

**HARRIS BEACH** PLLC  
ATTORNEYS AT LAW

99 GARNSEY ROAD  
PITTSFORD, NY 14534  
(585) 419-8800

**H. TODD BULLARD**  
PARTNER  
DIRECT: (585) 419-8696  
FAX: (585) 419-8816  
TBULLARD@HARRISBEACH.COM

May 3, 2018

**VIA MESSENGER and E-MAIL**

Loretta C. Scott  
City Council President  
City Council Chambers  
30 Church Street  
Rochester, New York 14614

**Re: Disciplinary Powers of Proposed Police Accountability Board**

Dear President Scott:

As requested by you on behalf of the City Counsel, enclosed please find our legal opinion with regard to your inquiry about the Disciplinary Powers of the Proposed Police Accountability Board.

Thank you for the opportunity to present this opinion. Please do not hesitate to contact me with any questions.

Very truly yours,



H. Todd Bullard

HTB:sem  
Enclosure

cc: Patrick M. Malgieri, Esq.

**HARRIS BEACH** PLC  
ATTORNEYS AT LAW

99 GARNSEY ROAD  
PITTSFORD, NEW YORK 14534  
(585) 419-8800

**MUNICIPALITIES AND LOCAL AGENCIES**  
DIRECT: (585) 419-8700  
FAX: (585) 419-8816

May 3, 2018

**VIA MESSENGER and E-MAIL**

Loretta C. Scott  
Rochester City Council President  
City Council Chambers  
30 Church Street  
Rochester, New York 14614

**Re: Disciplinary Powers of Proposed Police Accountability Board**

Dear President Scott:

We have been asked to analyze and provide a reasoned legal opinion concerning the permissible powers of a proposed civilian Police Accountability Board ("PAB") on the subject of police officer discipline. On behalf of the Rochester City Council (the "Council"), you have framed the relevant issue for the requested opinion as set forth below:

- (i). *May the proposed PAB be legally empowered to discipline police officers of the Rochester Police Department?*

Item (i) shall be hereinafter referred to as the "Issue". We have not been asked to address any other related processes or address any potential need to enter into negotiations as to any existing Collective Bargaining Agreement between the City of Rochester and the Rochester Police Locust Club in order to effectuate the creation of the PAB or any delegation of authority thereto. Our opinion is limited to the Issue defined herein and as set forth above.

**Conclusion**

Based on our legal analysis, as set forth below, of the applicable N.Y. Civil Service Law provisions, as well as the pertinent provisions of the Charter and Code of the City of Rochester, relevant statutes and case law, we have concluded that the proposed PAB may be legally empowered to discipline police officers, provided that certain amendments are made to the Charter of the City of Rochester that delegate such authority to the PAB. The legal reasoning for the conclusion is set forth hereinafter.

### **Legal Authorities and Documents Reviewed**

In connection with delivering this legal opinion, we have reviewed relevant case law along with the following list of relevant authorities and statutes, as well as, the background documents provided to us.

1. The Charter and Code of the City of Rochester (the "Charter");
2. N.Y. Civil Service Law Article 75 (the "Statute");
3. The Collective Bargaining Agreement between the City of Rochester and Rochester Police Locust Club, Inc.<sup>1</sup> (the "Agreement");
4. N.Y. Unconsolidated Laws Section 891 ("Section 891");
5. Recommended City of Rochester Ordinance Establishing The Police Accountability Board (the "PAB Ordinance") [Background Document];
6. Bylaws of the Police Accountability Board Alliance (the "Bylaws") [Background Document];
7. Case law cited herein.

### **General Background**

We have been provided with the following facts as relevant background information:

The City Council has made an inquiry to our firm for an independent legal opinion about the process of implementing a PAB comprised of civilians, empowered to provide some degree of oversight and discipline to employees of the Rochester Police Department found to have violated professional standards and/or the law in the course of their official duties.

Currently, the Professional Standards Section (the Rochester Police Department's internal affairs division) and the Civilian Review Board administered by the Center for Dispute Settlement provide oversight (or in the case of the CRB, advisory functions with respect to) of the Rochester Police Department. Pursuant to the City Charter and the Rochester Police Department Collective Bargaining Agreement, the City administration, acting through the Chief of Police and Professional Standards Section, currently has jurisdiction to discipline police officers.

---

<sup>1</sup> The Agreement is nominally effective July 1, 2013 to June 30, 2016, but pursuant to Article 32 of the Agreement, the terms of the Agreement remain in force even after June 30, 2016 until a superseding replacement agreement is negotiated and executed by the parties.

At a series of community meetings occurring throughout the City, some citizens have expressed concern that the Rochester Police Department is unable to regulate itself through the Professional Standards Section, and that the Civilian Review Board lacks the authority to provide any credible or deterrent oversight for the Rochester Police Department. Without taking any firm position on this issue, City Council is seeking guidance and information on its options to address this public policy concern.

The proposed PAB would replace the existing Civilian Review Board, but would enjoy certain powers the Civilian Review Board never had, including the power, under certain circumstances, to discipline employees of the Rochester Police Department.

For purposes of rendering this opinion, we have relied exclusively on the facts as presented to us which are set forth above. We have not conducted any independent investigation or inquiry into the facts to independently verify the accuracy or completeness of the facts as presented to us. Although as authors of this opinion letter we are familiar with the police accountability movement in general, we have no ties to law enforcement or any of the activist groups, including but not limited to, Enough is Enough, or the Police Accountability Board Alliance, that are directly interested in the proposed legislation for the PAB. Our personal or professional views of law enforcement or police accountability have no bearing on this opinion.

### Legal Analysis

In this section, we provide our analysis of the Issue as presented to us and we have structured the opinion into sections as outlined below. First, to place the legal analysis into context, we examine the relevant Charter provisions for a legal framework under local law. Second, we examine and discuss the Civil Service statute related to discipline. Third, we have examined the relevant sections of the Agreement. Fourth, we explain Section 891. Finally, we discuss the applicable law and case precedents to provide a reasoned opinion as to City Council's options with respect to the creation of the PAB and the delegation of the requisite powers to the PAB.

***1. May the proposed PAB be legally empowered to discipline police officers of the Rochester Police Department?***

**Answer:** Yes, provided certain amendments are made to the Charter as set forth herein.

**(A) CITY OF ROCHESTER CHARTER PROVISIONS**

The material issue presented in this analysis of the proposed PAB's ability to administer discipline turns upon what is determined to be the "*appointing authority*" or supervisory authority held by the appropriate City official, legislative body, or department head and the delegation of such authority. Accordingly, an analysis of the Issue requires an understanding of the related governmental department's chain of command. We have set forth in outline form the respective authority under the Charter of the Mayor, the City Council and the Police Chief.

(i) **City Charter - Article 2 - (Appointing Authority, and Power to Remove)**

Article 2, § 2-3 of the Charter provides, in pertinent part, as follows:

"The administrative departments of the City shall be a Department of Finance, a Police Department, a Fire Department, an Emergency Communications Department... Each department head shall be appointed by the Mayor shall at all times be subject to the Mayor and shall obey all orders from the Mayor and shall hold office during the Mayor's pleasure...."

Article 2, § 2-5 of the Charter provides further that:

"All department heads may, subject to the approval of the Mayor, appoint such division and bureau heads as may be prescribed by law. They may also appoint, subject to the approval of the Mayor, such subordinates and employees of their respective departments or any division or bureau thereof as the Mayor may prescribe. Each department head may also appoint a deputy and a secretary."

Article 2, § 2-3 and § 2-5 establishes that the Mayor has ultimate appointing authority, approval and veto power over her department heads. Therefore when analyzed under a chain of command theory, the Mayor is at the top of the chain and the Chief of Police is appointed by the Mayor as a department head and the Chief reports to her.

Article 2, § 2-9 of the Charter confirms that all "officers appointed by the Mayor shall hold office during his or her pleasure, unless otherwise specified in this act or by law." In other words, the Mayor may terminate her appointees at will provided those appointees do not enjoy a legal right to a particular term of service.

Article 2, § 2-19 of the Charter provides the City Council with the power and a method for removing City officers and employees:

"Any elected City officer or employee or one subject to the City Council's jurisdiction may be removed for cause, after written notice and an opportunity to be heard, by vote of three-fourths (¾) of all members of the City Council. The written notice shall be a brief and clear statement of specific charges adopted by a majority of the City Council and shall be served on the affected person in the manner provided by law at least two weeks prior to a hearing. At the hearing testimony shall be taken under oath, and the affected person shall be permitted to be represented by counsel and

to introduce testimony and evidence and cross-examine witnesses. This section does not restrict the right of removal otherwise vested in any board or commission to the City, but is an additional method of removal." (emphasis supplied)

This provision means the Council has the authority to remove a City officer or employee for cause by vote of three-fourths (¾) of all members of the Council, but only as to an employee subject to the City Council's jurisdiction<sup>2</sup>. In summary, both the Mayor and City Council possess the requisite power and authority to remove City officers or employees. The next step to address the issue of empowering the PAB is to examine a potential delegation, in a limited manner, of the disciplinary power held by the Mayor and City Council.

(ii) City Charter - Article 3 - (Supervision and Control)

Under Article 3 of the Charter, the Mayor exercises supervision and control of all administrative departments and heads of such departments which she appoints. In addition, the Mayor has the power to remove such officers and employees. The specific Charter provisions are set forth below.

Article 3, § 3-3(E) provides in pertinent part that the Mayor has the power:

"To exercise supervision and control over all administrative departments, the heads of which the Mayor appoints."

Accordingly, the Mayor has broad oversight authority and executive power over such departments.

Article 3, § 3-3(G) of the Charter grants the Mayor the power:

**"To appoint** all subordinate officers and employees and **to remove** all such officers and employees and department heads and members of boards, except as otherwise provided in this Charter."(emphasis supplied).

Stated plainly, the Mayor is the ultimate "appointing authority" and supervisor for members and employees of every administrative department of the City of Rochester including the Rochester Police Department, except to the extent the Charter provides otherwise.

Article 3, § 3-3(N) of the Charter grants the Mayor the ability:

---

<sup>2</sup> City Council could amend the Charter to expand its power to remove to include police officers to be within Council's jurisdiction. As explained later in the opinion, this type of Charter amendment may require a mandatory referendum pursuant to Section 23 of the N.Y. Municipal Home Rule Law.

"To prescribe and authorize the appointment of all subordinates, except in cases in which power to make such prescription and/or authorization is conferred by law on some other board, body or official."

This Charter provision also supports the position that the Mayor is the "ultimate" appointing authority for subordinate agents, officers, and employees of the City of Rochester except where other law confers that power on some other official or entity. Again, the issue presented here is the ability to delegate such power and authority to the PAB.

(iii) **City Charter – Article 8 - (Police Chief Authority and Police Tenure)**

Under Article 8 of the Charter, the Chief of Police has certain duties and authority described therein.

Article 8 § 8A-1(D) of the Charter identifies the departmental head of the Rochester Police Department as the Chief of Police:

"The Chief of Police shall be the head of the Police Department and shall have control of its administration. The Chief of Police shall assign, station and transfer all personnel under the Chief's jurisdiction. The Chief of Police shall be the *appointing authority* for members and employees of the Police Department." (emphasis added).

Thus, the Chief of Police is the appointing authority for members and employees of the Police Department under the terms of the Charter. The Chief of Police has delegated some of his disciplinary fact-finding authority to the Professional Standards Section, pursuant to internal policy and the Agreement, but retains actual discipline authority. As a consequence, there is precedent for some delegation of the Chief of Police's discretionary authority.

Article 8, § 8A-5 of the Charter grants police officers tenure, except that their employment may be terminated pursuant to lawful process:

"All the officers and members of the Police Department *subject to the power of removal herein contained* hold their respective offices during good behavior or until by age or disease they become permanently incapacitated to discharge their duties." (emphasis added).

Rochester police officers enjoy a certain level of job security for good performance of their duties subject to the Mayor's, or the Chief of Police's disciplinary or removal authority. Therefore, the issue of delegation must be examined in this context.

(iv) **City Charter- Article 12** – (Creation of Advisory Boards)

Article 12, § 12-31 of the Charter enables the City to create citizen *advisory* boards. This is the Charter provision utilized by the City to create the current Civilian Review Board.

Note that although there is case law upholding the City's establishment of a civilian advisory board for the Rochester Police Department pursuant to Article 12-31 of the Charter, Article 12-31 of the Charter is unlikely to provide a sufficient basis to establish the proposed PAB to the extent the Council desires that the proposed PAB enjoy actual disciplinary authority (as opposed to being purely advisory). In *Locust Club of Rochester v. City of Rochester*, 29 A.D.2d 134, 137 (4th Dept. 1968), the Appellate Division, Fourth Department held that a local law creating a Police Advisory Board (that lacked disciplinary authority) pursuant to Article 12-31 of the Charter did not violate Charter provisions giving the then Commissioner of Public Safety disciplinary authority over police officers precisely because the Police Advisory Board issued disciplinary **recommendations** only. (emphasis supplied). That decision was affirmed by the Court of Appeals. See, *Locust Club of Rochester v. City of Rochester*, 22 N.Y.2d 802 (1968).

Other courts that have looked at factually analogous cases also reached the same conclusion that the creation of a purely advisory civilian police review board does not conflict with charter provisions that vest ultimate disciplinary authority in a mayor, public safety commissioner and/or chief of police. See, e.g., *Lynch v. Giuliani*, 301 A.D.2d 351, 352 (1st Dept. 2003); see also *Kiernan v. City of New York*, 64 Misc. 2d 617 (Sup. Ct. N.Y. Cnty., July 24, 1970), *aff'd*, 35 A.D.2d 1081 (1st Dept. 1970).

In sum, Article 12, 12-31 of the Charter enables the City specifically to create advisory boards, not boards with independent enforcement power, so the City must create the delegation of authority in a Charter provision to accomplish the goal of the proposed PAB exercising disciplinary power over Rochester police officers in certain delineated circumstances.

(B) **THE STATUTE**

Section 75 of the N.Y. Civil Service Law (the "CSL") governs discipline procedures for public employees. Section 75 of the CSL, in pertinent part, states:

"The hearing upon such charges shall be held by the officer or body having the power to remove the person against whom such charges are preferred, or by a deputy or other person designated by such officer or body in writing for that purpose. In case a deputy or other person 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. The person or persons holding such hearing shall, upon the request of the person against whom charges are preferred, permit him to be represented by counsel, or by a representative of a recognized or certified employee organization, and shall allow him to summon witnesses in his behalf."

CSL § 75(2). As applied here, the officer or body that has the legal authority to remove an accused employee from the police force, or that officer's or body's designee, is the only entity statutorily qualified to preside over a police officer's statutory disciplinary hearing. However, only the legal "appointing authority" or other "official upon whom has been imposed the power to remove or mete out the discipline" may actually discipline a police officer. *Simpson v. Wolansky*, 38 N.Y.2d 391, 394 (1975) ("the findings of the hearing officer are not conclusive and may be overruled by the official upon whom has been imposed the power to remove or mete out the discipline, provided, of course, that the latter's action is supported by substantial evidence."). Presently under the Charter, the Mayor (as the ultimate appointing authority and supervisor), and the City Council (with power to remove for cause), have the power to remove City employees.

The Statute defines "appointing authority" as "the officer, commission or body having the power of appointment to subordinate positions." CSL § 2(9). Under the Charter, the Police Chief is the appointing authority for the Rochester Police Department. The Mayor is the appointing authority for the Chief of Police and has supervisory responsibilities over the Chief of Police and his administrative department.

### **(C) THE COLLECTIVE BARGAINING AGREEMENT**

In connection with the opinion, we reviewed the Agreement between the City of Rochester and Rochester Police Locust Club, Inc. The relevant section is Article 20. Section 15.1 under Article 20 requires that disciplinary hearings be held in accordance with CSL § 75, and provides a mechanism for selecting adjudicators for the disciplinary Hearing Board which consists of the Chief of Police and the officer charged with misconduct nominating Hearing Board members. Based on our analysis of relevant background information, the vast majority of officers charged with misconduct elect to proceed under Article 20, § 15.2 of the Agreement, which provides that a single Hearing Officer be appointed either (i) by mutual agreement between the City and the Locust Club, or (ii) in the event such an agreement cannot be reached, by the Chief of Police. Pursuant to Article 20, § 17 of the Agreement, the Chief of Police must make a final disciplinary decision based on the Hearing Officer's recommendation. We have not been asked to address any related issues to this Agreement which may result from the creation of the PAB.

(i) **Taylor Law and Police Discipline**

Even though we were not asked specifically to address the issue of the "Taylor Law" (Article 14 of the N.Y. Civil Service Law) and the application to local control of police discipline (and, as such, is beyond the scope of this opinion), we nonetheless wanted to bring to your attention this issue so as to provide context and some guidance for future research and consideration by the City as it may relate to the potential creation of the PAB.

The Court of Appeals has examined the tension between the "strong and sweeping policy" to support collective bargaining under the Taylor Law and the competing policy for strong disciplinary authority over police by local officials. See, *Matter of Patrolmen's Benevolent Assn. v. New York State PERB*, 6 N.Y. 3d 563 (2006); *In Matter of the Town of Wallkill v. CSEA*, 19 N.Y. 3d 1066 (2012); *In Matter of City of Schenectady v. New York State PERB*, 30 N.Y. 3d 109 (2017).

In *Schenectady*, the Court of Appeals, in a recent decision, held that the City of Schenectady had the power under the N.Y. Second Class Cities Law ("SCCL") to adopt new police disciplinary procedures different from those contained in the collective bargaining agreement, and that the Taylor Law was superseded by the existing law, SCCL, which was enacted prior to the Taylor Law. The Court found that the SCCL provides for local control of discipline of police officers. Accordingly, the Court of Appeals determined that police discipline was a prohibited subject of collective bargaining. As a result, the decision of the Appellate Division was reversed and the PERB decision was annulled. *In Matter of City of Schenectady, supra.* at 116-118.

*In Matter of Wallkill*, the Court of Appeals upheld a local law related to police discipline that was enacted under a general Town Law that pre-dated CSL § 75 and § 76. *Wallkill, supra.* at 1069. Finally in *Matter of Patrolmen's Benevolent Assn.*, the Court of Appeals held that although CSL § 75 and § 76 generally govern police disciplinary procedure, pre-existing laws that expressly provide for local control of police discipline were "grandfathered" under CSL § 76(4). See, *Patrolmen's supra.* at 573. As a result, the Court of Appeals held that the Taylor Law must give way in favor of "the policy favoring strong disciplinary authority for those in charge of police forces." *Id.* at 571.

These cases may prove instructive and provide guidance as to the City's consideration of its ability to maintain local control over police discipline without the restrictions or requirements of the Taylor Law.

(D) **SECTION 891**

N.Y. Unconsolidated Laws § 891 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.

N.Y. Unconsol. Law § 891. Hence, when the discipline sought against a police officer is removal, only the officer or body having the power to remove the person charged (or their appropriate designee) may preside over the required hearing. Here, the power, under the Charter, to remove a City official or employee from employment presently rests with the Mayor, City Council and in terms of police officers it also rests with the Chief of Police.

**ANALYSIS and DISCUSSION**

After completing the analysis of the relevant Charter provisions (Articles 2, 3, 8 and 12), the applicable statutes (N.Y. Civil Service Law § 75 and N.Y. Unconsolidated Laws § 891) and the Agreement, we now turn to a discussion of the relevant case authorities and additional relevant statutes related to the delegation of authority to the PAB.

The proposed PAB may be legally empowered to discipline police officers of the Rochester Police Department provided the Charter is amended to recognize the proposed PAB as having the disciplinary authority for members and employees of the Police Department as delegated by the appropriate appointing or supervisory authority. As a threshold matter, assuming the proper amendments to the Charter, the Court of Appeals case *Gomez v. Stout*, 13 N.Y.3d 182 (2009) does not preclude or prohibit the proposed PAB from disciplining police officers. In *Gomez*, the Court of Appeals concluded that the CSL § 75 disciplinary hearing for Gomez, an employee of the Westchester County Department of Parks, Recreation and

Conservation, was improperly presided over by the Commissioner of the Westchester County Department of Public Works. *Id.* at 187. The Commissioner of the Westchester County Department of Parks, Recreation and Conservation could not preside over Gomez's disciplinary hearing due to a conflict of interest. *Id.* at 185.

The Court of Appeals held that although CSL § 75(2) "does not explicitly state what the officer or body should do where a disqualifying conflict exists, it clearly requires that the power to discipline be delegated, if necessary, **within the governmental department's chain of command.**" *Id.* at 186-87 (emphasis supplied). Here, the Mayor, under the Rochester City Charter, is within the chain of command since she is the ultimate appointing authority and supervisor of all administrative City departments. As a result, her power can be delegated under appropriate and limited circumstances in the public interest to achieve the important public policy goals.

Opponents of the proposed PAB's disciplinary powers argue the quote means disciplinary power over officers and employees of the Rochester Police Department must in all cases be exercised by the Chief of Police or his duly designated subordinates within the Rochester Police Department. That interpretation as to the *Gomez* decision is flawed.

The Court of Appeals in *Gomez* clearly stands for the legal proposition that the person ultimately determining and enforcing discipline against a public employee must have "supervisory authority over that particular employee". *Id.* at 187. Because under the relevant local law in *Gomez*, (Westchester County Charter § 134.41), the Commissioner of Public Works did not have supervisory authority over Gomez, he could not discipline Gomez. As a result, the Commissioner of the Department of Public Works was not the proper hearing officer. *Id.* at 185-86. Rather, under the Westchester County Charter, the Deputy Commissioner of Parks, Recreation and Conservation should have presided over the hearing given the conflict of interest held by the actual Commissioner of Parks, Recreation and Conservation.

Thus, the principle of *Gomez* is that only those authorized by local law (municipal charter) to supervise a public employee may issue discipline pursuant to CSL § 75. In the present matter, under the City's current Charter, the Mayor, as the ultimate appointing authority, is within the governmental chain of command and she has supervisory authority over the Chief of Police (whom she appoints) and City employees as well as subordinates. The Charter could be amended to make clear that the Mayor has, concurrent with the Chief of Police, the power to appoint, discipline and remove officers and employees of the Police Department and to vest the exclusive authority, under certain circumstances, to the Mayor to remove and discipline police officers and employees, and the Charter could also be amended to delegate to the proposed PAB, the Mayor's authority to discipline employees of the Rochester Police Department. With such amendments, the *Gomez* case would actually support such disciplinary power of the proposed PAB.

Under the Charter, the Mayor, for example, has the supervisory power and control over all administrative departments which includes the authority to remove and discipline. The applicable case precedents make it clear that mayors enjoy such authority, and mayors' disciplinary decisions will be upheld when supported by a rational basis. *See, e.g., Correll v. Bucci*, 19 A.D.3d 919 (3d Dept. 2005); *Pocengal v. Crabb*, 154 A.D.2d 772 (3d Dept. 1989); *DiOrio v. Murphy*, 20 A.D.2d 754 (4th Dept. 1964).

Additionally, the City has the authority to create and discontinue government departments within its discretion:

"every local government, as provided in this chapter, shall have power to adopt and amend local laws not inconsistent with the provisions of the constitution or not inconsistent with any general law, relating to the following subjects, whether or not they relate to the property, affairs or government of such local government, except to the extent that the legislature shall restrict the adoption of such a local law relating to other than the property, affairs or government of such local government: . . . the creation or discontinuance of departments of its government and the prescription or modification of their powers and duties."

N.Y. Mun. Home Rule Law 10(1) (ii)(a)(1).

As a consequence, City Council has the authority and power to create the PAB. Under the Home Rule powers, the City Council, if it so elects, can by local law prescribe the powers of the PAB and its public policy goals.

Any Charter amendments to establish a PAB must be clear with respect to the PAB's power to discipline police officers and under what specific circumstances. A Charter amendment must address with some degree of clarity the scope of the PAB's disciplinary authority and the governmental source from which such disciplinary authority is derived.

**(A) Delegation of Authority**

The critical question is whether the disciplinary authority the Charter vests in the Mayor and the Chief of Police may be delegated by local law to the proposed PAB. There are no case precedents or relevant state statutes that prohibit the City from amending its Charter to delegate the Mayor's and the Chief of Police's disciplinary authority over police officers under certain circumstances to the proposed PAB.

The City is free to revise the Charter in a manner not inconsistent with the Constitution or general State Law. *See* N.Y. Municipal Home Rule Law §10(a) (ii); *see also Meredith v. Connally*, 38 A.D.2d 385, 386 (3d Dept. 1972) [holding local law adopted by city council transferring power to appoint corporation counsel from the city manager, himself an appointee of

the council, to the city council, was within council's power under section 23 and city charter and was not so substantial a change as to require a referendum].

Section 20(13) of the N.Y. General City Law provides a basis for the City to amend the Charter by local law so as to authorize the City to create the proposed PAB and empower it with disciplinary authority. Section 20(13) of the General City Law authorizes the City to "maintain order, enforce the laws, protect property and preserve and care for the safety, health, comfort and general welfare of the inhabitants of the city and visitors thereto." Amending the Charter to authorize the City to create the proposed PAB and empower it with disciplinary power over Rochester police officers would be a proper exercise of the City's powers under Section 20(13) of the N.Y. General City Law. The City has three main options for accomplishing the necessary amendment to the Charter.<sup>3</sup> We have outlined the most practical option below.

**OPTION: CHARTER AMENDMENT BY DIRECT LEGISLATIVE ACTION**

If City Council decides to proceed toward implementation of a PAB, the Council may take direct legislative action to amend the Charter under its local law power as provided in section 10 of the Municipal Home Rule Law:

"every local government, as provided in this chapter, shall have power to adopt and amend local laws not inconsistent with the provisions of the constitution or not inconsistent with any general law, relating to the following subjects, whether or not they relate to the property, affairs or government of such local government, except to the extent that the legislature shall restrict the adoption of such a local law relating to other than the property, affairs or government of such local government: . . . the revision of its charter or the adoption of a new charter by local law adopted by its legislative body pursuant to the provisions of this chapter and subject to the procedure prescribed by this chapter or by local law adopted pursuant to article four of this chapter."

N.Y. Mun. Home Rule Law 10(1)(ii)(c)(1). Pursuant to this option, the Council, by local law revises the Charter, creates and establishes the PAB as a department of the City and then with the consent and approval of the Mayor and/or Police Chief, delegates disciplinary authority to the PAB<sup>4</sup>.

<sup>3</sup> The New York State Department of State offers very helpful guidance to municipalities on the subject of how to amend their charters. See [https://www.dos.ny.gov/lg/publications/Revising\\_City\\_Charters.pdf](https://www.dos.ny.gov/lg/publications/Revising_City_Charters.pdf). Much of the following discussion of the City's amendment options relies on that guidance.

<sup>4</sup> It has been held that civilian police review boards that infringe upon the oversight functions vested in executive officials are invalid when such authority or functions reside exclusively in a mayor and/or chief of police, in the absence of an appropriate charter amendment. See, e.g., *Mayor of City of New York v. Council of City of New York*, No. 402354, 1995 WL 478872, at \*6 (Sup. Ct. N.Y. Cnty., June 28, 1995) (invalidating Independent Police

If City Council so chooses to proceed with the option, there should be a series of public hearings throughout the City related to the subject matter of the local law and debate within City Council to establish and develop the legislative record for the need for the PAB and its need to be independent of the Police Department and possess disciplinary powers, as well as, the circumstances under which such powers will be exercised by the PAB. The information obtained from the public hearings can provide a well-developed legislative record for the local law.

In this case, a referendum is not required to validate direct legislative action by the Council on this issue. The subject matter herein does not relate to any of the subjects for which a referendum on petition is appropriate pursuant to section 24 of the N.Y. Municipal Home Rule Law. Furthermore, a mandatory referendum would not be required by section 23 of the N.Y. Municipal Home Rule Law assuming that the power delegation is derived from the office of the Mayor and/or the Police Chief.

Courts have held N.Y. Municipal Home Rule Law section 23(2) (a), which requires referenda whenever cities make "new charters," does not apply to amendments to charters that do not substantially alter the municipal form of government. *See, e.g., Meredith v. Connally, supra* at 386; *s.*]; *see also Commer v. City of New York*, 236 A.D.2d 264 (1<sup>st</sup> Dept. 1997) (Local law did not effect a substantial change justifying the call for a referendum). The courts have held that "a local law shall be subject to mandatory referendum" only if it "abolishes, transfers or curtails any power of an elective officer." *See Shields v. County of Delaware*, 35 A.D.3d 1001, 1002 (3d Dept. 2006).

Here, 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. Rather, the proposed Charter amendments would bring clarity to the Mayor's existing power related to the disciplinary authority over the officers and employees of the Rochester Police Department in certain prescribed circumstances and provide a mechanism through the PAB by which the Mayor can delegate such exercise of the disciplinary power. *See also Comm'n of Pub. Charities of City of Hudson v. Wortman*, 255 A.D. 241, 246 (3d Dept. 1938) (holding proposed local laws adopted by the common council of the city of Hudson for the abolition of previously existing commissions and the creation of new departments for discharge of duties theretofore borne by the commissions did not provide a new charter for the city within meaning of section 23, and thus no referendum was required) *aff'd sub nom. Comm'n of Pub. Charities v. Wortman*, 279 N.Y. 711 (1938).

---

Investigation and Audit Board created by city council over mayor's objection because the Board usurped oversight and appointment powers that had been vested in the mayor and police commissioner by charter), *aff'd sub nom. Mayor of the City of New York v. Council of the City of New York*, 235 A.D.2d 230 (1st Dept. 1997). Here, it is important to obtain the Mayor's support as well as consent of the Chief of Police to move forward with the proposed local law.

Assuming the proposed amendments to the Charter, case law confirms the propriety of a duly authorized organization external to the Rochester Police Department disciplining department employees. The Municipal Civil Service Commission exists pursuant to Article 12-11 of the Charter, and is independent of the Rochester Police Department. In *Perry v. Mun. Civil Serv. Comm'n of City of Rochester*, 191 A.D.2d 971 (4th Dept. 1993), the Appellate Division, Fourth Department upheld the Municipal Civil Service Commission Hearing Board's decision to uphold the Chief of Police's decision to terminate Perry, a Rochester Police Department police officer who deliberately made false statements during the course of a formal investigation. At the time, officers could appeal disciplinary decisions by the Chief of Police to Municipal Civil Service Commission. See also, *De Franks v. City of Buffalo*, 248 A.D.2d 992 (4th Dept. 1998) (upholding authority of Civil Service Commission to terminate employees who failed to comply with residency requirements). By analogy, if the proposed PAB was appropriately codified into the Charter similar to the Municipal Civil Service Commission and given the proper authority, then the proposed PAB could possess the authority to discipline employees of the Rochester Police Department.

Given these case precedents, a mandatory referendum is not required to validate the Council's direct amendment of the Charter to create the proposed PAB, because the proposed amendment would merely clarify or expand the Mayor's existing supervisory authority and provide the mechanism to exercise that authority by creating a new department or board delegated to exercise that authority. In short, if the City Council elects to proceed with the creation of the PAB, then, the most efficient way to make the required amendments to the Charter is for the Council to take direct legislative action, prudently complying with the normal procedures of legislative action such as notice to the public, making legislative findings and determinations, holding public hearings, and legislative debate.

To summarize, the applicable Civil Service Law provisions and case precedents do not preclude the creation of a proposed PAB from having disciplinary power so long as the Charter is appropriately amended to allow for creation of the PAB and to delegate to the PAB certain disciplinary authority over police officers. The recommendations are as follows:

(i) First, the Charter amendment must be clear to resolve the conflict that may now exist between the Charter provision as to supervision, control and removal of police officers. Under the Charter, both the Mayor and the Chief of Police appear to have a co-existing power to discipline and remove police officers. Accordingly, to accomplish the stated public policy goal of making the PAB independent from the Police Department, the PAB's power to discipline must be derived from the Office of the Mayor.



(ii) Second, the PAB should fit within an organizational structure within City government. The supervisory role over all administrative departments exercised by the Mayor, under the Charter, provides a basis to place the proposed PAB under the Office of the Mayor. The Charter is clear that the Mayor has the power to appoint, supervise, control and remove officers and employees of the City. As a consequence, the drafting of the local law must be done with care and prudence to balance all of the stakeholder's interest in good and accountable government.

Although issues that may arise under the Agreement with respect to the creation of the PAB are beyond the scope of this legal opinion, we do note that the Agreement will need to be reviewed by the appropriate parties and consideration given to potentially making modification to reflect the changes in local law by the Charter amendments.

Attorneys in this firm are admitted to practice in the State of New York, and the foregoing opinions are limited to the laws of the State. Except as expressly stated herein, no opinions are offered or implied as to any matter, and no inference may be drawn beyond the strict scope of this opinion as expressed herein. The opinions set forth in this letter speak only as of the date hereof and we assume no obligation of any kind or character with respect to any matters that may arise after the delivery of this letter. We shall have no obligation to revise or reissue this opinion with respect to any change in law or any event, fact, circumstance or transaction which occurs after the date hereof. Our legal opinions are an expression of professional judgment and are not a guarantee of a result. Our opinion may not be relied upon by any other person or entity without our prior written approval.

It is with gratitude and in the spirit of public service that we provide this opinion to the City Council.

Respectfully Submitted,  
**HARRIS BEACH PLLC**

By: 

H. Todd Bullard, Esq., a Partner