

# DOUBLE INSULATION

How New York Law Shields Public Employees from Accountability

By Ken Girardin

July 2020

# Double Insulation

## How New York Law Shields Public Employees From Accountability

By Ken Girardin

George Floyd's video-recorded death in Minneapolis police custody stoked protests across the country. In New York, outrage over the Floyd case led to new police accountability measures including the repeal of a state law that kept secret the disciplinary records of police officers, firefighters and corrections officers.

But the steps taken by the Legislature in June were not the final word in addressing New York's need for disciplinary reform—nor are police the only category of public employee that remain insulated from adequate public oversight.

In fact, the vast majority of New York government workers, including teachers, continue to enjoy multi-layered protection from discipline or dismissal under a combination of state law and collective bargaining provisions. The rules governing public employment in New York are expressly designed to make it time-consuming and expensive to hold workers accountable for poor performance or misconduct.

This paper examines those rules and how they are generally applied today. It concludes by recommending a series of reforms designed to ensure a more accountable, less costly, and transparent disciplinary process for all public employees, while preserving their right to due process.



The recommended reforms include updating state laws and regulations to:

- prohibit collective bargaining of disciplinary procedures and standards;
- ensure that elected officials and their designated department heads have the last word on disciplinary penalties;
- provide state-appointed hearing officers for local governments and school districts;
- mandate public disclosure of disciplinary records and statistics; and
- require unions to reimburse employers for time that union officials spend representing colleagues in disciplinary proceedings instead of doing their government jobs.

## THE LAWS

The basic rule of private employment in New York is that workers can be disciplined or fired by their employers for any reason—or no reason at all—as long as no federal or state anti-discrimination statutes are violated.\*

It's very different in the Empire State's public sector. New York public employees since the late 19th century have enjoyed job protections under the state Civil Service Law. The law controls how employees get hired, receive promotions, and, when necessary, get disciplined or terminated.

The statute, which dates back to 1883, lays out ground rules for disciplinary charges and gives workers due process when “incompetence or misconduct” is alleged.<sup>1</sup> As the state's *Manual of Procedure in Disciplinary Action* explains:

There is no comprehensive list of acts and omissions which constitute ‘incompetency or misconduct.’ Rather, common sense and a review of the employer's rules and performance standards tell us, in most cases, whether an employee's performance or conduct provides a basis for disciplinary action.<sup>2</sup>

The disciplinary provisions in Civil Service Law section 75 apply broadly to state and local government employees in non-managerial “competitive class” roles (those requiring a civil service exam). They also apply to employees who have worked at least five years in “non-competitive” positions (for which testing isn't practical) or in unskilled labor roles, and to some other special categories of public employees.<sup>3</sup>

Section 75 requires employers to notify accused employees of the charges and give them time to prepare a defense. It limits workers to 30 days of unpaid suspension, and guarantees them a hearing where witnesses can be subpoenaed.

Hearing officers make decisions about whether the charges are substantiated, and they can choose from a short list of penalties outlined in the law:

- reprimand;
- monetary fine up to \$100;
- suspension without pay for a period not exceeding two months;
- demotion in grade and title; or
- dismissal.

Any member of management can preside over a Section 75 hearing, so long as he or she is not directly involved in the case. For instance, a county government could likely have its public works commissioner act as a hearing officer if the matter involved a health department employee. The county health commissioner or personnel director, on the other hand, probably couldn't serve in the role.

Hearing officers must strictly adhere to procedures or risk having the employer's eventual decision overturned on appeal. That leads many employers to hire outside specialists to perform this duty.

Hearings can last multiple days, and sometimes get adjourned for weeks at a time while parties deal with new evidence or scheduling. The hearing officer typically lets each party file post-hearing briefs before a decision is rendered about guilt and the appropriate penalty. If this process extends beyond 30 days, the employer often must resume paying the accused employee.

---

\* The only exception to the private sector's “at will” employment doctrine is when employers have entered an implied or written contract with their workers requiring just cause for discipline or dismissal.



Management makes the final decision whether to act on the hearing officer's finding. If convicted, an employee may appeal to the appropriate civil service commission or challenge the decision in court.<sup>4</sup>

If an employee is cleared of charges, he or she returns to work and gets back any lost pay and benefits.

### **Special terms for teachers**

Tenured<sup>5</sup> New York public school teachers and certain other school employees are entitled to a separate discipline process under Section 3020-a of the Education Law. The state's tenure laws date back to 1897, when the Legislature first created protections for New York City teachers.<sup>6</sup> Like Section 75, it sets procedures for presenting charges and guarantees the employee will get a hearing. Decisions under Section 3020-a can also be appealed by either party, but only in state court.

Individuals charged under Section 3020-a have three key advantages not available to other government employees.

First, the local school board must agree at the outset that "probable cause" exists.

Next, the employer must continue paying the accused employee unless he or she has been accused of certain crimes.<sup>7</sup>

Finally, the accused employee gets a say in who presides over his or her hearing. In school districts outside New York City, the state Education Department provides the employer and employee with a list of eligible arbitrators. The parties have 15 days to agree on one.<sup>8</sup> (A separate, more complex process governs hearing officer selection in New York City schools).

The state Education Department reimburses school districts for the cost of hiring a Section 3020-a hearing officer.<sup>9</sup> By contrast, local governments must pay the cost of hearing officers retained for Section 75 hearings unless the employee's union has agreed to pick up all or part of the cost.

While these laws give employees the right to due process, they do not require employees to subject themselves to disciplinary proceedings. Employers and employees have the option to settle, and often do.

But the processes in Section 75 and Section 3020-a are only part of the problem.

### **TAYLORED DISCIPLINE RULES: COLLECTIVE BARGAINING**

As described above, New York public employees enjoyed disciplinary due-process protections long before they won collective bargaining rights with the 1967 passage of the Public Employees' Fair Employment Act, also known as the Taylor Law. But in requiring public employers to negotiate "terms and conditions" of employment, the state Legislature set the stage for union contracts to become obstacles to disciplining public employees.

It's not clear that the framers of the Taylor Law intended or expected employee discipline to become a subject of collective bargaining. George Taylor, the Wharton School labor professor whose research gave rise to the law, wrote that the Civil Service Law "reduces...the range and aspects of subjects about which negotiations can take place freely and without reference to other executive or legislative decision-makers."<sup>10</sup>

However, the state Public Employment Relations Board (PERB) eventually began pressing employers to negotiate over any terms and conditions of employment that weren't explicitly disallowed by state law, including disciplinary procedures. Labor unions exploited the opening to demand different disciplinary rules on top of existing protections.

Union contracts negotiated under the Taylor Law can:

- give arbitrators the final say in most discipline proceedings;
- take away the employer's power to suspend an employee without pay;
- shorten the time in which an employer may initiate discipline, provided a crime was not committed;
- set a waiting period before charges can be brought;
- require the removal of unsubstantiated complaints from personnel files;
- prevent the employer from disclosing certain disciplinary records; and
- add steps to the discipline process which, if skipped, can constitute "fatal" flaws that prevent interviews or evidence from being considered.

In extreme cases, unions and employers have gone so far as to work out maximum penalties for specific infractions.

The combination of statutory due-process requirements and contractual provisions means there is little uniformity in New York's public sector when it comes to discipline. The rules are worked out with more than a thousand different employers

in secret union negotiation sessions. These are ultimately set out in contract language that isn't made publicly available until after it has been ratified by elected officials.

Even ratified contracts are rarely posted on the internet or otherwise made available by employers for public inspection. As a result, taxpayers are not informed of the disciplinary rules applying to the government employees who work for them.

Union contracts can separately interfere with basic accountability mechanisms that might prompt discipline. For instance, the rules and consequences related to drug testing are sometimes negotiated, as are matters related to the use of body cameras by police officers.

Employers face an uphill battle if they want to challenge such arrangements. Provisions of state and local labor contracts in New York remain in effect after a contract expires under the 1982 Triborough Amendment.<sup>11</sup> This gives labor unions a strong incentive to resist changes, as members continue getting longevity and other experience-based raises for years after deals expire.

Meanwhile, unions representing police officers, firefighters and certain other employees have even stronger powers with which to block discipline reforms at the bargaining table. These unions since 1974 have had the option to settle contract impasses through binding arbitration.<sup>12</sup>

The neutral person writing the decisions in these contract settlements rarely wades into disputes over matters beyond pay and benefits. That means unions, especially police unions, generally can count on getting raises without giving up contract provisions that shield employees from discipline. The state Legislature last year

renewed New York’s “temporary” mandatory impasse arbitration law for police and fire unions for another five years.<sup>13</sup>

The state’s scheme has expanded beyond preserving due process, mostly behind closed doors. The disciplinary rules for New York public employees have in many cases become a hindrance to holding individual employees accountable—and deterring other bad behavior.

## THE CONSEQUENCES

Derek Chauvin, the Minneapolis police officer charged with killing George Floyd, worked under a police union contract<sup>14</sup> that gave officers the option to arbitrate all discipline matters. This meant that even if the city had previously attempted to fire him, it’s possible, if not likely, that an arbitrator would have prevented it. A 2019 analysis found that arbitrators blocked Minnesota officials’ attempts to terminate law enforcement or corrections employees in 17 of 37 instances over five years.<sup>15</sup>

The same type of provisions are included in many police union contracts in New York State. In fact, between arbitration privileges in collective bargaining agreements and Section 3020-a, most New York state and local government employees likely work under discipline processes that give unaccountable arbitrators—instead of elected officials—the last word.

Arbitration gives what should otherwise be indelegable powers to a panelist who has a monetary interest in not upsetting either side. The hearing officer, after all, likely wants to get hired again.

As the New York State School Boards Association puts it, letting both parties mutually agree on who shall preside “creates an economic incentive for the hearing officer to avoid displeasing either party.”<sup>16</sup>

A faction of New York City teacher union activists is more blunt about this dynamic:

The hearing officers are selected jointly by the (New York City Department of Education) and the (United Federation of Teachers). This means that either party can strike arbitrators from the panel. So why keep an arbitrator that continues to terminate teachers?<sup>17</sup>

***Even if Minneapolis had previously attempted to fire Derek Chauvin, it’s possible, if not likely, that an arbitrator would have prevented it.***

Arbitration, above all, cuts a crucial link between the public workforce and the people elected to supervise it. And New York’s public sector is littered with examples of what results.

## The Teacher Tenure Trap

*“Tenure is just one of the safeguards NYS has put in place to ensure every student has an effective teacher.” —NYS United Teachers<sup>18</sup>*

The experience of school districts in applying Education Law section 3020-a, part of New York’s teacher tenure law, demonstrates what happens when disciplinary decisions are made by unaccountable arbitrators.

A 2018 survey<sup>19</sup> of school districts found the cost of disciplining an employee under Section 3020-a averages more than \$140,000 and takes 180 days on average. This actually was a marked improvement from years earlier, before reforms enacted in 2012 and 2015 streamlined the process. But the survey still found more than a third of districts abstained from pursuing

discipline in at least one instance in recent years. Many of those districts pointed to the cost of the proceeding – even with state government picking up the tab for the hearing officer.

The most notorious example of arbitration presenting an obstacle to enforcing accountability are the so-called “rubber rooms” in New York City schools. Teachers and other school employees confined to these locations are no longer working with students, but they keep collecting full salary and benefits, and even get pay raises. Some employees remain in rubber rooms for several years because employers can’t fire them but still don’t want to place them back in a classroom.<sup>20</sup>

Between 1995 and 2005, an average of 53 New York educators a year underwent Section 3020-a disciplinary hearings. Out of those nearly 600 teachers and other school employees, the number terminated during the 11-year period came to just 170 – less than 0.1 percent of the more than 200,000 elementary and secondary teachers employed at the end of the time period.<sup>21</sup>

By comparison, when the chancellor of Washington, D.C. public schools was given new firing powers in 2010, she terminated 241 out of about 4,000 teachers.<sup>22</sup>

## CSEA

A 2011 *New York Times* investigation<sup>23</sup> revealed a systematic breakdown in state government’s discipline process with respect to workers at facilities for people with developmental disabilities under state care:

---

***More than one-third of school districts said they had abstained from disciplining an employee in recent years.***

In hundreds of cases reviewed by *The Times*, employees who sexually abused, beat or taunted residents were rarely fired, even after repeated offenses, and in many cases, were simply transferred to other group homes run by the state.

Here, state officials were constrained by arbitration rules in the Civil Service Employees Association (CSEA) contract. The state racked up an abysmal track record in seeking terminations, *The Times* found, succeeding in just 30 out of 129 cases over a three-year period. Many instances of misconduct didn’t even trigger the discipline process: in one case, an employee who was caught raping a mentally disabled woman never faced discipline and was instead transferred to another facility.

Reforms to the discipline arbitration process followed, but subsequent *Times* reporting showed problems continued:

Hundreds of pages of disciplinary records from 2015 to 2017, obtained by *The Times* under the state open-records law, show that more than one-third of the employees statewide found to have committed abuse-related offenses at group homes and other facilities were put back on the job, often after arbitration with the worker’s union.

Separately, internal documents from CSEA’s Legal Department provide additional examples of the union’s success in thwarting – through arbitration – efforts by state and local government agencies to terminate employees who:

- used “inappropriate and excessive force” on a resident of a state facility by “plac[ing] his right arm in the

area of the Resident's neck" and "his full body weight on the Resident for approximately 26 seconds";<sup>24</sup>

- fell asleep while monitoring a patient on suicide watch;<sup>25</sup>
- "sent sexually explicit pictures of himself to a co-worker";<sup>26</sup>
- "pulled" a person with "profound developmental disabilities...off the floor by grabbing his hair";<sup>27</sup>
- "grabbed a co-worker by the neck and pushed him up against a window and made a threatening gesture";<sup>28</sup>
- "visited pornographic websites and printed thousands of images [at the workplace] involv[ing] graphic sexual assaults and bestiality";<sup>29</sup>
- "view[ed] rape-related and violent pornographic websites at work and print[ed] out documents from these sites";<sup>30</sup>
- "attempted to attack a [r]esident [of a state facility] and had to be restrained by staff and residents";<sup>31</sup>
- "exposed himself on various occasions";<sup>32</sup>
- "solicited a sexual act while on the job";<sup>33</sup>
- "submit[ted] fraudulent time records";<sup>34</sup>
- were "involved in leaving the scene of an accident and removing evidence from the scene";<sup>35</sup> and
- destroyed a government truck, and lied about it, after eight prior crashes.<sup>36</sup>

CSEA records also describe at least one instance of an arbitrator blocking termination on the basis that the employer "had given penalties less than termination to other employees in cases of alleged physical abuse."<sup>37</sup>

Arbitrators in CSEA matters showed notable leniency in cases where employees had committed serious offenses. One arbitrator found an employee guilty but still forced an employer to keep the employee on unpaid leave until he or she had reached 20 years of service—presumably to preserve or enhance certain retirement benefits.<sup>38</sup> In another case, the arbitrator blocked an employer's bid to terminate an employee who had stolen a mobile telephone from a mailbox while working. The arbitrator expressed a personal concern that the employee would not be able to find another job.<sup>39</sup>

### MTA Bus

A 2019 analysis by the *New York Post* detailed the challenges faced by the Metropolitan Transportation Authority (MTA) in terminating bus drivers accused of misconduct but protected by arbitration rules:

The MTA slapped bus drivers with 4,330 suspensions over a four-year period, but fired only 60, despite some having as many as 10 strikes against them.<sup>40</sup>

In one instance, it took the MTA over a year to fire a driver who killed a woman with his bus and left the scene.<sup>41</sup>

"It is significantly more difficult to discipline and, where appropriate, to terminate employees at NYC Transit than comparable employees in the private sector because of collective bargaining agreements and the fact that third-party arbi-



trators decide the final outcome,” an MTA spokesperson noted.

### Syracuse Firefighters

The city of Syracuse in 2017 fired a firefighter who helped cover up a fatal hit-and-run. His union, however, succeeded in reversing the termination at arbitration.

Records obtained by the Syracuse *Post-Standard*<sup>42</sup> in 2018 showed that the city’s firefighters union succeeded in part by arguing that their member had “been treated much worse than members who were actually guilty of crimes” – and by detailing the crimes of other Syracuse firefighters that had not been terminated. Among the cases cited in the newspaper report:

In 2011, a Syracuse firefighter was caught emailing pictures of his genitals. In 2012 a firefighter was found drunk on duty, four years after he had been arrested for drinking and driving. In 2013, police removed a firefighter from service as they investigated him for child porn.

Two other firefighters were arrested for harassment of their girlfriends. Another was arrested for DWI. Another for domestic assault. One firefighter was accused of forcing his way onto a bus and assaulting the driver.

None of those firefighters were fired.

All those crimes were detailed in the union legal brief.

The firefighter drinking on the job was removed from duty. The brief says firefighters can’t drink on the job, but only authorizes “discharge” if someone is caught drunk three times in 18 months.

The child pornographer was allowed to retire, even while cops probed his computer (he was later arrested and sentenced to seven years in jail). The lewd emailer is still with the department.

### Police Officers

New York courts in recent years have drawn an important line with respect to discipline. Judges have held in rulings since 1983<sup>43</sup> that matters related to disciplining police officers must be decided by elected officials or their designees, such as police commissioners – not through contracts or arbitration.

The most notable decision came in 2006 when the state Court of Appeals voided several provisions in the New York City Patrolmen’s Benevolent Association (PBA) contract related to discipline, including the “48-hour rule,” that forced city officials to wait before questioning officers suspected of misconduct.<sup>44</sup> The Court, in the same decision, voided the entire section of the Orangetown police union contract which dictated disciplinary rules.

Given the “quasi-military nature of a police force,” Judge Robert Smith wrote in his decision, “the public interest in preserving official authority over the police remains powerful.”<sup>45</sup>

Each of these decisions, however, pointed to the specific statute under which those local governments and police departments were created. This meant local officials had to wait for the court to rule on cases in peer communities before their disciplinary powers could be affirmed.

Following the New York City case, then-Schenectady mayor Brian Stratton warned in 2007 that his city “had a dysfunctional history of police disciplinary

actions being undone by arbitrators,” which “eroded public confidence in the police.”<sup>46</sup> A year later, Stratton floated the idea of Governor David Paterson declaring “martial law” and having state police and National Guard units replace the city’s police department.<sup>47</sup>

Schenectady paid \$1.23 million to fire seven police officers in 2010 alone,<sup>48</sup> and spent several more years fighting for the ability to discipline police directly instead of going through arbitration. It finally prevailed in 2017 when the state Court of Appeals ruled that mayors or police commissioners in “second-class” cities with historical populations between 50,000 and 250,000 had the same powers as New York City.

The courts haven’t yet decided whether these same protections extend to the state’s “third-class” cities with populations under 50,000, county sheriff departments or villages. And lower courts have moved to restore contractual discipline provisions for police: a Supreme Court justice blocked Syracuse Mayor Ben Walsh’s efforts to enforce the Schenectady ruling because his city’s charter was newer than the local laws at issue in the Schenectady case.<sup>49</sup>

In the midst of conflicting court rulings, some police union contracts still let officers seek arbitration. Under New York State’s adversarial bargaining process, it would be up to management to try to discipline an officer outside of rules set in the union contract. Some elected officials would prefer to avoid the financial – and political – costs of a lengthy legal fight with their police.

Meanwhile, state lawmakers have been moving in the wrong direction. They have voted, almost unanimously and as recently as last year,<sup>52</sup> to roll back the limits courts have placed on police officers negotiating their own discipline rules.<sup>50</sup> Governor Andrew Cuomo in 2014 pocket-vetoed a bill<sup>51</sup> that would have explicitly negated the 2006 New York City PBA decision.

### **Time and Money**

In deciding whether to discipline a public employee, elected officials and their designees must weigh the monetary cost and likelihood of success.

The restrictions on unpaid suspensions often force employers to continue or



*Schenectady City Hall*

resume paying the employee before the disciplinary process has ended, even if he or she shouldn't be allowed back to work. The process can be delayed, for instance, by a concurrent criminal investigation where law enforcement possesses necessary evidence. During that delay, the employer often ends up paying both the suspended employee and the cost of replacing him or her.

Disciplinary proceedings routinely cost tens of thousands of dollars. When management conducts a disciplinary hearing — which can stretch on for days — the taxpayers sometimes are paying *every person* in the room, including:

- the accused employee, who often is on paid suspension;
- the employee's representatives, which may include one or more union officers — who in turn may also require replacements, which can be particularly expensive in the case of police officers and other higher-paid employees;
- management's designated prosecutor, a government employee or a contractor, who may have to devote considerable time and resources to conducting interviews and presenting a case;
- other employees called as witnesses;
- the hearing officer, who in Section 75 hearings is often a professional whose time and expenses must be covered by employers; and
- a stenographer, since Section 75 requires the employer to provide the accused with a hearing transcript.

Management faces still more legal costs if the union complains to PERB over alleged

violations of the union's collective bargaining agreement.

### Lack of Transparency

New York's public-sector discipline processes lack transparency in both how the processes are set and what outcomes they produce.

Collective bargaining happens behind closed doors. The resulting contracts are public information, but they often aren't widely available. In Buffalo, for instance, the police union contract wasn't posted on the city website and local journalists instead obtained it from the union. It showed city police officers were working under a contract dating back to 1986 that has been modified about a dozen times through arbitration awards and memoranda between the union and Buffalo officials.<sup>53</sup>

And while PERB regulations<sup>54</sup> require employers to submit contracts within 15 working days of ratification, few do. The board has jurisdiction over about 5,300 bargaining units, but for calendar year 2019, just 12 contracts — likely fewer than 2 percent of the number negotiated and ratified — were submitted for posting on PERB's website by mid-2020.

Looking specifically at police, discipline determinations were, until recently, heavily shielded from public inspection. A provision of state law (Civil Rights Law section 50-a) blocked the release of unformed employees' personnel files, including discipline records.

The Legislature repealed Section 50-a in June, but other obstacles remain. For instance, some union contracts dictate when certain records are expunged. That means no record would exist for anyone — the public or management — to inspect.

State government, meanwhile, does not collect substantive statistics on local government disciplinary matters. So while the state Legislature sets the rules on how employees are disciplined, it has no way of knowing how those rules are working.

## THE SOLUTION

State lawmakers can eliminate New York's self-inflicted obstacles to holding police officers, teachers and other public employees accountable for misconduct and incompetence. They alone can make New York's discipline process more transparent and put decisions about discipline back in the hands of our elected officials — where they belong.

### *Prohibit Bargaining for Discipline*

Union contracts shouldn't decide how or whether a public employee faces discipline, which is why the state Legislature can and should explicitly prohibit collective bargaining over discipline. Lawmakers made a similar move in 1973, when the Legislature categorically prohibited employers from negotiating pension benefits in labor contracts.<sup>55</sup> That move has arguably made the state's public pension system more financially secure because benefits are set by state law rather than by politicians at the negotiating table. The Legislature can similarly make police and other public employees more accountable by limiting discipline rules to those set in statute, and subjecting those laws to constant review.

Police strikes, meanwhile, have been non-existent in recent decades even as the courts have prevented their unions from negotiating over discipline. That is quantitative proof that disciplinary matters don't need to be bargained to preserve "labor harmony" — the original purpose of the Taylor Law.

A proposal<sup>56</sup> by Senator Rachel May (D-Syracuse) would make disciplinary matters a "prohibited subject of bargaining" between local governments and law enforcement unions and would affect "matters relating to investigations, hearing procedures or penalty determinations." This would release local governments from arbitration requirements and other rules that have been baked into police contracts over the past half-century.

Other lawmakers have signaled a willingness to dial back, at least incrementally, the extent to which the Taylor Law interferes with the discipline process.

A task force<sup>57</sup> composed mainly of New York City councilmembers, U.S. House members, state senators and assemblymembers in 2008 endorsed "legislation expressly prohibiting the inclusion of language in collective bargaining contracts with law enforcement agencies that establishes a minimum period of time during which a police officer shall not be subject to questioning by agency officials."

### *Give Elected Officials And Their Designees The Last Word in Discipline*

Final determination for all employee discipline actions must rest with our elected officials or their designees. Arbitration processes, such as those in Section 3020-a, can play a role in distilling facts but the final decision about whether to discipline or terminate an employee should be made by officials accountable to the voters.

*Provide Professional Hearing Officers for Local Governments and School Districts*  
Hearing officers should be employed, trained and assigned by a state agency to preside over both Section 75 and Section 3020-a hearings for local governments and school districts outside New York City. This would eliminate the financial cost of



hiring or reassigning a hearing officer in Section 75 cases – and the risk, in Section 3020-a cases, that the arbitrator will be swayed by concern about future employment.

This also has the potential to shorten the discipline process by eliminating the selection process and eliminating the arbitrator’s financial incentive to have hearings span multiple days. In New York City, Section 75 cases for non-police employees are heard by the city’s administrative law judges at the Office of Administrative Trials and Hearings (OATH).

*Disclose Records, Contracts and Statistics*  
New Yorkers first and foremost deserve to see how the current discipline scheme is working in their own communities. Employers should proactively disclose the outcomes when disciplinary charges are substantiated.

Utica mayor Robert Palmieri announced plans to proactively disclose each police officer’s personnel records, including discipline records, with the exception of personal information protected by law such as their home addresses.<sup>58</sup> New York City and Rochester also plan to disclose their police officers’ discipline records.<sup>59,60</sup>

Employers should also post their complete collective bargaining agreements on the internet.

New York State should begin compiling statistics regarding the frequency, outcomes and costs of discipline proceedings for all categories of public employees.

*Share The Cost of Discipline By Reforming Release Time*

Union officers and designees are, and should be, granted leave from their official duties to represent their co-workers in

discipline hearings – but the union should reimburse the employer for that time.

In cases where the employer is picking up the cost of a hearing officer and an employee’s union representative, the union itself has no monetary reason to proceed efficiently. In fact, union officials have a strong incentive to drag out the process because it increases the likelihood that management will settle, and likely deters management from seeking future disciplinary actions.

The Legislature should require unions recognized under the Taylor Law to reimburse the employer for time that employees are released from their government jobs to perform union work – such as representing people in disciplinary actions.

This change is especially necessary because the Taylor Law was changed in 2018 to let unions represent only dues-paying members in disciplinary actions.<sup>61</sup> As a result, paid release time privileges may no longer benefit the employees as a whole – the way other contractual benefits must – if the union chooses to help only the workers who pay union dues.

Reforming paid release time practices would immediately reduce the cost of discipline since employers wouldn’t have to pay the union officials participating in various steps of the process. It would likely also speed up the process because the union would have a new reason to watch the clock.

Most importantly, it would give every union a greater monetary incentive to police its members’ conduct and prevent discipline from being needed in the first place.

## ENDNOTES

- <sup>1</sup> NY Civil Service Law § 75
- <sup>2</sup> *Manual of Procedure in Disciplinary Action*, NYS Dept. of Civil Service (2019) [https://www.cs.ny.gov/pio/publications/manual\\_of\\_procedure\\_in\\_disciplinary\\_actions.pdf](https://www.cs.ny.gov/pio/publications/manual_of_procedure_in_disciplinary_actions.pdf)
- <sup>3</sup> Other special categories of workers covered by §75 include honorably discharged war veterans, volunteer firefighters, and detectives with at least three years of service.
- <sup>4</sup> NY Civil Service Law § 76
- <sup>5</sup> Tenure qualification is set by Ed. Law § 3012
- <sup>6</sup> "Tenure: A Chronology," NYSUT, <https://www.nysut.org/news/nysut-united/issues/2014/september-november-2014/tenure-a-chronology>
- <sup>7</sup> NY Education Law § 3020-a(2)(b)
- <sup>8</sup> 8 NYCRR 82-3.5
- <sup>9</sup> Terry O'Neil and E.J. McMahon, *Taylor Made: The Costs and Consequences of New York's Public-Sector Collective Bargaining Law* (2018), Empire Center
- <sup>10</sup> George Taylor et. al. *Governor's Committee on Public Employee Relations: Final Report* (1966)
- <sup>11</sup> E.J. McMahon, *Triborough Trouble* (2012), Empire Center
- <sup>12</sup> See also E.J. McMahon and Michael Wright, "Police and Fire Pay Keep Rising, Benefits Sticky Under Arbitration" (2013), Empire Center
- <sup>13</sup> L. 2019, Ch. 55, Part F.
- <sup>14</sup> [http://www.minneapolismn.gov/hr/laboragreements/labor-agreements\\_police\\_index](http://www.minneapolismn.gov/hr/laboragreements/labor-agreements_police_index)
- <sup>15</sup> Mara H. Gottfried, "How often do arbitrators reinstate fired cops? Just under half the time," *St. Paul Pioneer Press*, June 23, 2019 (<http://www.twincities.com/2019/06/23/how-often-do-arbitrators-reinstate-fired-cops-just-under-half-the-time>)
- <sup>16</sup> *Accountability for All*, New York State School Boards Association, March 2007. ([https://www.nyssba.org/clientuploads/gr\\_3020a\\_reform.pdf](https://www.nyssba.org/clientuploads/gr_3020a_reform.pdf))
- <sup>17</sup> *3020-a Hearing Guide*, UFT Solidarity Caucus, <http://www.uftsolidarity.org/3020-a/>
- <sup>18</sup> "Fact Sheet 15-15," New York State United Teachers, Aug. 20, 2015. (<https://www.nysut.org/resources/all-listing/2015/august/fact-sheet-15-15-changes-to-tenure-and-the-tenured-teacher-removal-process>)
- <sup>19</sup> Paul Heiser, "When tenured educators break the rules, one-third of districts don't seek discipline," *On Board*, NYS School Boards Association, May 7, 2018. (<https://www.nyssba.org/news/2018/05/03/on-board-online-may-7-2018/when-tenured-educators-break-the-rules-one-third-of-districts-don-t-look-for-discipline>)
- <sup>20</sup> Susan Edelman, "NYC pays 'rubber room' teacher \$1.7M over 20 years after sex abuse claims," *New York Post*, Nov. 2, 2019 (<http://nypost.com/2019/11/02/nyc-pays-rubber-room-teacher-six-figures-20-years-after-sex-abuse-claims/>)
- <sup>21</sup> *Accountability for All*, New York State School Boards Association, March 2007 - [https://www.nyssba.org/clientuploads/gr\\_3020a\\_reform.pdf](https://www.nyssba.org/clientuploads/gr_3020a_reform.pdf)
- <sup>22</sup> Veronica DeVore and Imani Cheers, "D.C. Schools Chief Rhee Fires 241 Teachers Using New Evaluation System," *PBS NewsHour*, July 23, 2010. (<https://www.pbs.org/newshour/education/dc-schools-chief-rhee-fires-241-teachers-using-new-evaluation-system>)
- <sup>23</sup> Danny Hakim, "At State-Run Homes, Abuse and Impunity," *The New York Times*, March 12, 2011. (<https://www.nytimes.com/2011/03/13/nyregion/13homes.html>)
- <sup>24</sup> *Advocate*, CSEA, April 2015
- <sup>25</sup> *Id.*
- <sup>26</sup> *Advocate*, CSEA, July 2014
- <sup>27</sup> *Advocate*, CSEA, Jan. 2014
- <sup>28</sup> *Id.*
- <sup>29</sup> *Disciplinary Matters – A Survey*, CSEA, January 2013
- <sup>30</sup> *Id.*
- <sup>31</sup> *Advocate*, CSEA, July 2015
- <sup>32</sup> *Advocate*, CSEA, July 2014
- <sup>33</sup> *Advocate*, CSEA, July 2015
- <sup>34</sup> *Advocate*, CSEA, Jan. 2015
- <sup>35</sup> *Disciplinary Matters – A Survey*, CSEA, Jan. 2013
- <sup>36</sup> *Advocate*, CSEA, Oct. 2013
- <sup>37</sup> *Disciplinary Matters – A Survey*, CSEA, Jan. 2013
- <sup>38</sup> *Id.*
- <sup>39</sup> *Advocate*, CSEA, July 2014
- <sup>40</sup> Melissa Klein and Mary Kay Linge, "MTA bus driver suspensions surge but drivers rarely fired," *New York Post*, June 8, 2019. (<https://nypost.com/2019/06/08/mta-bus-driver-suspensions-surge-but-drivers-rarely-fired/>)
- <sup>41</sup> *Id.*
- <sup>42</sup> Chris Baker, "High-profile pals rallied to save job of firefighter who left dying teen," *The Post-Standard*, July 27, 2018. ([https://www.syracuse.com/news/2018/07/chiefs\\_of\\_police\\_fire\\_went\\_to\\_bat\\_for\\_ted\\_ackerman\\_while\\_city\\_officials\\_tried\\_to.html](https://www.syracuse.com/news/2018/07/chiefs_of_police_fire_went_to_bat_for_ted_ackerman_while_city_officials_tried_to.html))
- <sup>43</sup> *Matter of Town of Greenburgh*, 94 A.D.2d 771, 772 (2d Dept. 1983)
- <sup>44</sup> *Matter of Patrolmen's Benevolent Association of The City of New York, Inc.*, 6 N.Y.3d 563 (2006)
- <sup>45</sup> *Id.*
- <sup>46</sup> "Stratton, Bennett, Applaud Governor's Veto of Police Discipline Bill," City of Schenectady press release, Aug. 2, 2007
- <sup>47</sup> Steve Ference, "Schenectady mayor considers options, martial law over police woes," *Capital News 9*, March 19, 2009 ([https://web.archive.org/web/20090328032236/http://capitalnews9.com/content/top\\_stories/135816/schenectady-mayor-considers-options--martial-law-over-police-woes/Default.aspx](https://web.archive.org/web/20090328032236/http://capitalnews9.com/content/top_stories/135816/schenectady-mayor-considers-options--martial-law-over-police-woes/Default.aspx))

<sup>48</sup> Steven Cook, “State’s highest court sides with Schenectady on police discipline,” *The Daily Gazette*, Oct. 17, 2017. (<http://dailygazette.com/article/2017/10/17/state-s-highest-court-sides-with-schenectady-on-police-discipline>)

<sup>49</sup> Chris Baker, “Mayor Walsh tried to reform police discipline in Syracuse; the union blocked him,” *The Post-Standard*, June 9, 2020. (<https://www.syracuse.com/news/2020/06/walsh-tried-to-reform-police-discipline-in-syracuse-the-union-blocked-him.html>)

<sup>50</sup> Ken Girardin, “New York lawmakers have sought to weaken police discipline,” Empire Center <https://www.empirecenter.org/publications/new-york-lawmakers-have-sought-to-weaken-police-discipline/>

<sup>51</sup> Veto No. 589 (2015)

<sup>52</sup> 2019 Senate Bill S5803

<sup>53</sup> Geoff Kelly and Ali Ingersoll, Union shares Buffalo police contract, *Investigative Post*, June 16, 2020. (<https://www.investigativepost.org/2020/06/16/union-shares-buffalo-police-contract>)

<sup>54</sup> 4 NYCRR 215.1

<sup>55</sup> Jerome Lefkowitz, Melvin H. Osterman and Rosemary A. Townley, eds, *Public Sector Labor and Employment Law, Second Edition*, New York State Bar Association (1998); pension and retirement benefits issue cited at pp. 489-91.

<sup>56</sup> 2019 Senate Bill S8678

<sup>57</sup> Hon. Malcolm A. Smith et. al., *A Report on Improving Public Confidence in Law Enforcement and Our Criminal Justice System*, June 2008. ([https://www.nysenate.gov/sites/default/files/articles/attachments/Senator%20Smith\\_%20Improving%20Public%20Confidence%20in%20Law%20Enforcement%20and%20Criminal%20Justice%20System.pdf](https://www.nysenate.gov/sites/default/files/articles/attachments/Senator%20Smith_%20Improving%20Public%20Confidence%20in%20Law%20Enforcement%20and%20Criminal%20Justice%20System.pdf))

<sup>58</sup> Chris Baker, “Utica mayor will publish discipline record for every city cop,” *The Post-Standard*, June 17, 2020. (<https://www.syracuse.com/news/2020/06/utica-mayor-will-publish-discipline-record-for-every-city-cop.html>)

<sup>59</sup> Gino Fanelli, “Rochester will put all police disciplinary files online,” *City Newspaper*, July 7, 2020. (<https://www.rochestercitynewspaper.com/rochester/lawmakers-call-for-local-police-files-to-be-put-online/Content?oid=11989282>)

<sup>60</sup> Erin Durkin, “NYC to publish police disciplinary records online,” *POLITICO New York*, June 17, 2020. (<https://www.politico.com/states/new-york/albany/story/2020/06/17/nyc-to-publish-police-disciplinary-records-online-1293508>)

<sup>61</sup> L. 2018, Ch. 59, Part RRR



The Empire Center for Public Policy, Inc. is an independent, non-partisan, non-profit think tank dedicated to making New York a better place to live and work by promoting public policy reforms grounded in free-market principles, personal responsibility, and the ideals of effective and accountable government.

Nothing in this paper is to be construed as necessarily reflecting the views of the Empire Center, or as an attempt to influence the passage, defeat, approval or disapproval of any legislation or any other matter before the State Legislature, the Governor, or any other state or local agency.

The Empire Center is a 501(c)3 nonprofit organization. Contributions are tax-deductible to the fullest extent of the law. EIN #46-1987418

