § 209.4. In 1995, the Legislature enacted CSL § 209.4 (e), extending interest arbitration to state troopers. However, the Legislature expressly excluded non-compensatory, albeit mandatorily negotiable, terms and conditions of employment from the subjects that troopers could submit for consideration by the interest arbitration panel, including "disciplinary procedures and actions." *See* L. 1995, c 432 § 3.[2] Because non-mandatory and prohibited subjects are not arbitrable (*see* 4 NYCRR § 205.6 [a] [1]; *NYCPBA*), the Board observed that there would have been no need for the Legislature to specifically exclude disciplinary procedures and actions from the subjects that state troopers could submit to interest arbitration if it did not understand and intend them to be mandatorily negotiable in the first place.

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[2] As enacted in 1995, CSL § 209.4 (e) states, in relevant part:

"[T]he provisions of this section shall only apply to the terms of collective bargaining agreements directly relating to compensation, including, but not limited to, salary, stipends, location pay, insurance, medical and hospitalization benefits; and shall not apply to non-compensatory issues, including, but not limited to. . . *disciplinary procedures and actions*." [Emphasis added.]

The Board bolstered its construction of the Legislature's intent by emphasizing the supporting memorandum for the new bill by then Assembly Majority Leader Michael Bragman, which the Board considered to demonstrate that the amendment was not intended to impair the negotiability of disciplinary procedures for members of the State Police:

> Sections 1 and 2 of this bill amend sections 209(2) and (4) of the civil service law, the State's binding arbitration law, to include members of the State Police. Section 3 of this bill limits binding arbitration to compensation issues (including such items as salary, overtime, vacation pay, etc.). Other issues will be subject to existing collective bargaining procedures. New York State Bill Drafting Commission, Legislative Retrieval System, c 432, Memorandum in Support of Bill No. A07370A (1995).

According to the Board, Majority Leader Bragman's reference to "other issues" that are "subject to existing collective bargaining procedures" refers to disciplinary procedures and other non-compensatory issues that, although specifically excluded from resolution at compulsory interest arbitration, remain negotiable under the Taylor Law and subject to the impasse resolution procedures applicable to non-police units.

In 2001, the Legislature amended CSL § 209.4 (e) by deleting the exclusion of disciplinary procedures and other non-compensatory subjects that state troopers could submit to compulsory interest arbitration. *See*, L. 2001, c 587. Here, again, the Board determined that the supporting memorandum revealed the Legislature's understanding and intent that disciplinary procedures for police officers are mandatorily negotiable:

> Local police officers and Firefighters currently are afforded full binding arbitration (that is compensatory and non-compensatory issues are subject to binding arbitration). The legislation would simply grant all State Police officers equal treatment with respect to their local counterparts. [*See*, 2001 McKinney's Session

Laws of N.Y., Vol. 2, L. 2001, c 587, Memorandum in Support of Bill No. A. 8589.]

According to the Board, the "equal treatment with respect to their local counterparts" referenced in the memorandum shows that by restoring disciplinary procedures and other non-compensatory terms and conditions of employment to the scope of subjects that state troopers could submit to interest arbitration, the Legislature understood and intended that disciplinary procedures and actions are proper subjects for interest arbitration and, thus, mandatorily negotiable for troopers, as they are for bargaining units of police officers employed by any "police force or police department of any county, city, town, village or. . . police district."

CSL § 209.4 (e) was amended again in 2002, reinstating the exclusion of "issues relating to disciplinary procedures and investigations" from the subjects that state troopers can submit to compulsory interest arbitration. *See*, L. 2002, c 232. Again, the Board observed that if "issues relating to disciplinary procedures and investigations" were not mandatorily negotiable, there would have been no need for the Legislature to expressly exclude those issues from the subjects that troopers could submit to interest arbitration.

***City of Albany (NYS Law Enf Officers Union)*,**

42 PERB ¶ 3005 (2009)

[Same holding as *PERB-Wallkil*l, except Second Class Cities Law was raised as the defense to negotiability]

***Matter of Town of Wallkill v Civil Serv Empls Assn*,**
19 NY3d 1066 (2012)

While *PERB-Wallkill* was being considered by PERB, and unbeknownst to the Board, the parties were engaged in a CPLR Article 75 proceeding concerning the arbitrability of a disciplinary dispute under their contractual

disciplinary procedure. That proceeding, in which PERB was not a party, led to the Court of Appeals' decision in *Wallkill*. There, the Court of Appeals applied the prohibition in *NYCPBA* to police officers employed by towns that are subject to Town Law § 155, stating:

> We agree that [*NYCPBA*] is dispositive. There, we confronted the tension between the strong and sweeping policy of the State to support collective bargaining under the Taylor Law and the policy favoring strong disciplinary authority for those in charge of police forces. We held that police discipline may not be a subject of collective bargaining under the Taylor Law when the Legislature has expressly committed disciplinary authority over a police department to local officials. *Wallkill*, at 1067 [internal quotations and citations to *NYCPBA* omitted].

Therefore, the Court held that the contractual disciplinary procedures for the Town of Wallkill's police officers were unenforceable (and, thus, not negotiable under the Taylor Law), effectively annulling *PERB-Wallkill*.

***Matter of City of Schenectady v New York State Pub Empl Relations Bd.*, 30 NY3d 109 (2017)**

Although § 137 of the Second Class Cities Law commits certain aspects of police discipline to the discretion of the City's Public Safety Commissioner, in confirming PERB's determination, the Appellate Division relied on Second Class Cities Law Art. 2, § 4, which states that the provisions contained therein shall apply only "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]. Applying principles of statutory construction, the Appellate Division concluded that § 4 of the Second Class Cities Law expressly authorized the City to enter into a collective bargaining agreement concerning police disciplinary procedures pursuant to collective bargaining mandated by the Taylor Law. The Court of Appeals reversed, holding that the "supersession" language in the Second Class Cities Law had not more relevant meaning that the "except as otherwise provided by law" language in Town Law § 155; i.e. none. As for the legislative history of CSL § 209.4, the Court observed that disciplinary procedures for police officers are arbitrable if they are mandatorily negotiable under *NYCPBA* and its progeny.

***City of Long Beach*, 51 PERB ¶ 3005 (2018)**

Section 47 of the City's Charter, as enacted by the New York State Legislature in 1922, provides that "[t]he powers and duties of the commissioner which shall be performed and exercised as herein provided and in accordance with the laws of the state and the ordinances of the city," includes that the commissioner "shall assume and exercise supervision of the police department and make all proper rules for the government and

discipline thereof." Therefore, as in *Middletown, supra*, the Board held that disciplinary procedures for police officers employed by the City of Long Beach are prohibited.