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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF TOWN OF WALLKILL,

Respondent,

-against-

No. 180

CIVIL SERVICE EMPLOYEES ASSOCIATION,
INC., (Local 1000, AFSCME, AFL-CIO,
Town of Wallkill Police Department
Unit, Orange County Local 836), et al.,
Appellants.

20 Eagle Street
Albany, New York 12207
September 13, 2012

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE CARMEN BEAUCHAMP CIPARICK
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE THEODORE T. JONES

Appearances:

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Penina Wolicki
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 180, Town of Wallkill
2 v. CSEA.

3 Counselor, go ahead. Do you want any
4 rebuttal time, counsel?

5 MR. CROTTY: One minute, Judge. If - - -

6 CHIEF JUDGE LIPPMAN: One minute. Sure.

7 MR. CROTTY: May it please the court, John
8 Crotty for the Wallkill PBA. You have two basic
9 questions here. I can't overstate their significance
10 to the field of public sector labor relations. The
11 first - - -

12 CHIEF JUDGE LIPPMAN: Counsel, but let's
13 talk about, though, the - - - from a broader
14 perspective, the police are a quasi-paramilitary,
15 whatever you want to call it, organization. Why - -
16 - isn't it the policy - - - isn't there - - - aren't
17 there good policy reasons to have discipline that
18 relates to the police, in again, a paramilitary
19 group, from their employer to be based - - - or from
20 the municipality, or whatever it is, for discipline
21 to be determined by the municipality or by the
22 governmental entity? Doesn't that make sense to hold
23 them responsible in that way rather than through an
24 arbitration or a collective bargaining agreement?

25 MR. CROTTY: It does not make sense.

1 CHIEF JUDGE LIPPMAN: Putting aside the
2 statutes or anything else - - -

3 MR. CROTTY: It - - -

4 CHIEF JUDGE LIPPMAN: - - - why isn't there
5 a good policy reason to do that?

6 MR. CROTTY: To me, there might be. But I
7 think that that policy choice - - - and that is
8 ultimately what this is about, I suppose - - -

9 CHIEF JUDGE LIPPMAN: Yes, go ahead.

10 MR. CROTTY: - - - but that policy choice
11 should be made by the legislature. They are the
12 repository of the public policy.

13 CHIEF JUDGE LIPPMAN: But you're saying
14 there might be a good policy reason to do that, but
15 it wasn't done here, because of the particular - - -

16 MR. CROTTY: It absolutely was not.

17 JUDGE READ: Well, there - - -

18 JUDGE CIPARICK: So when we heard the PBA
19 case, there were two competing public policies there,
20 the Taylor Law policy, which is that things should be
21 submitted to - - - people of public employment should
22 have their grievances submitted to arbitration. And
23 then there was the policy that Judge Lippman just
24 spoke about, that police discipline should be in the
25 hands of local officials. And we balanced those two

1 and we came out in favor of the local officials. Why
2 doesn't that work here? Or are you saying that - - -

3 MR. CROTTY: For a number of reasons.

4 JUDGE CIPARICK: Why? Is one of them
5 because the Local Law was not long established but
6 newly created?

7 MR. CROTTY: In Wallkill?

8 JUDGE CIPARICK: Yes.

9 MR. CROTTY: No. The Local Law is an
10 irrelevancy. This all traces back to the Town Law,
11 because the Local Law is just the implementation of
12 the Town Law.

13 CHIEF JUDGE LIPPMAN: So why wasn't the
14 Town Law preexisting and - - -

15 MR. CROTTY: It is preexisting. You did
16 not say in New York City PBA that police officer
17 discipline is a prohibited subject of bargaining
18 statewide. You did not say that. In fact you said
19 the opposite. You said specifically that in those
20 jurisdictions where Section 75 applies, there is no
21 bargaining prohibition. You can reverse - - -

22 JUDGE SMITH: We also said that 155 was
23 kind of similar to 75, didn't we?

24 MR. CROTTY: It is similar. But the
25 sentence reads - - -

1 JUDGE SMITH: In fact, it's identical when
2 you come right down to it.

3 MR. CROTTY: It is not identical. I know
4 the Town says that. That is not true. The Rockland
5 County Police Act is different from the Town Law in
6 two major respects. First, the Rockland County
7 Police Act is a special law. And as I read New York
8 City PBA, you said throughout that decision that it
9 was those special laws - - - over and over again you
10 make reference to the laws that were in issue in the
11 Appellate Division decisions that you had found had
12 evaluated the policies - - -

13 JUDGE CIPARICK: So this - - -

14 MR. CROTTY: - - - correctly.

15 JUDGE CIPARICK: - - - preexists, but this
16 is a general law.

17 MR. CROTTY: This is an absolutely general
18 law. And if - - -

19 JUDGE SMITH: Just - - -

20 JUDGE READ: So we might - - - so we might
21 have to extend PBA.

22 MR. CROTTY: That's the second question.
23 The first question is, did you hold - - -

24 JUDGE READ: But what's wrong with that?

25 MR. CROTTY: - - - what the Appellate

1 Division said you did. And the answer, I think, to
2 that, unequivocally is no, you didn't.

3 JUDGE READ: Well, what's wrong with
4 extending the law for the reasons the Chief
5 expressed?

6 MR. CROTTY: You could do that. But this
7 is what you would have to do in order to do that.
8 You'd have to do many things in order to do that.

9 JUDGE JONES: Is it your position that the
10 Town Law is not specific enough?

11 MR. CROTTY: The Town Law was enacted in
12 1932. It clearly delegates power over discipline to
13 local officials. But it specifically subordinates
14 its text to other laws. And I think that makes a
15 difference.

16 JUDGE SMITH: Well, but this - - -

17 MR. CROTTY: That is not true in the
18 Rockland County Police Act.

19 JUDGE SMITH: Just to get back to whether
20 they're identical or not, the words are identical,
21 aren't they?

22 MR. CROTTY: Only in one section. The
23 Rockland County Police Act starts out in Section 1 by
24 saying, notwithstanding any other law to the
25 contrary, this is the way discipline for police

1 officers in Rockland County towns will be handled.

2 You then go to - - -

3 JUDGE SMITH: That's the part we did not
4 quote in - - -

5 MR. CROTTY: You did not quote that part.
6 You did not. And that's why I think it's - - - you
7 say they are worded similarly. Yes, they are worded
8 similarly in one respect. At the beginning and end
9 of the Rockland County Police - - -

10 JUDGE SMITH: You say we said similar but
11 not identical. Let me suggest that maybe that's
12 because we were talking about the Town Law and the
13 Village Law. And the Village Law isn't identical,
14 because it says "village" not "town". Isn't that why
15 you - - -

16 MR. CROTTY: Well, the Village Law says the
17 same thing. The Village Law is subordinated to other
18 laws as well. I think - - -

19 JUDGE SMITH: But it's not - - - the
20 Village Law is not identical, because the word
21 "village" replaces the word "town".

22 MR. CROTTY: Well, they're nigh on
23 identical in substance.

24 JUDGE SMITH: Yes. Yes.

25 MR. CROTTY: Yes. I'm - - -

1 JUDGE SMITH: Yes.

2 MR. CROTTY: - - - they are. But the
3 Rockland County Police Act is not worded similarly to
4 the Town Law. It starts and it ends with language
5 that clearly says - - - and this is the way it's been
6 interpreted - - - that in Rockland County, the Civil
7 Service Law does not apply. That is true in New York
8 City.

9 So everybody up until the Appellate
10 Division wrote this decision interpreted New York
11 City PBA to mean that what you needed in order to
12 effect the bargaining ban were special state laws
13 that operate to preempt the application of 75 and 76
14 in those jurisdictions.

15 JUDGE SMITH: But where do we say "special"
16 in PBA?

17 MR. CROTTY: It's throughout the decision,
18 Your Honor.

19 JUDGE SMITH: You got the word there
20 anywhere?

21 MR. CROTTY: Yes. It's all through the - -
22 - it's all through the decision. In fact, you go out
23 of your way a little bit in New York City PBA to deal
24 with the PBA's main argument. The PBA's main
25 argument to you in that case was the New York City

1 Code and Charter is local law. Local law doesn't
2 trump a subsequently enacted state law. And so what
3 you wrote was yes, that may be true that they are now
4 local, but they had their genesis in special state
5 laws, just like the Rockland County Police Act.

6 And every law that you have in every single
7 one of those Appellate Division decisions were all
8 special laws.

9 JUDGE READ: Okay. So we'd have to extend
10 it.

11 MR. CROTTY: You would. That's the second
12 question.

13 JUDGE READ: All right. But why wouldn't
14 we? Why shouldn't we, I guess, is my question to
15 you?

16 MR. CROTTY: You - - - to do that, you have
17 to do a number of things, Judge Read.

18 JUDGE READ: Well, I think we were here a
19 few minutes ago. So what are the number of things?

20 MR. CROTTY: Now we're coming back?

21 JUDGE READ: Yes.

22 MR. CROTTY: Number one, you'll have to
23 reverse Auburn. Number two, you'll have to rescind
24 your statement in New York City PBA that where
25 Section 75 applies, there is no bargaining

1 prohibition. And there is no doubt, on the existing
2 law, that the Town Law does not render Section 75
3 inapplicable in those jurisdictions that are subject
4 only to the general Town Law. The decisions are in
5 the brief - - - there's four or five of them - - -
6 it's to the same effect with the Village Law. They
7 work together hand-in-hand.

8 JUDGE SMITH: Well, what you didn't - - -
9 in context, when you say when Section 75 applies, you
10 mean it applies to police discipline. Yes?

11 MR. CROTTY: Yes. And that's the point,
12 that in Wallkill, but for the court - - -

13 JUDGE SMITH: Isn't that what you're
14 standing here arguing, whether police discipline has
15 been superseded by the Town Law?

16 MR. CROTTY: It has not. Not on the basis
17 of New York City PBA. But whether you should - - -

18 JUDGE SMITH: But it is - - - just for my
19 satisfaction, am I right in thinking that every word
20 of the part of Section 75 that we quoted back in PBA,
21 every word of that is in this - - - in Town Law
22 Section 155?

23 MR. CROTTY: I'm not sure it's identical,
24 but it's close to it, if not identical. Yes. But
25 there's two sections that are omitted: the beginning

1 and the end that says this is preemptive. Not true
2 of Section 75.

3 CHIEF JUDGE LIPPMAN: Okay, counselor.
4 You'll have some rebuttal time.

5 MR. CROTTY: Thank you.

6 CHIEF JUDGE LIPPMAN: Counsel?

7 MR. MCKAY: Good afternoon.

8 JUDGE CIPARICK: So we - - -

9 MR. MCKAY: If it please the court, my name
10 is Joseph McKay. I represent the Town of Wallkill.

11 JUDGE CIPARICK: So apparently there is a
12 distinction between Town Law 155 and the Rockland
13 County Law, the New York City Charter, et cetera.

14 MR. MCKAY: They are true - - - the
15 Rockland County Police Act, the language that is
16 being discussed - - -

17 JUDGE CIPARICK: Right.

18 MR. MCKAY: - - - and Town Law 155, in all
19 relevant respects are identical. There's also
20 Section 6 of the Rockland County Police Act, and also
21 Section 154 of the Town Law, authorizing towns to
22 enact - - - to have strong control over police
23 forces. And they, too, are identical. So there is
24 no distinction; this court was - - -

25 JUDGE CIPARICK: So why did it take the

1 Town so long to enact Local Law to implement 155?

2 MR. MCKAY: Well, I think, quite frankly,
3 Your Honor, and this is - - - that was actually the
4 question that was asked in the Appellate Division - -
5 - until cases like the Town of Greenburgh and Cuevas
6 and others came along in the early '80s and into the
7 '90s, these issues started to come to the forefront.
8 Then, at first, in Town of Greenburgh, the local
9 Police Acts were found to expressly prohibit
10 negotiation of police discipline. And these issues
11 started to develop.

12 And when your court issued the Matter of
13 PBA decision, it was clear; Matter of PBA says when -
14 - -

15 JUDGE SMITH: Well, when did you issue - -
16 - when was the Local Law enacted?

17 MR. MCKAY: 2007. And a few months - - -

18 JUDGE SMITH: And PBA was 2006. So you're
19 saying this was essentially a reaction to PBA?

20 MR. MCKAY: Absolutely. In the legislative
21 history portion of the Local Law, we say it's enacted
22 specifically pursuant to Section 154 and 155 under
23 this court's decision.

24 JUDGE CIPARICK: Do you have any idea how
25 many other towns have done the same thing?

1 MR. MCKAY: Not to my knowledge.

2 JUDGE GRAFFEO: And before we issued PBA,
3 did your town engage in collective bargaining on
4 issues related to - - -

5 MR. MCKAY: Yes. There's an - - -

6 JUDGE GRAFFEO: - - - police discipline?

7 MR. MCKAY: - - - existing colle - - - yes.
8 There's an existing collective bargaining agreement.

9 JUDGE PIGOTT: Is there any sense in the
10 Town, that having negotiated that - - - in other
11 words, you know, there's some give-and-take, and the
12 PBA gave up certain things for the waiver, that
13 enacting a law that just changes one of the major
14 provisions in the CBA shouldn't be enacted until
15 after the CBA's renegotiated?

16 MR. MCKAY: Well, the Town had to. In
17 Matter of PBA you said so.

18 JUDGE PIGOTT: You felt you had to?

19 MR. MCKAY: You said you cannot - - - you
20 cannot negotiate the subject of police discipline,
21 period.

22 JUDGE CIPARICK: Well, that's when there
23 was a preexisting special - - - specific law.

24 MR. MCKAY: Well, unless - - -

25 JUDGE PIGOTT: See you would have needed

1 this law if what we said became the law. You felt
2 you needed to change your law.

3 MR. MCKAY: No. No, actually, that's not
4 true, Your Honor. In Matter of PBA, you specifically
5 referred to the Village Law and Section 155 of the
6 Town Law. Section 155 of the Town Law is enabling
7 legislation. It says the town has the authority to
8 enact rules and regulations concerning police
9 discipline.

10 So based upon this court's decision, the
11 Town referred back to the preexisting general Town
12 Law. And it was empowered under Sections 154 and 155
13 to enact Local Law 2 of 2007.

14 JUDGE SMITH: So essentially, you did for
15 the Town what the Rockland County Act did for
16 Rockland County?

17 MR. MCKAY: Well, I did for the Town what
18 this court said to do in Matter of PBA. It said you
19 cannot negotiate police discipline where there is a
20 law that was enacted - - - a general, special, or
21 local law or city charter - - -

22 JUDGE PIGOTT: Well, that was kind of my
23 point. You didn't have to pass the Local Law. I
24 mean, that's your argument that once we decided PBA,
25 there was no more - - - that we voided a section of

1 the collective bargaining agreement.

2 MR. MCKAY: That is absolutely correct.
3 Just as the court did in Matter of PBA by striking
4 out a certain section of the collective bargaining
5 agreement in the Town of Orangetown.

6 JUDGE SMITH: Are you saying that Town Law
7 55 (sic), by its own force, invalidated that
8 provision of the collective bargaining agreement, or
9 are you saying the Local Law was necessary to do it?

10 MR. MCKAY: What I'm saying is this court's
11 decision in Matter of PBA made it clear that the Town
12 could not negotiate concerning discipline.

13 JUDGE SMITH: Okay. Let me - - - focus on
14 my question.

15 MR. MCKAY: Okay.

16 JUDGE SMITH: Was what we made clear - - -
17 I think you've answered it, but let me see. You're
18 saying what we made clear in PBA was that Town Law
19 155, by its own force, invalidated that provision of
20 your collective bargaining agreement?

21 MR. MCKAY: Yes, correct. And just to
22 complete the thought; 155 and 154 of the Town Law is
23 enabling legislation. It specifically allows the
24 Town to adopt rules and regulations concerning police
25 discipline.

1 JUDGE PIGOTT: Could those rules and
2 regulations be that there would be - - - upon consent
3 of the PBA there's a waiver of Article 75 rights, and
4 you go to arbitration?

5 MR. MCKAY: Well, not now. Not now. That
6 was probably the interpretation years ago. That's
7 how, I believe, going back over the decades, these
8 police disciplinary provisions found their way into
9 the collective bargaining agreements.

10 As you said in Matter of PBA, and you were
11 very specific, where there is a general, special, or
12 local law, or a city charter, which pre-dates the
13 enactment of CSL 75, then under 76.4 of the CSL, as a
14 matter of public policy, negotiation of police
15 discipline, under those preexisting laws is
16 prohibited as a matter of public policy.

17 JUDGE CIPARICK: So you don't feel that
18 this would be an extension of PBA; you think that PBA
19 controls and there's no other - - -

20 MR. MCKAY: I believe PBA absolutely
21 controls. And I think - - -

22 CHIEF JUDGE LIPPMAN: And makes no
23 distinction between general and special?

24 MR. MCKAY: No, it doesn't. Because quite
25 frankly, this court points out the language of 76.4.

1 That language specifically says preexisting, general,
2 special, local laws, or city charters. I don't agree
3 with Mr. Crotty's interpretation where he says that
4 the term "special" is used throughout the Matter of
5 PBA decision. I disagree. This court, generally
6 speaking, will only make the decision it's presented
7 with. This court, in Matter of PBA, was presented
8 with the Rockland County Police Act. It made its
9 decision based upon that statute. But in doing so,
10 it noted that Section 155 of the Town Law is exactly
11 the same as the provision that you were reviewing in
12 Matter of PBA.

13 If this court is going to rule in Mr.
14 Crotty's favor, then this court's going to have to
15 explain why two statutes, Town Law 155 and Rockland
16 County Police Act Section 7, which contain identical
17 language, and which were enacted only seven years
18 apart, stand for two completely different public
19 policies; that one says you must have mandatory
20 negotiation over police discipline, and the very same
21 language in a different statute says you cannot.

22 JUDGE PIGOTT: What's the relief for an
23 officer who's charged and the commissioner makes his
24 ruling? Is it an Article 78?

25 MR. MCKAY: Yes.

1 JUDGE PIGOTT: Okay.

2 CHIEF JUDGE LIPPMAN: Okay. Anything else,
3 counselor?

4 MR. MCKAY: Well, except to say that much
5 of what's contained in the union's brief were also
6 already argued and passed upon by this court in
7 Matter of PBA. This court did not make a distinction
8 between special laws, local laws. And since this
9 court's decision, we now have within the Town of
10 Wallkill, the City of Middletown. The City of
11 Middletown concerned a charter provision.

12 And the Fourth Department recently ruled in
13 that case that by virtue of the city charter you
14 cannot negotiate police discipline. So this line of
15 cases now stands for the proposition that local laws,
16 special laws, and city charters cannot - - - you
17 cannot negotiate police discipline when you have
18 those preexisting laws.

19 But the union still wants you to say - - -
20 wants you to ignore the word "general" in Section
21 76.4 and say well, Matter of PBA didn't apply to
22 general laws. And that's simply not true.

23 And there's one thing that would be
24 extraordinarily ironic here, and I pointed it out in
25 my papers. The City of Middletown is located within

1 the Town of Wallkill. Recently, the Fourth
2 Department said you cannot negotiate discipline in
3 the City of Middletown, because as a matter of public
4 policy, it's prohibited. However, in the Town of
5 Wallkill, if this court were to reverse the Appellate
6 Division, on one side of a street or another side of
7 an intersection, there would be two competing public
8 policies in play.

9 JUDGE CIPARICK: Same police force?

10 MR. MCKAY: Different police forces. One
11 community, but different police forces. And I point
12 out in my papers, people go to school and shop and
13 work in the city, the town. Either there's a public
14 policy favoring the strong control of police forces
15 or there's not.

16 CHIEF JUDGE LIPPMAN: Okay, counsel.

17 MR. MCKAY: Thank you.

18 CHIEF JUDGE LIPPMAN: Thanks.

19 Counselor, rebuttal?

20 MR. CROTTY: Yes, just quickly. In the
21 City of Middletown, the charter that was in issue
22 there, that was a special state law. Every single
23 one of them are special state laws. It was not local
24 law. It was just - - -

25 JUDGE SMITH: Which language in PBA do you

1 say most clearly distinguishes between the "special"
2 and the "general"?

3 MR. CROTTY: I have them, Judge. I've put
4 - - - written down a few of them.

5 You refer throughout the decision - - -
6 after you refer to the Appellate Division decisions,
7 you refer to the Westchester County Police Act,
8 that's a special law; the Rockland County Police Act,
9 special law; New York City, originally a special law.
10 All of them were special laws.

11 You say that it is such legislation, that
12 it is legislation of this kind, that it is these
13 enactments that effect the bargaining ban. The
14 reference to Civil Service Law 76.4 is a fragment of
15 one sentence offered for the purpose only of saying
16 the laws are grandfathered. Yes, they are. You
17 still have to get to the question as to whether,
18 within those laws that are grandfathered, there are
19 any policies that trump Taylor Law.

20 You use the implicit policies and special
21 laws to do so, but you have here two competing
22 policies, arguably - - - I don't think there is. But
23 assuming you do, it's two general laws. The normal
24 rule of construction is, two general laws, the
25 conflict between them is resolved by the later

1 enactment.

2 JUDGE SMITH: Does it really make sense to
3 say that the legislature says here's our policy for
4 Rockland County - - -

5 MR. CROTTY: Right.

6 JUDGE SMITH: - - - it trumps the Taylor
7 Law. But if the legislature says here's our policy
8 for every town in the state, the same policy, it
9 doesn't trump the Taylor Law?

10 MR. CROTTY: Law draws lines all the time,
11 Judge. And you did it in your own decision here,
12 when you said where 75 applies, there is no
13 bargaining ban. 209.4 of the Taylor Law, the
14 interest arbitration provisions, they're all police
15 officers there, but they don't have the same rights.
16 They have the same powers, the same status, but they
17 don't have the same rights.

18 Permanent police officers have different
19 rights than probationary police officers. Same
20 powers, same duties. Part-time police officers have
21 different rights than full-time police officers.
22 There's line drawing all over.

23 So when he said you shouldn't have two
24 different rules, the law is about not necessarily one
25 size fits all. Thank you.

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CHIEF JUDGE LIPPMAN: Thanks, counselor.

Thank you both. Appreciate it.

(Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Town of Wallkill v. Civil Service Employees Association, Inc., et al., No. 180 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Penina Wolicki

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Date: September 20, 2012