

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-003298-17T3

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FRATERNAL ORDER OF POLICE  
NEWARK LODGE NO. 12,

Plaintiff-Respondent,

v.

CITY OF NEWARK,

Defendant-Appellant.

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Civil Action

On Appeal From a Final Order  
of New Jersey Superior Court,  
Chancery Division,  
Essex County

Sat Below:  
Hon. Donald A. Kessler,  
J.S.C.

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AMICUS BRIEF ON BEHALF OF THE ATTORNEY GENERAL  
OF NEW JERSEY

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### INTEREST OF AMICUS

The Attorney General is New Jersey's chief law enforcement officer, charged with "provid[ing] for the general supervision of criminal justice" to secure "the benefits of a uniform and efficient enforcement of the criminal law and the administration of criminal justice throughout the State." N.J.S.A. 52:17B-98. To that end, the Attorney General issues guidelines and directives to county and municipal law enforcement agencies.

This appeal is from an order of the Chancery Division, permanently enjoining the City of Newark from implementing and/or enforcing a city ordinance creating a "Civilian Complaint Review Board" to review, investigate, and participate in the resolution of complaints against the city's Department of Public Safety, Division of Police, and/or its officers and members, "except to the extent" it authorizes the Board "to serve strictly in an oversight capacity."

This court invited the Attorney General to appear as amicus curiae, noting the trial court's rulings that the city's ordinance infringes on the powers of the chief of police, pursuant to N.J.S.A. 40A:14-118, and is preempted by N.J.S.A. 40A:14-181 and the Attorney General's Internal Affairs Policy & Procedures. The Attorney General accepts the court's invitation to address these important issues concerning the administration of criminal justice in the State.

PRELIMINARY STATEMENT

Objectively and efficiently handling police misconduct complaints, and imposing effective discipline when warranted, are critical to establishing and maintaining trust between law enforcement agencies and the communities they serve. That is why the Attorney General has issued and regularly updates statewide Guidelines on Internal Affairs Policy & Procedures ("IA Policy"), which the Legislature has required municipalities to implement. As stated in the Introduction to the Guidelines:

Indifference to the internal affairs function will have a negative impact on the administration of criminal justice and the delivery of police services to New Jersey's citizens. Agencies that fail to make the internal affairs function a priority can lose the respect and support of the community. The integrity of individual law enforcement agencies, and the reputation of the State's criminal justice system, can also suffer if agencies fail to identify and correct officer misconduct.

In 2014, the findings of a U.S. Department of Justice ("DOJ") civil rights investigation into the Newark Police Department ("NPD") revealed that the internal affairs function of the NPD was not working effectively and that its problems -- along with other misconduct identified in the DOJ report -- had damaged police-community relations in New Jersey's largest city. Change was necessary.

And change came -- principally through a 2016 consent decree between the United States and the City of Newark. The consent decree included numerous commitments by the City of Newark to improve its internal affairs processes for acting on complaints against officers and members of the police force. And the consent decree also addressed the role of a new civilian oversight entity, whose duties and responsibilities would

at a minimum, include the substantive and independent review of internal investigations and the procedures for resolution of civilian complaints; monitoring trends in complaints, findings of misconduct, and the imposition of discipline; and reviewing and recommending changes to NPD's policies and practices, including, but not limited to, those regarding use of force, stop, search, and arrest.

But the City did not stop there. Going beyond the requirements of the consent decree, the Newark Municipal Council passed an ordinance empowering the new Citizen Complaint Review Board ("CCRB") to conduct its own investigations, parallel to the NPD's internal affairs investigations, and to make findings of fact and recommendations of discipline, which Newark's Public Safety Director would be required to adopt unless the CCRB's action was clearly erroneous. In effect, this "CCRB Ordinance" meant that the CCRB's judgments could override the police force's internal affairs decisions.

The Chancery Division held below that State law largely preempts the CCRB Ordinance but permits the CCRB to serve in an

"oversight capacity" in accordance with the consent decree. For the reasons set forth below, the Attorney General agrees that the Police Force Statute, the IA Policy, and the statute requiring municipalities to implement the IA Policy all point to the conclusion that the Newark Municipal Council exceeded its authority in passing the CCRB Ordinance.

Citizen complaint review boards like the one created in Newark can make valuable contributions to ongoing public discussions about how police can better serve their communities. In doing so, citizen complaint review boards can help us work together to strengthen police-community relations. But, by creating a civilian body with investigative and disciplinary authority that parallels the police force's internal affairs function, and whose decisions will prevail in the event of any reasonable disagreement, Newark's CCRB Ordinance impermissibly interferes with the statutory duties of Newark's police chief and intrudes on the police force's internal affairs function. Affirming the lower court's decision on these points would leave Newark's CCRB fully equipped to carry out the important mission established for the CCRB in the City's consent decree and allow the Newark police to continue without undue disruption of their ongoing work to strengthen the handling of citizen complaints.



## STATEMENT OF FACTS

### A. LEGAL BACKGROUND

1. The Police Force Statute, N.J.S.A. 40A:14-118

The Police Force Statute, N.J.S.A. 40A:14-118, governs the creation and regulation of police forces by municipalities in New Jersey, as well as the role and responsibilities of the chief of police in municipalities that choose to establish such a position.

Pursuant to the Police Force Statute, any municipality's governing body, by ordinance, "may create and establish, as an executive and enforcement function of municipal government, a police force." Ibid. The governing body of the municipality also may by ordinance "provide for the maintenance, regulation and control" of the police force. Ibid. Such a municipal ordinance additionally "may provide for [1] the appointment of a chief of police and [other personnel], [2] the determination of their terms of office, [3] the fixing of their compensation and [4] the prescription of their powers, functions and duties." Ibid.

While each municipality's governing body has discretion as to whether it will create a police force and provide for the appointment of a chief of police, the Police Force Act requires that certain policies be put in place once a municipality creates a police force and/or establishes the position of chief of police. See ibid.

First, if a police force is established, a municipal ordinance must "provide for a line of authority relating to the police function and for the adoption and promulgation by the appropriate authority of rules and regulations for the government of the force and for the discipline of its members." Ibid. Subject to separation-of-powers considerations, the "appropriate authority" may be "the mayor, manager, or such other appropriate executive or administrative officer, such as a full-time director of public safety, or the governing body or any designated committee or member thereof, or any municipal board or commission established by ordinance for such purposes, as shall be provided by ordinance." Ibid. "[I]n all matters relating to the police function," the municipal governing body and its members must "act . . . as a body, or through the appropriate authority if other than the governing body." Ibid.

Second, if a municipality establishes the position of chief of police, the chief "shall be directly responsible to the appropriate authority for the efficiency and routine day to day operations" of the police force, and "shall, pursuant to policies established by the appropriate authority"

- a. Administer and enforce rules and regulations and special emergency directives for the disposition and discipline of the force and its officers and personnel;

- b. Have, exercise, and discharge the functions, powers and duties of the force;
- c. Prescribe the duties and assignments of all subordinates and other personnel;
- d. Delegate such of his authority as he may deem necessary for the efficient operation of the force to be exercised under his direction and supervision; and
- e. Report at least monthly to the appropriate authority in such form as shall be prescribed by such authority on the operation of the force during the preceding month, and make such other reports as may be requested by such authority.

[Ibid.]

The statute also expressly identifies ways in which it does not limit civilian oversight of the police force. As relevant here, nothing in the Police Force Statute "prevent[s] the appointment by the governing body of committees or commissions to conduct investigations of the operation of the police force," or "the delegation to such committees or commissions of such powers of inquiry as the governing body deems necessary or to conduct such hearing or investigation authorized by law." Ibid. In addition, nothing in the statute "prevent[s] the appropriate authority, or any executive or administrative officer charged with the general administrative responsibilities within the municipality, from examining at any time the operations of the police force or the performance of any officer or member thereof." Ibid.

The Legislature enacted the current version of the Police Force Statute in 1981, to significantly restructure the relationship between municipalities and their police forces. "Before 1981, N.J.S.A. 40A:14-118 gave municipal governing bodies broad authority to regulate the internal affairs of police departments, including the authority to prescribe the duties and functions of police officers." Falcone v. De Furia, 103 N.J. 219, 221 (1986). "The powers of a chief of police derived not from a statute, but from municipal ordinances and regulations." Ibid. (citing Smith v. Twp. of Hazlet, 63 N.J. 523, 526-27 (1973)).

"By granting chiefs of police express statutory authority, the statute sought to avoid undue interference by a governing body into the operation of the police force." Id. at 222; see also Gauntt v. Bridgeton, 194 N.J. Super. 468, 482 (App. Div. 1984) (noting the statute was amended to "grant statutory powers to police chiefs by mandating that they shall be in charge of their departments and providing for their specific duties and functions . . . [and] prevent interference by elected officials individually in the operation of the police force").

2. The Attorney General's Internal Affairs Policy and Procedures and N.J.S.A. 40A:14-118

Pursuant to the Criminal Justice Act of 1970, N.J.S.A. 52:17B-97 to -117, the Attorney General, as the "chief law enforcement officer of [this] State, is charged with adopting guidelines,

directives and policies that bind local police departments in the day-to-day administration of the law enforcement process." O'Shea v. Twp. of W. Milford, 410 N.J. Super. 371, 382 (App. Div. 2009) (quoting N.J.S.A. 52:17B-98). The Attorney General oversees the New Jersey State Police, the Division of Criminal Justice, all County Prosecutors, and all local and municipal police officers, exercising the office's general supervisory authority to promote the "uniform and efficient enforcement of the criminal law and the administration of criminal justice" throughout the State." N.J.S.A. 52:17B-98.

When county and municipal law enforcement agencies conduct internal affairs investigations, they do so under the general supervision of the Attorney General. Through the Division of Criminal Justice, the Attorney General has issued Guidelines "to assist the State's law enforcement agencies with investigating and resolving complaints of police misconduct that originate with private citizens or are generated by the supervisors, officers or employees of a law enforcement agency." IA Policy at 3. "The goals of the policy are to enhance the integrity of the State's law enforcement agencies, improve the delivery of police services and assure the citizens of New Jersey that complaints of police misconduct are properly addressed." Ibid.

First issued in 1991, the IA Policy was revised in 1992, 2000, 2011, 2014, and 2017 to keep up with changes in law enforcement

and the internal affairs function. Meanwhile, recognizing the importance of the internal affairs function to New Jersey law enforcement, the Legislature in 1996 enacted N.J.S.A. 40A:14-181 to give the Attorney General's IA Policy statutory backing.

The statute reads in pertinent part:

Every law enforcement agency . . . shall adopt and implement guidelines which shall be consistent with the guidelines governing the "Internal Affairs Policy and Procedures" of the Police Management Manual promulgated by the Police Bureau of the Division of Criminal Justice in the Department of Law and Public Safety, and shall be consistent with any tenure or civil service laws, and shall not supersede any existing contractual agreements.

[N.J.S.A. 40A:14-181.]

The current IA Policy includes "several mandates that, at the Attorney General's direction, every law enforcement agency must implement," while also affording agencies discretion as to the manner in which they implement these mandates. IA Policy at 4. Among other requirements, every law enforcement agency "must establish by written policy an internal affairs function"; "must accept reports of officer misconduct from any person, including anonymous sources, at any time"; "must thoroughly and objectively investigate all allegations against its officers"; must notify the County Prosecutor "immediately" where a preliminary investigation indicates the "possibility of a criminal act on the part of the subject officer"; must notify the County Prosecutor "immediately"

of "any use of force by an officer that results in death or serious bodily injury"; must notify officers of complaints and their outcomes; must notify complainants of the outcome of their complaint; must establish a protocol for monitoring and tracking officer conduct; must ensure that officers assigned to the internal affairs function complete training mandated by the Division of Criminal Justice; and must periodically report to the County Prosecutor and to the general public summaries of the allegations received and the investigations concluded. Id. at 3-4.<sup>1</sup>

With regard to internal affairs investigation files, those records are considered confidential. Not only is access to those records severely restricted, but the information and records can only be released in four limited circumstances: by court order, request by Attorney General or County Prosecutor, if the officer or agency is named in a lawsuit arising out of the incident, or if administrative charges are brought and a hearing against the officer is held. Id. at 42.

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<sup>1</sup> The principal change made to the IA Policy in 2017 was to mandate that an internal affairs investigator advise the complainant (if the identity of the complainant is known) of the status of the complaint, if requested, and upon completion of the investigation, of the ultimate disposition of the complaint. Previously, the decision to provide such notice was at the discretion of the internal affairs officer. See Memorandum from Attorney General Christopher S. Porrino re: Attorney General Law Enforcement Directive No. 2017-2 (Nov. 15, 2017).

## B. FACTUAL BACKGROUND

### 1. Newark's Public Safety Ordinance

Newark has exercised its authority under the Police Force Statute to: (1) establish a police force, (2) provide for the appointment of a chief of police, and (3) provide that the Public Safety Director would serve as the "appropriate authority" for purposes of N.J.S.A. 40A:14-118.

Each of these decisions is reflected in an Ordinance passed by the Newark Municipal Council on January 7, 2016. (Pa205-214).<sup>2</sup> This Ordinance established a Department of Public Safety, headed by the Director of Public Safety. (Pa205). The Ordinance establishes a Division of Police (also known as the Newark Police Division) within the Department, and establishes a Police Force within the Division of Police. (Pa205, Pa208). The Ordinance designates the Public Safety Director as head and Chief Executive Officer of the Division of Police and the Police Chief as the head of the Police Force. (Pa206, Pa208). The Ordinance makes the Police Chief "directly responsible to the Mayor through the Public Safety Director designated by the Mayor as the Appropriate Authority for the Police Force's efficiency and day to day

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<sup>2</sup> "Da" refers to the appendix of Defendant-Appellant Newark, "Db" refers to its brief, and "Drb" refers to its reply brief. "Pa" refers to the appendix of Plaintiff-Respondent FOP. "Amb" refers to the brief of the Amici supporting the City of Newark. "Tr" refers to the transcript of the March 14, 2018 hearing.



operations." (Pa209). Thus, the Public Safety Director is the "appropriate authority" in Newark for purposes of N.J.S.A. 40A:14-118. (Tr. 71-72). And the Ordinance vests in the Police Chief "the powers and duties established under N.J.S.A. 40A:14-118 and in accordance with applicable case law and the Attorney General guidelines and directives." (Pa209).

As to discipline, the duties of the Public Safety Director under the Ordinance include the following:

- J. Make, administer and enforce rules and regulations for the control, disposition and discipline of the Department of Public Safety, and of its officers and employees in all its Divisions and Offices.
  
- K. Establish procedures for the hearing and determination of charges of violation of departmental rules and regulations by any member of the Police Division provided that a member may be fined, reprimanded, removed, suspended or dismissed from the Division only on written charges made or preferred against him or her, after such charges have been examined, heard and investigated by a Disciplinary Trial boards [sic] selected from among the members of the Police Division as provided for herein, upon such reasonable notice to the member charged, and according to such practice, procedure and manner as may be prescribed by rules and regulations of the Department. . . .
  
- M. Be responsible for appointing members to serve on the Disciplinary Trial Boards.

[Pa206.]

Paragraphs O and P incorporate language from N.J.S.A. 40A:14-118 concerning the authority of committees and commissions to investigate the operation of the Police Force and the authority of the appropriate authority and other executive or administrative officers to examine the operations of the Police Force and the performance of its officers and members. Ibid.

## 2. Newark's CCRB Ordinance, 6PSF-B

On March 17, 2016, the Newark Municipal Council passed Ordinance 6PSF-B ("the CCRB Ordinance"), which created and established a CCRB within the Office of the Mayor. (Da139-153). As subsequently amended, the CCRB Ordinance provides that the CCRB will consist of eleven members, including: (1) the City of Newark's Inspector General, (2) three elected members of the Municipal Council or their designees, and (3) nominees representing each of the following seven organizations or constituencies: American Civil Liberties Union - New Jersey; National Association of Colored People - New Jersey; People's Organization for Progress; Ironbound Community Corporation; Newark Anti-Violence Coalition; the clergy; and the LGBTQ community. (Pa307-308).

The CCRB Ordinance granted the new CCRB jurisdiction "concurrent with that of the NPD to investigate complaints or behavior." (Da142). The CCRB has "the power to receive, investigate, hear, make findings and recommend action upon complaints by members of the public (including, but not limited to

complaints made by other police officers or personnel) against uniformed and sworn personnel of the NPRD that allege misconduct involving inappropriate behavior or actions." Ibid. Its jurisdiction under the CCRB Ordinance includes, but is not limited to, "excessive use of force, abuse of authority, unlawful arrest, unlawful stop, unlawful searches, discourtesy or use of offensive language . . . , theft, and any other categories protected under law." Ibid.

The CCRB Ordinance asserts that it does not relieve "in any way the obligations of the Division of Police to conduct appropriate and timely investigations of NPD uniform and sworn members of the NPD." (Da150). Upon receiving a complaint within its jurisdiction, the CCRB may either (1) initiate an investigation to run contemporaneously in parallel with the investigation being conducted by the Division of Police or (2) decline to conduct a parallel investigation but instead conduct an "Investigation Review" upon the Division of Police's conclusion of its investigation. (Da146). An "Investigation Review" includes "a review of the findings, conclusions and recommendations of the Division of Police." (Da142).

The CCRB then provides its findings and recommendations of discipline (based on a discipline matrix and guidelines) to the Public Safety Director. (Da142-145, Da148, Da150). The Public Safety Director is required to accept the CCRB's findings of fact

"absent clear error" and "make all disciplinary decisions based on the CCRB's findings of fact, absent clear error." (Da143). "Clear error" is defined narrowly to mean findings of fact that are "based upon obvious and indisputable errors" and that "cannot be supported by any reasonable interpretation of the evidence." (Da150). If the Public Safety Director disagrees with the CCRB's findings of fact or decides to impose a lower level of discipline than recommended by the CCRB, the Public Safety Director must provide a detailed written explanation of the reasons and may be called upon to appear in person before the Board to explain further.

ibid.

The CCRB Ordinance states that its provisions "shall not be construed to prevent or hinder the investigation or prosecution of a member of the NPD for violations of the law," but also states that the CCRB may not defer an investigation "because of any pending or parallel disciplinary proceeding or criminal investigation unless such request for deferment is made by the office of a county prosecutor or a state or federal law enforcement agency or prosecutor or by court order." (Da144).

A provision of the CCRB Ordinance on "Complainant Confidentiality" states that the identity and other personally identifiable information of complainants and witnesses will not be released "[d]uring the investigatory process," but that "the complainant's identity may be released in the course of any public

hearing about the alleged misconduct” “[i]f the complaint is substantiated and is referred to a CCRB hearing.” (Da146).

In addition, the CCRB performs oversight and policy-advisory functions, such as considering and making recommendations “with regard to policies and procedures concerning the general investigation of complaints by the Division of Police as well as its Internal Affairs procedures” (Da142); conducting “public hearings related to issues of public concern with NPD policies, patterns, or practices” (Da151); and issuing periodic public reports about police discipline (ibid.).

### 3. DOJ Investigation and Consent Decree

The City of Newark pursued the reforms reflected in its 2016 Public Safety and CCRB Ordinances against the backdrop of a civil rights investigation and lawsuit by the DOJ into the NPD. DOJ’s findings and the eventual consent decree with the City of Newark made clear that significant reforms were imperative, including significant reforms to how Newark handled citizen complaints of police misconduct. The City’s leaders demonstrated a commitment to making improvements, and ultimately adopted reforms that went well beyond the requirements of the consent decree.

On July 22, 2014, DOJ issued a report on its three-year investigation of the NPD, following allegations of civil rights violations by its officers. (Da1). DOJ found “a pattern or practice of constitutional violations in the NPD’s stop and arrest

practices, its response to individuals' exercise of their rights under the First Amendment, the Department's use of force, and theft by officers." Ibid. DOJ further concluded that its investigation "revealed deficiencies in the NPD's systems that are designed to prevent and detect misconduct, including its systems for reviewing force and investigating complaints regarding officer misconduct." Ibid.

On March 30, 2016, the United States filed a civil action against the City of Newark, seeking to remedy legal violations by the NPD described in the 2014 report. (Da53-59). The Complaint alleged that the NPD's pattern or practice of unconstitutional conduct had arisen, in part, from systemic deficiencies in the City's systems for holding NPD officers accountable, including "a failure to adequately review and investigate officers' use of force and fully and objectively investigate all allegations of misconduct." (Da57).

The litigation was resolved by a consent decree filed on April 29, 2016. (Da61-138). The consent decree included numerous commitments by the City of Newark concerning NPD's intake and investigation of police misconduct complaints and its administration of discipline for substantiated allegations of misconduct. (Da105-114). In addition, Paragraph 13 of the consent decree called for the establishment of a "civilian oversight

entity" and provided that "[t]he duties and responsibilities of that entity shall, at a minimum include":

[1] the substantive and independent review of internal investigations and the procedures for resolution of civilian complaints; [2] monitoring trends in complaints, findings of misconduct, and the imposition of discipline; and [3] reviewing and recommending changes to NPD's policies and practices, including, but not limited to, those regarding use of force, stop, search, and arrest.

[Da74.]

As reflected above, the powers and duties of the CCRB go beyond those specifically addressed in the consent decree. See Pa24-25, Pa349-350; Tr. 25.

#### PROCEDURAL HISTORY

On or about August 8, 2016, the Fraternal Order of Police, Newark Lodge Number 12 ("FOP") filed a verified complaint in the Superior Court, Chancery Division, seeking an order declaring the CCRB Ordinance void *ab initio* and unenforceable, among other relief. (Da154-168). After some preliminary proceedings, the court considered cross-motions for summary judgment.

The court found that the CCRB Ordinance "plainly intrudes on the Newark police chief's authority to oversee day-to-day operations of the internal affairs function." (Tr. at 94). It reasoned that N.J.S.A. 40A:14-118, which governs the delegation of responsibility for the police function, grants to the police chief

the authority to investigate and discipline police officers. (Tr. at 94). Accordingly, the court concluded that the City was unable to delegate disciplinary responsibility to the CCRB because it was not power the City had in the first place. Ibid.

With regard to 40A:14-181 and the IA Policy, the court found that the CCRB Ordinance conflicted with the Attorney General's role as the State's chief law enforcement officer and his responsibility to ensure the "uniform and efficient administration of the criminal law." (Tr. at 128; see also N.J.S.A. 52:17B-98). By attempting to hand investigatory and disciplinary authority to the CCRB, the court observed, the City had attempted to "accomplish indirectly through the CCRB, what it can't accomplish directly," by "giv[ing] responsibilities to the CCRB which under the guidelines must be performed by internal affairs under the direction of the chief of police." (Tr. at 129). The court also found the IA Policy is "so pervasive and comprehensive, that it precludes the coexistence of municipal regulation." (Tr. 130).

Ultimately, on March 19, 2018, the court issued an order ruling that the CCRB Ordinance is *ultra vires*, void and unenforceable except to the extent that it permits the CCRB "to serve strictly in an oversight capacity" in accordance with the consent decree and "expressly prohibited" the CCRB from "engaging in investigations, hearings, adjudications, or the issuance of



subpoenas relating to police misconduct and/or discipline.” (Da170-171).

This appeal followed. Thereafter, this court invited the Attorney General to appear as amicus curiae in light of the issues presented in this case.

#### ARGUMENT

#### THE CHANCERY DIVISION CORRECTLY CONCLUDED THAT NEWARK'S CCRB ORDINANCE SUBSTANTIALLY CONFLICTS WITH STATE LAW.

Preemption doctrine provides a framework for evaluating the questions presented here. “Preemption is a judicially created principle based on the proposition that a municipality, which is an agent of the State, cannot act contrary to the State.” Redd v. Bowman, 223 N.J. 87, 108 (2015) (quoting Overlook Terrace Mgmt. Corp. v. Rent Control Bd., 71 N.J. 451, 461 (1976)). “In a preemption analysis, the initial question is ‘whether the field or subject matter in which the ordinance operates, including its effects, is the same as that in which the State has acted.’” Id. at 108-09 (quoting Overlook, 71 N.J. at 554).

If the field or subject matter is the same, courts then look to the five-factor test outlined in Overlook. Those elements are:

(1) Does the ordinance conflict with state law, either because of conflicting policies or operational effect; (2) Was the state law intended, expressly or impliedly, to be exclusive in the field; (3) Does the subject matter reflect a need for uniformity; (4) Is the state scheme so pervasive or comprehensive that it precludes coexistence of municipal

regulation; and (5) Does the ordinance stand as an obstacle to the accomplishment of the full purposes and objectives of the Legislature?

[Overlook, 71 N.J. at 461-62.]

"The ultimate question is whether, upon a survey of all the interests involved in the subject, it can be said with confidence that the Legislature intended to immobilize the municipalities from dealing with local aspects otherwise within their power to act." Redd, 223 N.J. at 109 (quoting Summer v. Twp. of Teaneck, 53 N.J. 548, 555 (1969)).

On that ultimate question, the Attorney General is of the view that the City of Newark's CCRB Ordinance conflicts with state law by establishing a civilian body to duplicate the police force's internal affairs function -- conducting investigations of alleged misconduct by police officers, making findings of fact, and recommending discipline -- and requiring the City's Public Safety Director to act on the CCRB's findings unless clearly erroneous -- even when those findings conflict with the reasonable findings of an internal affairs investigation. This conclusion is supported by the Police Force Statute - N.J.S.A. 40A:14-118, the Attorney General's IA Policy, and the statute incorporating the IA Policy, N.J.S.A. 40A:14-181, as well as the interaction between each of them. Those provisions of the CCRB Ordinance that conflict with state law and the IA Policy cannot stand; however, imposing

appropriate limits on the CCRB's authority will not prevent it from serving an important oversight and policy-advice function.

**A. The CCRB Ordinance Substantially Conflicts with  
N.J.S.A. 40A:14-118**

The court below correctly concluded that the City of Newark's CCRB Ordinance, 6PSF-B, violates the Police Force Statute, N.J.S.A. 40A:14-118, in substantial part. See Tr. 80-95; see also id. at 113-114, 121, 129-130. According to the court, the Police Force Statute reserves to the police chief responsibility for "day-to-day operations," including the responsibility to pursue individual disciplinary matters against officers and members of the police force. Id. at 85, 93-94. However, the court explained, the statute permits municipalities to establish bodies such as the CCRB to perform "an oversight function to examine and remedy systemic problems in the police force." Id. at 85.

The Chancery Division's decision is supported by the text of the Police Force Statute as well as its underlying purpose. The CCRB Ordinance violates N.J.S.A. 40A:14-118 not only by assigning to the CCRB functions that the statute assigns elsewhere, but also by impinging upon the statutory "line of authority" between the police force and the Public Safety Director. The arguments to the contrary are unavailing.

First, by empowering the CCRB to conduct investigations and proceedings in individual disciplinary matters, while giving the

CCRB's decisions dispositive weight unless clearly erroneous, the CCRB Ordinance impermissibly assigns to the CCRB functions that the Police Force Statute assigns to the police chief.

"[T]o avoid undue interference by a governing body into the operation of the police force," Falcone, 103 N.J. at 222, the Police Force Statute generally distinguishes between regulatory or policy-making authority relating to the police force, on the one hand, and administrative and enforcement authority, on the other. See also Loigman v. Twp. of Middletown, 409 N.J. Super. 13, 25-26 (App. Div. 2009) ("[T]he purpose of the [1981] amendments was to prevent meddling by elected officials in the day-to-day operations of local police departments."); Hawthorne PBA Local 200 v. Borough of Hawthorne, 400 N.J. Super. 51, 59-60 (App. Div. 2008) (stating that the 1981 amendments were "intended to decrease the influence of a local governing body over the municipal police department by leaving the department's day-to-day operations in the hands of the police chief, who would be accountable to the appropriate authority."). While the former may be vested in civilian authorities, the latter must be vested in the chief of police if one has been appointed. In the terms of the statute, the "appropriate authority" within the municipality (the Public Safety Director in this case) is made responsible for "the adoption and promulgation . . . of rules and regulations for the government of the force and for the discipline of its members." N.J.S.A. 40A:14-

118. The police chief, however, "shall be directly responsible . . . for the efficiency and routine day to day operations thereof." Ibid.

As to disciplinary matters in particular, the statute instructs that the chief of police "shall, pursuant to policies established by the appropriate authority: (a) Administer and enforce rules and regulations and special emergency directives for the disposition and discipline of the force and its officers and personnel." Ibid. As this court has recognized, this provision means that the chief of police, if one has been appointed, "has the responsibility to file police disciplinary charges," Gauntt, 194 N.J. Super. at 491, and "discipline[] members of the police [force]," Aristizibal v. City of Atl. City, 380 N.J. Super. 405, 429 (App. Div. 2005).

While N.J.S.A. 40A:14-118(a) grants the chief of police the authority to administer and enforce rules and regulations for the discipline of the police force's officers and personnel, the CCRB Ordinance would impermissibly grant the same authority to the CCRB. Arguing to the contrary, the City of Newark contends that the CCRB's functions do not overlap with the police chief's statutory authority, even though the CCRB can initiate disciplinary investigations and make findings of fact and recommendations for discipline that must be accepted absent clear error. See Db21-22; Drb5-7. As the City sees it, N.J.S.A. 40A:14-118(a) only protects

the police chief's authority to "administer (impose) discipline," Drb6, and none of the CCRB's functions constitute "imposing," "administering or enforcing discipline," id. at 6, 7. See also id. at 7 ("The CCRB is not administering or enforcing discipline. The CCRB will be a fact finding body that recommends discipline, that's it."); App. Br. at 21 ("The CCRB is not a disciplinary body . . . .").

The City reads N.J.S.A. 40A:14-118(a) too narrowly. By its plain terms, N.J.S.A. 40A:14-118(a) does not speak only to a police chief's authority to "administer," "enforce," or "impose" discipline. The statute more broadly preserves police chiefs' authority to "[a]dminister and enforce rules and regulations . . . for the . . . discipline of the force and its officers and personnel." N.J.S.A. 40A:14-118(a). Undoubtedly, the CCRB's authority to conduct investigations, find facts, and make recommendations for the discipline of officers and members of the police force falls within the ambit of the chief's authority under the statute.

In a similar vein, the City's Amici argue that the resolution of citizen complaints against individual officers and members of the police force should be considered a policy-making function, rather than day-to-day police operations. See Amb17-20. The importance of objectively and efficiently addressing internal affairs matters, however, does not make each individual

disciplinary adjudication a "policy" matter for civilian authorities. And Amici's argument to the contrary ignores N.J.S.A. 40A:14-118(a)'s express reservation of disciplinary authority to police chiefs.

The City also errs in arguing that the chief of police's authority under N.J.S.A. 40A:14-118(a) is not "exclusive," Db20, 21-23, and that the CCRB Ordinance "does not divest the police department of its authority to discipline police officers," id. at 23. See also id. at 20 ("It would seem that Judge Kessler interpreted Gauntt to mean that police chiefs generally have exclusive power to direct how investigations of police officers are conducted. Such is simply not the case.").

On the first point, the City cannot be correct that municipalities are free to create a civilian body that duplicates a police force's internal affairs function in a separate but parallel process. See Db20 ("The ordinance does not interfere with the chief of police's power to prescribe the duties of subordinates. The Ordinance provides for a separate arena to resolve civilian complaints."); id. at 31 (describing "parallel proceedings"). The internal affairs function is part of the police function subject to the general oversight by the Attorney General and County Prosecutors. See N.J.S.A. 52:17B-98. The City's

approach would unlawfully vest this police function in civilian authorities.<sup>3</sup>

On the City's latter point, the suggestion that the CCRB Ordinance does not "displace" the authority of the Division of Police cannot be squared with the facts. The City admits that in the event of "competing or even divergent conclusions resulting from simultaneous CCRB and internal affairs investigations," the CCRB's findings and recommendations will override the Police Division's unless clearly erroneous. Db31-32. If even disciplinary decisions by the Police Division must be rejected in favor of the CCRB's, it is hard to understand how the CCRB does not "displace" the internal affairs function.<sup>4</sup>

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<sup>3</sup> Jordan v. Harvey, 381 N.J. Super. 112 (App. Div. 2005), is instructive on this point. In that case, this court held that the Police Force Statute and related state laws preempted a municipality's attempt to authorize its civilian police director to perform law enforcement duties, including personally apprehending suspects. See id. at 114. Allowing municipalities to vest law enforcement duties in civilian authorities, the court explained, would invite municipalities to circumvent a host of statutory requirements -- from training requirements and age restrictions on police hires to mandates that police chief positions be filled by promotion from within the department and that law enforcement officers retire at age 65. See id. at 116-118 & n.3.

<sup>4</sup> The CCRB Ordinance provides for the use of a discipline matrix and guidelines, to be developed by the Public Safety Director and affected bargaining units, in consultation with the CCRB. (Da143). The Attorney General expresses no view on what role a body such as the CCRB might permissibly play in the development of such a discipline matrix and guidelines, or the effect of the Chancery Court's order on the development of such a discipline matrix and guidelines.



Second, the manner in which the CCRB Ordinance provides for the Public Safety Director to resolve disagreements between the CCRB and the Police Division illustrates how the CCRB Ordinance also impinges upon the statutory "line of authority" between the police force and the Public Safety Director.

The Police Force Statute requires that any ordinance establishing a police force also provide for a "line of authority relating to the police function." N.J.S.A. 40A:14-118. With regard to municipalities that have a chief of police, "the line of authority reference in the statute refers to the relationship from the chief upward. In other words, it refers to the relationship between the chief . . . and the municipal governing body." Loigman, 409 N.J. Super. at 24. The statute further provides that the chief "shall be directly responsible to the appropriate authority" for the efficiency and routine day-to-day operations of the force. Ibid. Like other provisions of the Police Force Statute, the "line of authority" requirement "was designed to end the problem of interference with the police function by elected officials." Reuter v. Ft. Lee Borough Council, 167 N.J. 38, 49 (2001) (LaVecchia, J., concurring and dissenting).

The CCRB Ordinance upsets the statutorily mandated relationship between Newark's police force and the Public Safety Director, whom the City has designated as the "appropriate authority" for purposes of N.J.S.A. 40A:14-118. (Tr. 71-72;

Pa209). In conflict with the statute, the CCRB Ordinance inserts the Board into the internal affairs process in a way that makes the police chief no longer "directly responsible" to the Public Safety Director.

The problem may be clearest with respect to complaints that the CCRB decides not to investigate itself. In these cases, the CCRB conducts an "Investigation Review" at the conclusion of the Division of Police's investigation, exercising "the power to conduct a review of the findings, conclusions and recommendations of the Division of Police." (Da142, Da146). The CCRB then "report[s] its findings of the Investigation Review to the Public Safety Director," who must defer to the findings and recommendations of the CCRB even when they part ways with the Division of Police. (Da142).

In effect, the CCRB is acting as an appellate review body (with fact-finding authority) between the police force and the Public Safety Director, who then must defer to the CCRB. This arrangement conflicts with the statutory requirement of a "line of authority" providing that the chief of police is "directly responsible" to the "appropriate authority."

The same problem arises in cases for which the CCRB "contemporaneously initiate[s] a parallel investigation" of its own instead of waiting for the Division of Police to conclude its investigation. (Da146). In these cases, the two investigations

proceed on parallel tracks. If the results conflict, the Director of Public Safety is required to defer to the CCRB -- overriding the Division of Police -- unless the CCRB's decision was clearly erroneous. Again, the decision-making of civilian authorities has been injected into the line of authority between the police force and the Public Safety Director in a manner that the Police Force Statute forbids.

Finally, the City of Newark and its Amici cannot save the CCRB Ordinance by pointing to the sentences of the Police Force Statute which state that nothing in the statute (1) "prevent[s] the appointment by the governing body of committees or commissions to conduct investigations of the operation of the police force" or (2) "prevent[s] the appropriate authority, or any executive or administrative officer charged with the general administrative responsibilities within the municipality, from examining at any time the operations of the police force or the performance of any officer or member thereof." N.J.S.A. 40A:14-118. See Db17, 18, 21, 38, 41-42; Amb15-17.

As an initial matter, the second provision -- which addresses authority to "examin[e] . . . the performance of any officer or member" of the police force -- is inapplicable to the CCRB. That provision speaks only to the authority of "the appropriate authority" and "any executive or administrative officer charged with the general administrative responsibilities within the

municipality." There is no basis for concluding that the CCRB falls into either category. The CCRB is not the "appropriate authority" and is not charged with "the general administrative responsibilities within the municipality" but rather with the limited and specific responsibility of conducting police misconduct investigations and proceedings.

The first provision, in contrast, does address the authority of committees and commissions such as the CCRB. And the potential authority of such committees and commissions is narrower than the potential authority of the officials referenced in the second provision. Although a committee or commission may be appointed to "conduct investigations of the operation of the police force," the statute does not authorize such a committee or commission to examine the performance of any particular officer or member thereof.

This difference between the two provisions is significant. That the Legislature used otherwise parallel language in the two provisions, but omitted any reference to examining or investigating "the performance of any officer or member" of the force in the provision for committees or commissions appointed by the governing body, strongly indicates that such committees and commissions may not be vested with authority to examine the performance of individual officers or members. See DePascale v. State, 211 N.J. 40, 73 (2012) ("[W]hen the legislature uses certain

language in one part of the statute and different language in another, the court assumes different meanings were intended." (quoting Singer & Singer, 2A Sutherland Statutory Construction § 46:6 (7th ed. 2007))).<sup>5</sup>

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The upshot of the foregoing discussion is that a body resembling the CCRB may be given authority to perform a broad oversight and policy-advice function, and to "conduct investigations of the operation of the police force" (as a whole) to inform its work. This meaningful work has the potential to improve how the police force handles citizen complaints and to strengthen police-community relations. But N.J.S.A. 40A:14-118 does not permit a municipality to establish a CCRB whose investigations will duplicate the internal affairs function of the police force and whose judgments will supersede the police force's own.

**B. The CCRB Ordinance Substantially Conflicts with State Law Governing Internal Affairs Matters**

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<sup>5</sup> The trial judge focused on another difference between the two provisions discussed above: that the first uses the word "investigations" while the second uses the word "examining." Tr. 84-85. The conclusion that the second provision does not apply to bodies like the CCRB in any event makes it unnecessary to consider whether the Legislature intended these words to carry different meanings.

The Attorney General's IA Policy and the statute making the IA Policy mandatory for all municipalities, N.J.S.A. 40A:14-181, provide related but independently adequate grounds for deciding that the Newark Municipal Council exceeded its authority by granting the CCRB powers that conflict with state law.

The Attorney General's IA Policy is comprehensive and includes several mandates that every law enforcement agency in New Jersey must implement. The City appears to suggest that the IA Policy need not be followed because it has been labeled as "Guidelines." See Drb10 ("The Attorney General Guidelines are simply that - guidelines."). Attorney General "guidelines, directives or policies cannot be ignored, however: they are binding and enforceable on local law enforcement agencies, and, at a minimum, they are statements concerning the internal management or discipline of an agency." O'Shea, 410 N.J. Super. at 383 (cleaned up; citations omitted). Moreover, the Legislature has required that every law enforcement agency "shall adopt and implement guidelines which shall be consistent with" the IA Policy. N.J.S.A. 40A:14-181. Accordingly, this court has recognized the "binding" nature of the IA Policy. O'Shea, 410 N.J. Super. at 383.

"[W]hen a law enforcement agency adopts rules pursuant to N.J.S.A. 40A:14-181 to implement the Attorney General's Guidelines, the agency has an obligation to comply with those rules." O'Rourke v. City of Lambertville, 405 N.J. Super. 8, 23

(App. Div. 2008). Thus, in O'Rourke, this court ruled that a City of Lambertville police officer was entitled to reinstatement because he was terminated following an investigation conducted personally by the Lambertville Police Director while the City's rules (adopted to comply with the IA Policy and N.J.S.A. 40A:14-181) called for allegations of serious misconduct to be investigated by the police force's Internal Affairs Unit in the first instance. See 405 N.J. Super. at 11, 19-21. And, in reaching the conclusion that the Police Director could not assume for himself the responsibility of the Internal Affairs Unit, this court did not find it relevant that the results of any investigation by the Internal Affairs Unit ultimately would have been presented to the Police Director at the conclusion of the investigation. See id. at 21.<sup>6</sup>

The principal argument of the City of Newark and its supporting Amici is that the IA Policy and N.J.S.A. 40A:14-181 do not preempt the CCRB Ordinance because they only govern investigations by a police force's own internal affairs unit. In their view, state law and policy are entirely silent as to whether

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<sup>6</sup> The City of Newark and its supporting Amici seek to distinguish O'Rourke on the ground that Newark's ordinance differs from Lambertville's by expressly authorizing a concurrent investigation by civilian authorities. O'Rourke recognized, however, that Lambertville's rules regarding who may conduct a police disciplinary investigation were adopted to comply with the IA Policy and state law.

municipalities can vest civilian authorities with concurrent jurisdiction to investigate and recommend discipline against police officers. See Db37-39, 46; Amb37-38, 41.

But this argument must be rejected for the same reasons as the City of Newark and its Amici's arguments about the Police Force Statute. As the court below recognized, the IA Policy and N.J.S.A. 40A:14-181 must be read *in pari materia* with N.J.S.A. 40A:14-118. See Tr. 129 ("It bears noting that N.J.S.A. 40A:14-118 which as the City points out should be read together with N.J.S.A. 40A:14-181, requires the chief of police run the police department."). The internal affairs function is a police function that, under N.J.S.A. 40A:14-118, cannot simply be replicated outside the police force itself. Creating such a parallel track for police misconduct investigations would remove from the general supervisory authority of the County Prosecutor and the Attorney General a critical law enforcement function, and there is no reason why municipalities would be required to stop there. Cf. IA Policy at 12 ("Internal affairs investigations must be considered as important to the agency as any criminal investigation.").

State law is not indifferent to whether municipalities replicate the internal affairs function or any other police function under civilian authorities outside the police force. These efforts to circumvent state law and the chain of command for law enforcement agencies are impermissible and interfere with the



"uniform and efficient enforcement of the criminal law and the administration of criminal justice throughout the State." N.J.S.A. 52:17B-98; see also O'Rourke, 405 N.J. Super. at 19-21; Jordan, 381 N.J. Super. at 116-18.

The City of Newark and its supporting Amici also argue that the features of the CCRB Ordinance satisfy many of the requirements of the IA Policy. See Db39-47; Amb40 n.11, 41-45. The fact that internal affairs functions may not be replicated outside the police force makes it unnecessary to consider these points.

In any case, the CCRB Ordinance conflicts with the IA Policy in multiple ways. This brief will focus on two: confidentiality of investigation files and deference to criminal investigations.

With regard to confidentiality, the IA Policy designates the contents of internal affairs investigation case files as confidential and releasable only in limited circumstances. IA Policy at 42. Protection of complainants and witnesses is critical to the internal affairs function, yet the CCRB may make their identities and other information available to the general public. And, even if the CCRB does not release such information to the general public, the CCRB Ordinance requires that otherwise confidential information be made available to the members of the CCRB. That disclosure to civilian political appointees -- without more -- is itself a violation of the requirements of the IA Policy.

As to concurrent criminal investigations and prosecutions, the CCRB Ordinance stands the IA Policy on its head. The CCRB will not defer an investigation because of a parallel criminal investigation absent a request for deferment by a prosecutor, law enforcement agency, or court. (Dal44). In contrast, the IA Policy prohibits internal affairs investigators from taking further investigative action, with regard to allegations of criminal conduct, until directed to do so by the county prosecutor unless an imminent threat exists to the safety or welfare of an individual. IA Policy at 20. The contrary policy reflected in the CCRB Ordinance impairs prosecutors' and law enforcement agencies' ability to maintain the confidentiality of criminal investigations. It offers them a Hobson's choice between allowing the CCRB to proceed with an investigation that may impair a criminal prosecution and disclosing to the CCRB's civilian members otherwise confidential information about a criminal matter.

The conflicts between the CCRB Ordinance and the IA Policy and N.J.S.A. 40A:14-181 are inescapable.

CONCLUSION

For the foregoing reasons, the City of Newark's CCRB Ordinance conflicts in substantial part with applicable state law. The CCRB's functions should be limited by court order to those that comport with state law.

Respectfully Submitted,

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By: 

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Dated: April 26, 2019