



**City of Rochester**  
**Inter-Departmental Correspondence**

Mayor Warren  
 May 9, 2018  
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**To:** Mayor Lovely A. Warren  
**CC:** City Council President Loretta C. Scott  
**From:** Corporation Counsel Timothy R. Curtin  
**Date:** May 9, 2018  
**Subject:** Harris Beach PLLC Opinion regarding Police Accountability Board Proposal

Mayor - This memorandum addresses the draft legal opinion from Harris Beach PLLC to Council President Scott, dated April 17, 2018, as revised May 3, 2018 (collectively, the "Opinion") concerning the proposal for a Police Accountability Board ("PAB") for the City of Rochester. In our view, the Opinion is an incomplete analysis of the topic and we recommend that the Opinion not be relied on to justify creation of the proposed Police Accountability Board. Please consider the following:

1) **Opinion Does Not Consider the RPD Union CBA and the Taylor Law**

- The Opinion fails to comprehend the implications of the collective bargaining agreement between the City and the police union (the "CBA") and the state's Public Employees' Fair Employment Act, Civil Service Law § 200 *et. seq.*, commonly known as the "Taylor Law."
- The statement in the Opinion that "we have not been asked to address any issues related to the [CBA]" indicates a less than comprehensive analysis of the viability of a PAB.
- Pursuant to the Taylor Law, the City is obligated to maintain all of the provisions of an expired collective bargaining agreement. Specifically, pursuant to Civil Service Law § 209-a.1(e), it is an "improper practice" for a public employer  
 "(e) to refuse to continue all the terms of an expired agreement until a new agreement is negotiated, unless an employee organization which is a party to such agreement has, during such negotiations or prior to such resolution of such negotiations, engaged in conduct violative of subdivision one of section two hundred ten of this article" [i.e. a strike].
- Under the Taylor Law, all existing provisions of the CBA, including provisions that specifically set forth the Police Chief's disciplinary authority, are mandatory subjects of bargaining, and the City cannot change them unilaterally. See N.Y. Civ. Serv. L. § 209-a(1)(e); *Auburn Police Local 195 v. Helsby*, 46 N.Y.2d 1034 (1979), *aff'g* 62 A.D.2d 12 (3d Dep't 1978); *City of Schenectady v. PERB*, 30 N.Y.3d 109 (2017).
- Even if a Charter amendment transfers the "appointing authority" title to another City entity, the CBA specifically gives the "Chief"—not the appointing authority—certain disciplinary functions. For example, the CBA requires that "[t]he Chief shall make a written final disposition" of disciplinary charges within 30 days of receiving the disciplinary hearing officer's findings and recommendations. CBA Art. 20 § 1 ¶ 17. Legislation would not change that obligation.
- Any unilateral change would face union opposition and undoubtedly a legal challenge, exposing the City to both cost and risk, and likely failure.

- Though the Opinion admits it fails to “address the issue of the Taylor Law” – that is an undeniable component of this entire analysis – creation of a City PAB without proper consideration of the CBA and the Taylor is not a meritorious endeavor.

2) **Opinion Does Not Contemplate the PAB as Proposed**

- The Opinion does not envision the PAB as proposed in the Recommended City of Rochester Ordinance Establishing The Police Accountability Board (the “Ordinance”). The Opinion contemplates that the PAB will be a “department of the City” with authority delegated from the Mayor and Police Chief. *See* Opinion at 12. That is not the proposal.
- The Ordinance, however, proposes that the PAB will report to Council, *see* Ordinance § 1-3[B], and that all but one of its members will be appointed by Council (four members) and the PAB Alliance, an unincorporated group of community organizations (six members). *See* Ordinance § 1-4[J]–[M]. The Mayor would have no power to remove a PAB member. The Mayor would appoint one member. Ordinance § 1-4[N].
- Failure to consider the PAB as proposed means the Opinion does not contemplate the implications of the PAB reporting to Council rather than the Mayor and of the appointment and removal of PAB members by other than the Mayor; if the facts are misstated the conclusion is likely suspect.

3) **Opinion Concludes PAB Proposal Does Not Require Mandatory Referendum**

- The Opinion incorrectly concludes that the Ordinance would not require a mandatory referendum under Municipal Home Rule Law, assuming the disciplinary authority is delegated to the Mayor or Police Chief, and that “the delegation of certain disciplinary authority from the Mayor and Police Chief to the PAB is not curtailing or abolishing any power of an elective official.” Opinion at 12.
- The Mayor’s powers cannot be diminished without a City-wide mandatory referendum. The Ordinance would curtail the Mayor’s power in at least two ways, triggering a mandatory referendum under Municipal Home Rule Law § 23(2)(f) if enacted as proposed. *See Mayor, City of New York v. Council, City of New York*, 280 A.D.2d 380, 380–81 (1st Dep’t 2001).
  - While the Ordinance calls for the PAB to report to Council, the Charter provides that all City departments report to the Mayor. *See* Charter § 3-3[E] (Mayor has power and duty to “exercise supervision and control over all administrative departments”).
  - The Ordinance calls for all but one of the PAB members to be appointed by Council or the PAB Alliance, but the Charter gives the Mayor the power and duty to “appoint . . . the members of all boards as set forth in this Charter.” Charter § 3-3[D].

4) **Opinion Misreads the Charter Provisions Controlling Appointments**

- The Opinion concludes that “the Mayor is the ultimate ‘appointing authority’ and supervisor for members and employees” of all City departments, including RPD. Opinion at 5.
- This conclusion misconstrues the Charter’s appointment provisions and confuses the Mayor’s authority to hire and fire the Police Chief with the Police Chief’s role as “appointing authority”

at the top of the RPD chain of command. The Mayor can appoint or remove the Police Chief, including for failure to follow an order regarding officer discipline, but the Mayor cannot directly appoint or remove police officers.

- The Charter provides that the Mayor has the power to appoint, “except as otherwise provided in this Charter,” Charter § 3-3[G], the Opinion does not consider the exception clause.
- The Charter specifically provides an exception from the Mayor’s appointment authority by naming the Police Chief as the “appointing authority” for RPD. *See* Charter § 8A-1(D) (“Chief of Police shall be the appointing authority for members and employees of the Police Department”).
- “Appointing authority” is a term of art defined by New York Civil Service Law—in the singular—as “the officer, commission or body having the power of appointment to subordinate positions.” N.Y. Civ. Serv. L. § 2(9).<sup>1</sup> There can be only one appointing authority, and the Police Chief is it.
- The Opinion’s analysis of *Gomez v. Stout*, 13 N.Y.3d 182 (2009), relies on a misreading of the Charter and is therefore not convincing.

**Conclusion:** Due to the Opinion’s misreading of the Ordinance, compounded by the failure to appropriately evaluate the implications of both the CBA and the Taylor Law, the Law Department recommends that the City not rely on the Opinion as drafted.

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<sup>1</sup> Civil Service Commission of the City of Rochester Local Rule I (1) similarly provides that “‘Appointing authority’ or ‘appointing officer’ means an officer, Commission, board or body to which these rules apply, who has the power of appointment to subordinate positions in any office, court, department, board, commission or institution under the jurisdiction of the Civil Service Commission of the City of Rochester.”