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Municipal Lawyer

A publication of the Local and State Government Law Section of the
New York State Bar Association, produced in cooperation with Touro Law Center

Recruiting and Retaining Diverse Public Sector Employees

Does the Climate Leadership and Community Protection Act Preempt Local Decarbonization Efforts? A Lawsuit Challenging New York City's Local Law 97 Seeks To Find Out

Continuing the Tradition of Excellence: *Commercial Litigation in New York State Courts, 5th, Edited by Robert L. Haig*

NYSBA PUBLICATIONS

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Fourth Edition

Editors
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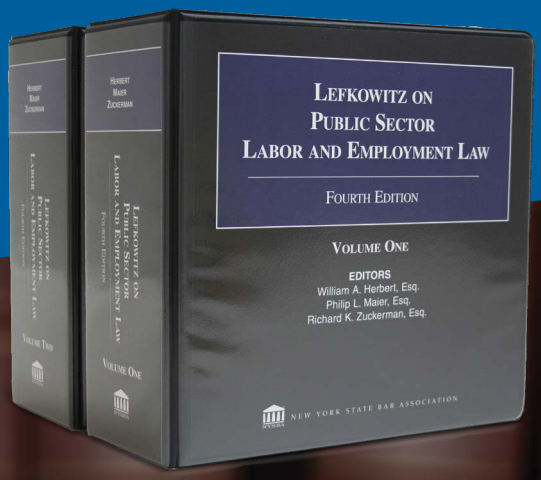

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Message from the Chair

Michael E. Kenneally Jr.

Originally scheduled to take place in the fall of 2020, the LSGL Section will be celebrating its 75th (and 76th and 77th) anniversary at its fall meeting in Washington, D.C. on October 14-16, 2022. After more than three years of planning and postponements, I am happy (and relieved) that we are finally able to get back together in person for a Section meeting. And while the scheduling and coordination of this event had its share of difficulties, it has given me the chance to look back on the history of our Section and the folks who have chaired it in years past. The names on that distinguished list are quite humbling, but there are three names that stood out to me, as each would directly or indirectly shape my legal career.

The very first chair of the then-Municipal Law Section was Frank Moore in 1945. At the time, he was serving as comptroller of New York State, a position he held from 1943-1950, and lieutenant governor after that. Prior to his elections to statewide office, he served as counsel to the town, village and school district of Kenmore. He was a principal author of the revised 1932 town law (the version that still exists today) and served as a delegate to two New York State Constitutional Conventions (1938 and 1967). In 1933, he helped to find the Association of Towns of the State of New York and served as its first executive secretary. Seventy years later, less than a year out of law school, I would join the Association of Towns as a staff attorney and begin my career in municipal law.

At the time I joined the Association of Towns, I had already developed a keen interest in municipal law thanks to another of our Section's former chairs, Patty Salkin (Chair, 2009-11). I suspect many readers are familiar with Patty, if not personally, then through her impressive scholarship on state and local government issues. She is the provost of the Graduate and Professional Divisions of Touro College and the former (and the first female) dean of Touro College's Jacob D. Fuchsberg Law Center. Patty is also a nationally recognized scholar, having authored hundreds of books, articles and columns on state and local government law issues.

As a 1L at Albany Law School, I had the privilege to work for and learn from Patty, who at the time was serving as associate dean and director of the Government Law Center. Dean Salkin's knowledge and passion for government law and policy is infectious, and I was immediately drawn to challenges facing elected officials and local leaders and helping shape the public policy at the local and state levels. My work and studies under the tutelage of Dean Salkin provided an understanding and passion for municipal law that I carry with me today, and I am fortunate to have had the opportunity to have worked so closely with her.

Which brings me to Murray Jaros, chair of the Municipal Law Section in 1979. Murray has been a mentor, colleague and friend whom I still have the privilege of meeting up with a few times each year. During his distinguished career in public service, Murray has served as the director of legal services for the former Office for Local Government, counsel to the State Board of Equalization and Assessment, and deputy executive director and general counsel of the Facilities Development Corporation. In recognition of his distinguished public service career, he received the New York State Bar Association's Award for Excellence in Public Service in January of 2007, an award our Section will seek to reinstate in 2023.

While these three former chairs have helped shape my legal career, the history of the Local and State Government Law Section is rich with members, officers and chairs who are far more accomplished than me and are too many to list in this brief message. The friends and colleagues you will make through this Section are a tremendous resource both professionally and personally, and they remain the most prized attribute of our Section.

Beyond this network of professionals, there are many more advantages to membership in the Local and State Government Law Section. The educational component is perhaps the most visible and widely recognized service our Section offers its members. Our programming at the NYSBA Annual Meeting and our Section's Spring Government Law Forum and fall meeting provides education on the full array of issues encountered by attorneys who practice in municipal or state government settings, as well as by those representing clients before or in concert with local and state agencies.

Municipal Lawyer features scholarly articles on the broad array of issues that arise in municipal practice; some arise on a consistent basis (land use, labor and employment, ethics) while others may arise sporadically (the exercise of eminent domain, revaluation of property). Regardless of the frequen-

cy of the issues, municipal attorneys are often the first to be consulted for advice, and the articles contained in the *Municipal Lawyer* help provide the broad foundation necessary to address them.

The Section is always looking for scholarly articles to be considered for inclusion in upcoming issues of *Municipal Lawyer*. To submit your article for consideration by the Section's Publications Committee, please email them at municipalawyersubmissions@gmail.com.

For more complex or nuanced questions, we rely on our greatest asset: our members themselves. Through our online Communities and networking, our members can connect with one another to share their questions and solutions. Communities is an online forum for our Section members to post and respond to questions and is available to all members. For more information on how to access and post/respond in Communities, please see the instructions included on page 29.

Through our committees, our members can interact with one another to discuss developments within a particular practice area (standing committees) or take on a particular issue (ad-hoc). Among the current work undertaken by our committees are a review of Article 78; a discussion on qualified immunity and the "special duty rule" for municipal liability; improving diversity and inclusion among our membership; and the financing of broadband infrastructure. A new "Code Drafting" committee, still in its infancy, will be a tremendous resource for attorneys charged with drafting legislation such as short-term rentals, 5G/wireless, cannabis (retail and processing), food trucks, EV charging stations, and outdoor dining and outdoor music, among others. A full schedule of our standing committee meetings follows this message, and I encourage all of our members to participate in one or more of these meetings.

The value of membership in our Section is directly tied to the involvement of our members. A member who takes advantage of all that our Section has to offer will reap the professional benefits, and through their participation, all other active members of our Section benefit as well. There are plenty of opportunities to participate in our Section, so please reach out if you would like to be more involved.

Michael E. Kenneally Jr.

Government Ethics Quiz

Sponsored by the Section's Ethics and Professionalism Committee

By Steve Leventhal and Mark Davies

Case No. 1

When leaving a restaurant with her family, a town board member is struck by a town DPW vehicle. The town board member sues the town to recover monetary damages for her injuries.

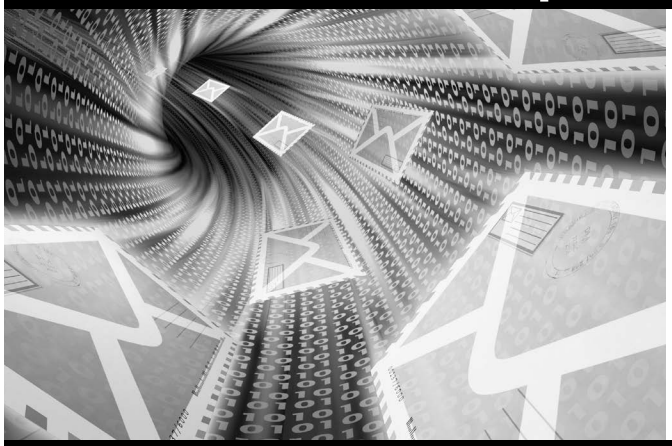
Case No. 2

A newly elected town supervisor sues the town to reverse unlawful personnel decisions made in the last days of the prior administration.

Q. Are the claims permitted?

Answers and analyses on page 26.

Request for Articles



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Articles should be submitted in electronic document format (pdfs are NOT acceptable), along with biographical information.

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Recruiting and Retaining Diverse Public Sector Employees

By Martha Krisel

I. Introduction and Overview

New York State Civil Service Law controls all public sector prospective and current appointments and promotions; this ranges from candidates for employment with a neighborhood library or tiny special district through those seeking employment with New York State itself, and every public sector setting in between. The civil service system in New York State is designed to ensure that public sector hiring is in accordance with merit and fitness. In practice, this means that job candidates—with limited exceptions—must score high enough on a written exam to be "reachable" for employment. Since job classifications vary by position, a specifically designed and New York State Civil Service Commission-approved subset of positions do *not* require participation in in-class competitive exams. Exempt, labor, and non-competitive positions afford employers greater discretion in hiring; however, to foster diverse workforces, public sector employers must maximize outreach efforts. Although competitive positions—those that require a formal exam—present a challenge because of the test-based ranked system, specific recruitment strategies also do exist to advance public sector workforce diversification.

Anecdotally, the civil service system resulted from the assassination of President James Garfield by a disgruntled individual who believed he was entitled to employment because of his political connections. Prior to the adoption of civil service reforms, public sector appointments are reported to have been dominated by political patronage, in what has been referred to as the "spoils system" (i.e., to the victor go the spoils). [1] Accordingly, the civil service system was specifically designed to eliminate political patronage by *primarily* filling government positions through an equitable merit system that placed applicants on equal footing, without regard to political affiliation. The competitive testing system, premised almost exclusively on lists established in grade order, does not dance easily with diversity goals.

In the federal government, the civil service system has been in place since President Grover Cleveland's administration in 1882.[2] New York State followed suit in 1883, formalizing the merit system within its Constitution and in its Civil Service Law.[3] Article V of the state Constitution provides that "[a]ppointments and promotions in the civil service of the state and all of the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive." [4] This constitutional mandate is then further implemented in state civil service law, as well as local civil service rules that are based upon New York State's Model Rules and amended only through public hearings and New York State Civil Service Commission approval.

On the county, town and city levels, civil service commissions and personnel officers report to the New York State Civil Service Commission and must uphold the principles of merit and fitness by adhering to the provisions of New York State Civil Service Law.[5] In addition to competitive examinations, the merit system is also protected through the adoption of "training and experience" requirements for public sector positions. Mostly absent from civil service law, however, are demographic requirements and diversity goals for the public sector workforce.

II. Classification of Civil Service Positions

The public sector workforce within New York State is composed of the "unclassified" service[6] and the "classified service."[7]

A. Unclassified

The unclassified service is comprised of a limited list of positions that fall outside the jurisdiction of civil ser-

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With gratitude to James Toohey, a graduate of Georgetown University and a former Nassau County civil service personnel specialist, currently attending St. John's Law School, for his assistance in the research and preparation of this article.

vice. Examples of unclassified positions include elected officials, certain department heads and teaching positions within schools.[8] For instance, in Nassau County, the list of unclassified positions is as follows:

- all elective officers,
- all election officers,
- the head or heads of any department,
- all officers and employees of the Legislature and of the County Executive,
- members of all boards or commissions, and
- all other officers or positions specifically mentioned in Section 35 of the Civil Service Law.[9]

Although civil service does not establish any requirements for appointment to these unclassified positions, candidates may need to satisfy requirements established by other sections of state law or by the codes, rules, and regulations of New York State.[10]

B. Classified

The classified service, however, is strictly controlled by civil service law and is sub-divided into four jurisdictional classes: competitive,[11] non-competitive,[12] labor,[13] and exempt.[14]

Competitive positions are filled through the appointment of candidates who qualify to compete in an examination and who pass that examination. As a result, diversity efforts are best achieved when public sector employers are proactive in recruitment efforts *in advance of* the examination application due date.[15] For competitive positions, candidates must satisfy minimum qualifications to enroll in an examination, participate in an examination, and be appropriately appointed from an established list of "eligibles," who are ranked according to score on the exam.[16]

Non-competitive and labor class positions allow a more flexible hiring process than competitive positions. Candidates for non-competitive positions must demonstrate their specific training and experience; however, the traditional "sit-in-a-classroom-with-a-test-booklet" civil service examination process is not required because the New York State Civil Service Commission has specifically determined that these are positions for which it would be "impracticable"[17] to hold a formal competitive examination.[18,19] Similarly, the labor class, which includes positions entailing the performance of unskilled tasks, often does not require any formal previous experience. Non-competitive and labor class positions can be filled, for example, through private sector-equivalent advertising. When a non-competitive job specification is approved, it carries with it a limitation on the number of positions each agency or municipality has, and that number cannot be increased without the permission of the New York State Civil Service Commission. Amendments to non-competitive job specifications are under the jurisdiction of the local civil service commission but an increase in the number of positions is not.

Appointment to exempt class positions neither depends on examinations nor formal training and experience. These positions are not subject to competitive testing because they perform highly responsible managerial and/or confidential duties for which examinations of any kind have been determined by the New York State Civil Service Commission to be impracticable.[20] Public sector employers are granted significant discretion to select exempt employees as they deem appropriate; because of this, the number of exempt positions is extremely limited and cannot be increased without express New York State Civil Service Commission permission.[21] These positions are deliberately limited because the civil service law and the New York State Civil Service Commission favor competitive testing. Before a local civil service commission or personnel officer can either establish a new job specification for

a non-competitive position or expand the number of positions in an existing non-competitive job specification, New York State Civil Service Commission approval is required. Justification for the new or expanded number of positions is required to obtain approval; that approval is not based upon the intent to achieve diversity. The justification must be specific to the duties of the position as well as to the pertinent qualifications and examination process.

III. Recruitment and Open Competitive Positions: Application, Qualification and Placement

Since public sector employment is based upon competitive examinations that result in the establishment of a formal list of candidates based strictly upon on examination grades,[22] commitments to diversifying the public sector work force do not play a role in the canvass/interview process, with limited and specific exceptions.[23]

Accordingly, the only opportunity to increase diversity in competitive positions in the public sector workforce takes place (a) in advance of and (b) after the announcement but (c) before the deadline for a written open competitive exam. Selection of competitively tested employees in a public sector workforce is culled from a test-based pool of applicants ultimately placed on an established list, developed primarily from competitive testing and the grades achieved. Accordingly, employers have minimal discretion in the selection of candidates; under the "Rule of Three," a public sector employer is able to "non-select" two candidates from an established list but then must offer employment to the third.[24]

Best practices to diversify the public sector therefore must focus on meaningful outreach to middle schools, high schools, and colleges as well as to community and faith-based organizations. Presenters must include those with practical knowledge about the civil service system and the agencies and municipalities that are prospective employers. This is essential to establish a pipeline of potential public sector employees who "grow up" with an understanding of the possibilities and advantages that public sector employment provide.

When a public sector employer has a vacant position, civil service law requires that employer to request a current established list from the commission.[25] That employer uses that list to "canvass," which simply means that it notifies applicants, starting with those that scored the highest in that title, of the vacancy. An applicant that has been canvassed can decline the position under certain circumstances.[26]

When the employer interviews applicants, it is entitled to non-select (reject) two applicants for any reason at all,[27] other than an illegal reason. The employer must, however, select one of the first three applicants; this is referred to as the "rule of three"[28] as described above. Conversely stated, the appointing authority can "non-select" two candidates; it then must select the third candidate. Should the selected candidate decline the position, the appointing authority is permitted to continue its canvass, moving through the list from highest to lowest grade order.

Commitments to diversifying the public sector work force do not play a role in the canvass process, with limited and specific exceptions. For example, a position that includes bathing female children can be limited to the selection of a female applicant.[29] In addition, veteran status entitles applicants to extra points.[30]

Religious accommodations for competitive test rescheduling must be granted upon request.[31] Also, applicants can be hired without competitive testing when an arm of the New York State Department of Education (ACCES-VR) certifies a disability.[32] And applicants who identify disabilities but are not certified and are participating in competitive exams are entitled to accommodations when requested in advance of the competitive exam, when supporting documentation is attached, and when approved by the New York State Department of Civil Service.[33]

Accommodations that can be requested include a "reader" to narrate exam questions, a scribe to record answers on the answer sheet, extra time to complete examinations, large print booklets for visually impaired candidates and special seating for lip reading when necessary.[34]

In addition, to ensure that non-traditional diploma graduates who do not qualify for ACCESS-VR certification are included in the public sector workforce, job specifications should be collaboratively reviewed with transition guidance counselors at high schools and vocational schools where appropriate to expand non-competitive and competitive opportunities for individuals with different diplomas now awarded to students graduating from high school. For example, specifications that spell out high school diploma or GED are easily revised to allow graduates to qualify with additional options such as "superintendents' diplomas," or "local diplomas."[35] In addition, outreach to parents, teachers, guidance counselors and transition coordinators should include specific information about the levels of education required for different civil service opportunities. Coordination of resources is essential, with high schools and civil service agencies combining forces with state agencies specifically charged with employment initiatives.[36]

The well-intentioned equalizer achieved through competitive testing results in challenges and limitations in achieving diversity; diversity is obviously much more easily achievable when private sector employers—without the constraints of legislatively mandated competitive testing—commit to prioritize recruiting and retaining a diverse workforce.

IV. Limited Exceptions: Protected Status, and Bilingual Exams

Once a civil service list is established, however, courts consistently reject post-announcement and examination public sector strategies to increase employee diversity. This is because of the legally required strict adherence to the established lists of prospective employees that result from the competitive examination system. While bilingual examinations can (and should) lawfully be announced and scheduled, an agency cannot eliminate already ranked individuals on an already established list by, for example, valuing fluency in another language during the interview process.

V. Recruitment and Retention in the Non-Competitive Class

Employees applying for non-competitive positions are not required to sit for traditional written open competitive exams; eligibility for these positions are on a case-by-case basis and requires specific review of candidates' qualifications. Non-competitive positions are regulated by job specifications adopted by the local civil service commission in accordance with New York State Civil Service law and under the supervision of the New York State Civil Service Commission.

This is because these are:

> positions for which it is found by the State Civil Service Commission to be impracticable to ascertain the merit and fitness of applicants through competitive examination. Individuals who meet the minimum requirements for these positions may be appointed. The Commission can designate among non-competitive positions those which are confidential or require the performance of functions influencing policy. These are commonly referred to as non-competitive "phi" positions.[37]

Positions in the non-competitive class do afford broader discretion in selection and—because of that discretion—are more amendable to achieving diversity in hiring than are competitive positions. This is simply because non-competitive positions do not require applicants to take a traditional written competitive exam that results in a structured, established, grade-based list that in turn triggers canvassing. Unlike applicants for exempt positions, applicants still must meet specific training and experience criteria. Appointments are not made until a full review of the qualifications of applicant for the non-competitive position is completed.[38] As with competitive positions, the burden is on the applicant to establish qualifications to the satisfaction of the commission. Assessment of training and experience expressly excludes any work experience gained or acquired in violations of the provisions of the civil service law or which experience is deemed to have been gained through out of title work.[39]

VI. New York State Diversity Initiatives, and Amendments to New York State Civil Service Law

In 2006, the New York State Legislature amended the Civil Service Law to require diversity initiatives.[40] The amendment charged the New York State Civil Service Commission with conducting annual studies and issuing reports to evaluate the success of diversity initiatives by charting workforce demographics. Consistent with the long-standing emphasis on competitive testing, the studies focus on recruiting.

In 2016, New York State Civil Service Law was amended to address gender equality in the state civil service.[41] Again, the strategy focuses on recruitment, with tracking through an annual evaluation report that includes how many women were referred to examinations for jobs and careers that offer high earning potential, including jobs traditionally dominated by men, the ratio of women to men in traditionally high paying jobs in state civil service and any change in that ratio from the previous year.[42]

In 2018, New York State created the Department of Civil Service, Office of Diversity and Inclusion Management (ODIM) to support "strategic efforts to increase diversity in the workforce."[43] According to the state's most recent Workforce Management Report, "New York State's population is one of the most diverse in the country. Recruiting and retaining a diverse and inclusive workforce is an essential component for a strong organization. White employees represent almost 58% of the entire NYS civilian labor force, and 73% of the NYS government workforce."[44]

ODIM's stated goals are to:

> build tomorrow's workforce today by committing to greater community out-

> reach and renewing our commitment to the recruitment and hiring of diverse individuals into public service careers, consistent with the requirements of merit and fitness. Enhanced strategic recruitment and outreach activities will be undertaken to attract and cultivate a broad array of candidates, from all segments of New York State's population, who are engaged, adaptable, and prepared to do the work necessary to achieve success.[45]

Also in 2018, then-Governor Cuomo issued Executive Order 187, entitled "Ensuring Diversity and Inclusion and Combating Harassment and Discrimination in the Workplace."[46] Setting a December 31, 2018, deadline, EO 187 directed the preparation of objectives for the employment of minorities, women, lesbian, gay, bisexual, and transgender individuals, disabled persons, and veterans.

And in 2020, four sections of Civil Service Law were amended as a result of two new Executive Law definitions.[47] The legislation addresses military trauma and LGBT veterans "discharged less than honorably from military or naval service due to their sexual orientation or gender identify or expression."[48] This expands longstanding veterans' rights under the Civil Service Law that extend extra credits to veterans under very specific provisions and conditions.[49]

VII. New York State Case Law

Except for the use of properly announced *bilingual* competitive exams, the Appellate Division has limited government's ability from preferring candidates fluent in foreign languages. In *Roske v. Keyes*,[50] the Second Department prohibited Suffolk County from adding a **new** qualification of fluency/proficiency in Spanish *after* certification of a list of eligible candidates. Specifically, the Second Department reviewed a challenge to the police department's "determination to appoint out of turn three Spanish-speaking eligible . . . on the basis of their linguistic ability."[51] In this case, Suffolk County used oral examination, but *after* the list establishment, to identify fluent candidates. The Second Department rejected this methodology, even though it recognized the need for diversity:

> The record adequately demonstrates the need for bilingual officers to adequately service Suffolk's substantial Spanish-speaking community, as well as the fact that normal recruitment programs have so far failed to satisfy this need. Be that as it may, an attempt to impose other and further qualifications, not listed in the examination notice, after the certification of the list of eligibles is palpably improper and is not to be condoned . . . .[52]

Similarly, in *Ruddy v. Connelie*, [53] the Third Department rejected appointment procedures **after** the New York State Troopers' announcement of a two-part competitive examination that assessed a 65% weight to written performance and a 35% weight to physical performance. When New York State funding allowed the hiring of two sets of new troopers (50 new troopers, and 50 new troopers to police interstate highways), the trial court held that the established list controlled. The Third Department summarized the troopers' strategy:

> However, instead of offering appointment to as many of those ranked highest on the eligible list as would fill this complement of Troopers, respondents proposed to appoint only 75 candidates in that fashion. To further an avowed goal of procuring greater representation of certain minorities and women in the State police, it was decided that the remaining 25 candidates would be obtained by separately appointing the 15 highest ranked 'ethnic minority' eligibles and the 10 highest ranked female eligibles without regard to their individual placement among all others so listed.[54]

Rejecting that strategy and affirming the trial court's direction to appoint troopers solely on the basis of their ranking on the existing eligible list, the Appellate Division held that the New York State superintendent can exercise the power of appointment "only through the process of competitive examination."[55] Further, even though "examination scores need not always constitute the sole basis for determining fitness and . . . some leeway must be accorded to the appointing authority in making final selection" the answer to the "narrow question as to whether the Superintendent may constitutionally depart from the apparent results of an examination to the extent of making appointments that allow a preference to ethnic minorities and females . . . is no."[56]

The Third Department relied upon the fact that "both males and females took part in the examination on an equal footing. Thus, respondents use of a sexually mixed eligible list can only signify that the position of Trooper is not one for which the work demands individuals of one sex."[57]

VIII. The Particular Importance of Diversity in Law Enforcement

In 2020, then-Governor Cuomo issued Executive Order 203,[58] which established the "Committed to a New York State Police Reform and Reinvention Collaboration." To implement Executive Order 203, New York State issued Resources and Guides for Public Officials and Citizens.[59] Focusing specifically on law enforcement recruitment, in its section entitled "Recruiting a Diverse Workforce," the lack of awareness of opportunities to apply to participate in the public sector workforce is identified as an impediment.

In 2021, the New York State Bar Association issued a report[60] on racial injustice and police reform. In its first of 23 recommendations, the task force lists "Focus hiring efforts on recruiting women and people of color."[61] And one of the four components of its vision for 21st century policing is:

> modifying criminal law procedures that hinder holding police officers accountable for misconduct as well increasing diversity and diversity training for the key actors in the criminal justice process—police, DA's office, Public Defenders and Courts[62]

The New York State Bar report also suggested a strategy for accountability in recruitment. Noting that "[p]olice departments across the state do not reflect the community they serve as they have insufficient numbers of women and people of color in their ranks,[63]" the report suggested that

> Police departments in every jurisdiction should be under a mandate to actively recruit personnel of color, along with other diverse backgrounds, and to account for their efforts annually, similar to the framework set forth under Article 15-A of the Executive Law to promote participation by minority and women owned businesses in State contracts. State funding should be allocated to support this initiative.[64]

The Asian American Bar Association of New York recently published a report entitled "A Rising Tide of Hate and Violence against Asian Americans in New York During COVID-19: Impact, Causes, Solutions."[65] Triggered by COVID-19 hate crimes, the report evaluates long-standing deficits in law enforcement protection of the Asian community. The section of the report relevant to diversity centers on the ability of law enforcement to communicate with victims unfamiliar with and therefore untrusting of the criminal justice system. New York City, for example, has addressed this through recruitment of bilingual police officers. Its current task force is staffed by 25 detectives of Asian descent who speak a combined nine Asian languages; they are tasked with guiding victims through the justice system, from reporting a crime all the way to prosecution.[66]

With the constraints of civil service law identified in this article, diversity strategies must continue to focus upon recruitment designed to attract a diverse population to apply for the examinations that ultimately result in established lists.[67]

IX. Conclusion: Recruitment and Outreach Strategies

Local and state governments striving to diversify their workforces should collaborate with community stakeholders in a meaningful and ongoing basis. For example, the Nassau County Civil Service Commission participates in forums (in person and, in recent years, virtually) with the Nassau County Offices of Asian-American Affairs, Hispanic Affairs, and Minority Affairs as well as with the Nassau County Library Staff of Color Committee. The commission also works with high school transition guidance counselors and with Nassau Community College. In addition, the commission participates in job fairs and designs programs to educate potential candidates of all backgrounds and communities about the advantages of public sector employment.

The Nassau County Offices of Asian-American, Hispanic and Minority Affairs have links on their websites to civil service job interest cards and application information and forms, and each agency collaborates with civil service training on the civil service system generally, on the application process and on the qualification process.[68]

Training includes overall education about the many facets of a public sector career, as well as detailed instructional classes on how to complete an application and how to determine in advance of completing an application that an individual's background (education and employment history) meets the qualifications. Training is designed to address identified areas of interest.

These strategies are part of a long-range plan to increase diversity in the public sector, including in law enforcement, notwithstanding the limitations of New York State Civil Service Law.

Endnotes

1. In an 1831 Congressional debate, New York State Senator William L. Marcy used the phrase "to the victor belong the spoils." This saying accurately described the "spoils system" of appointing government workers since each time a new administration came into power thousands of public servants were discharged as members of the victorious political party took over their jobs. Marcy has been reported to have stated that "[t]hey (Democrats) see nothing wrong in the rule that to the victor belong the spoils of the enemy." Gregory Y. Titelman, Random House Dictionary of Popular Proverbs and Sayings, 342 (1st ed., 1996).
2. Known as the Pendleton Act, this new federal law required merit and fitness as qualifiers for appointment. Signed into law by President Chester Arthur—who ascended from his vice presidency when President Garfield was assassinated—the New York Times described the Pendleton Act as "the first step in professionalizing the Civil Service and eliminating the spoils system." Gail Collins & Bret Stephens, *Our Favorite Presidents You've Never Heard of*, N.Y. Times (July 21, 2021), https://www.nytimes.com/2021/07/12/opinion/presidents-presidency-history.html.
3. 1883 N.Y. Laws ch. 354.
4. N.Y. Const.. art. V, § 6.
5. In New York, counties, certain suburban towns, and cities may administer civil service law through a civil service commission or a personnel officer. N.Y. Civ. Serv. Law § 15(1)— (2) (McKinney 2022). The New York State Civil Service Commission serves as the oversight agency for all local civil service commissions and personnel officers. Nassau County operates under a commission; Suffolk County operates under a personnel officer.
6. *Id*. § 35.
7. *Id*. § 40.
8. *Id*. § 35.
9. Nassau Cnty. Civ. Serv. R. Bk. App. C. Nassau County's Civil Service Rule Book is available on the Commission's website (nassaucivilservice.com). The Rules can be accessed at https://bit.ly/CivilServiceRuleBook. The Rule Appendices are available at https://bit.ly/CivilServiceRuleBookAppendices.
10. *See, e.g.*, N.Y. Soc. Serv. Law § § 17, 116 (McKinney 2022).
11. Civ. Serv. Law § 44.
12. *Id*. § 42.
13. *Id*. § 43.
14. *Id*. § 41.
15. *Id*. § 50. Government employment is generally through "open competitive" examinations. This means that candidates with the required qualifications apply for and sit at a proctored testing site for an examination to secure a place on a list of eligible candidates. Examinations "include one or more tests, which are designed to assess candidates' qualifications for jobs to be filled. Many examinations include a written test. A written test presents candidates with questions in a written format, such as multiple-choice, job simulation exercise, constructed response short answer or essay, or other written test format." *How To Take a Written Test for State Civil Service Examinations*, N.Y. Dep't of Civ. Serv., 4, https://www.cs.ny.gov/pio/publications/howtotakeawrittentest.pdf (last visited Aug. 23, 2022).
16. *Id*. § 42(1).
17. *Id*.
18. Civil service law distinguishes between competitive examinations and non-competitive examinations. An example of a competitive examination is a formal, multiple-choice examination. Participants compete with one another as their performances are graded and ranked. An example of a non-competitive examination is an employment application. The application is examined to ensure that the candidate meets the requirements of the position; however, the candidate's application is not compared to or ranked against that of other candidates.
19. *See, e.g.,* Nassau Cnty. Civ. Serv. R. Bk. App. B. *See supra* note 9 for information on accessing the Rule Book.
20. *See*, *e.g.*, Civ. Serv. Law § 42(2-a).
21. *Id*. § 41(1)(e).
22. *Id*. § 56. This section states that the final scores of each candidate of either a written or oral examination are "based on a scale to 100, where the score of 100 represents the best performance possible and where 70 represents a performance meeting the minimum needs of the position. When appointing or promoting in the competitive class, the employer may select between the individuals whose final rating in the examination is equal to or higher than the rating of the third highest ranking eligible on the list. Each eligibility list shall be fixed at not less than one nor more than four years."). *Id.*
23. *Id*. § 53. This section provides that "[e]xcept as otherwise provided by law, no alien lawfully admitted for permanent residence in the United States shall be denied appointment to a position in the competitive class of civil service for reasons of alienage."). *Id.*
24. *Id*. § 61(1).
25. The absence of an established list permits the appointing authority to provisionally appoint an employee.
26. For example, the Nassau County Civil Service Rule Book provides that "[t]he name of the person declining appointment shall be eliminated from further certification from the eligible list unless declination is for one or more of the following reasons:

    > (a) Insufficiency of compensation offered when below minimum of grade of the position for which the examination was held;
    >
    > (b) Location of employment;
    >
    > (c) Temporary inability, physical or otherwise, which must be satisfactorily explained by the eligible in writing. The Commission shall enter upon the eligible list the reasons for its action in such cases."
    >
    > Nassau Cnty. Civ. Serv. R. Bk. R. XVI (5). *See supra* note 9 for information on accessing the Rule Book.

27. Civ. Serv. Law § 61.
28. *Id*. § 61(1).
29. *Id*. § 50(8).
30. *Id*. § 85(3).
31. *Id*. § 50(9).
32. *Id*. § 50(10) ("Determination of disability shall be made by a medical officer employed or selected by the civil service department or the municipal commission having jurisdiction."). *See also, id*. § 55-a.
33. Supporting documentation such as an Individualized Education Plan or a doctor's note must be provided. In Nassau County,

for example, a candidate must check "yes" to the application question "Do you have a temporary or permanent disability that requires you to be granted special assistance in order to participate in a written examination?" Candidates can upload their documentation by attaching a file to their application to qualify for an examination. *See, id*. § 55-a(2).

34. *See* N.Y. State Off. of Emp. Rels., Procedures for Implementing Reasonable Accommodation for Applicants and Employees with Disabilities and Pregnancy-related Conditions in New York State Agencies, https://goer.ny.gov/system/files/documents/2021/04/reasonable_accommodation_disability_procedures.3.2021.pdf (last visited Aug. 23, 2022).
35. *CDOS Pathway to a Regents or Local Diploma*, N.Y. State Educ. Dep't, http://www.nysed.gov/curriculum-instruction/cdos-pathway-regents-or-local-diploma (last visited Aug. 23, 2022).
36. *See Employment Services*, N.Y. State Off. for People with Dev. Disabilities, https://opwdd.ny.gov/types-services/employment-services (last visited Aug. 23, 2022); *List your job with ACCES-VR*, N.Y. State Educ. Dep't Adult Career & Continuing Educ. Servs., http://www.acces.nysed.gov/vr/list-your-job-acces-vr (last visited Aug. 23, 2022); *Public Employers*, N.Y. State Educ. Dep't Adult Career & Continuing Educ. Servs., http://www.acces.nysed.gov/vr/public-employers (last visited Aug. 23, 2022).
37. N.Y. State Dep't of Civ. Serv., 2021 New York State Workforce Management Report 15, https://www.cs.ny.gov/businesssuite/docs/workforceplans/2021.pdf (last visited Aug. 23, 2022).
38. N.Y. Civ. Serv. Law § 42 (McKinney 2022).
39. *Id*. § 61(2).
40. *Id.* § 7-a.
41. *Id.* § 12. "The department, through existing programs, shall provide information to both women and men about high paying jobs and careers, including jobs traditionally dominated by men. Such information shall be distributed as part of any recruitment efforts as well as be available on the department's website." *Id.* § 12(1).
42. *See id.* § 12.
43. N.Y. State Dep't of Civ. Serv. Off. of Diversity & Inclusion Mgmt., Workforce Diversity and Inclusion: Strategic Plan 1, https://www.cs.ny.gov/extdocs/pdf/Workforce%20Diversity%20and%20Inclusion%20Strategic%20Plan.pdf (last visited Aug. 23, 2022).
44. 2021 New York State Workforce Management Report, *supra* note 37, at 18.
45. Workforce Diversity and Inclusion: Strategic Plan, *supra* note 43, at 7.
46. N.Y. Exec. Order 187 (Aug. 23, 2018).
47. The amendment—effective November 2020—impacted civil service law as well as more than 20 other New York State laws in relation to veterans with qualifying conditions and discharged LGBT veterans.
48. N.Y. Exec. Law § 350 (8)—(9) (McKinney 2022).
49. N.Y. Civ. Serv. Law § 85 (McKinney 2022)..
50. *See Roske v. Keyes*, 46 A.D.2D 366 (2d Dept. 1974).
51. *Id.* at 368.
52. *Id*. at 369.
53. *See Ruddy v. Connelie*, 61 A.D.2d 372, 373 (3d Dept. 1978).
54. *Id.* at 373-74.
55. *Id.* at 374.
56. *Id.* at 374-75.
57. *Id.* at 376.
58. N.Y. Exec. Order 203 (June 12, 2022).
59. *See Resources & Guide for Public Officials and Citizens*, New York State Police Reform and Reinvention Collaborative, Aug. 2020, https://www.governor.ny.gov/sites/default/files/atoms/files/Police_Reform_Workbook81720.pdf (last visited Aug. 23, 2022).
60. *See Report and Recommendations of the Task Force on Racial Injustice and Police Reform*, N.Y. State Bar Ass'n, June 2021, https://nysba.org/app/uploads/2021/06/Report-by-the-Task-Force-for-Racial-Injustice-and-Police-Reform-Fixed-TOC-with-Comments-and-cover.pdf (last visited Aug. 23, 2022).
61. *Id*. at 5.
62. *Id*. at 31.
63. *Id*. at 41.
64. *Id*..
65. *A Rising Tide of Hate and Violence against Asian Americans in New York During COVID-19: Impact, Causes, Solutions*, Asian American Bar Ass'n. of N.Y., https://cdn.ymaws.com/www.aabany.org/resource/resmgr/press_releases/2021/A_Rising_Tide_of_Hate_and_Vi.pdf (last visited Aug. 23, 2022).
66. Shan Li and Ben Chapman, *NYPD Forms Asian Hate Crimes Task Force*, Wall Street Journal, Oct. 18, 2021, www.wsj.com/articles/nypd-forms-asian-hate-crime-task-force-11603040400.
67. In 2016, the United States Department of Justice and the United States EEOC issued a joint report on the importance of diversifying law enforcement. *Advancing Diversity in Law Enforcement*, U.S. Dep't of Just. & U.S. Equal Emp. Opportunity Comm'n (Oct. 2016), https://www.eeoc.gov/advancing-diversity-law-enforcement.
68. For a list of county departments, see https://www.nassaucountyny.gov/1437/Departments.

Beyond Civil Service Law

By Paul Eldridge and Patricia Rau

Introduction by Patricia Rau

When I accepted a position with the Putnam County Personnel Department in the fall of 2020, people who knew me were confused. I was asked time and time again, "is that an attorney position?" People could not understand how I went from being a prosecutor in a courtroom to taking a job that did not require a law degree. They assumed it was a stopgap solution after my brief foray into private practice quickly resulted in a COVID layoff. I admit, even I was a little wary—would I get bored? Would I be able to use my knowledge and skills from law school?

Not only have I not been bored, but my experience has been quite the opposite. Working in a civil service human resources department has proven to be a constant learning experience. More unexpectedly, it has introduced me to areas of law I had previously never contemplated. I, of course, knew about the Civil Service Law and Labor Law but had not considered I would ever be reading Social Services Law or the New York State Sanitary Code. To my great surprise, working in a municipal human resources department requires an analysis of a great number of laws and the interplay between them.

Paul Eldridge has been a government personnel practitioner for 47 years and has served as personnel officer for Putnam County for more than 44 years. Mr. Eldridge is currently vice chair of the NYSAC Standing Committee on State and Local Public Employee Relations. He has been a member of the Putnam County Board of Ethics for four decades and serves as first acting county executive for Putnam County. In 2011, he was unanimously appointed by the Putnam County Legislature to serve as county executive when the then recently elected county executive was barred from taking office.

Patricia Rau began her journey into civil service in 2010 when she was appointed as deputy town clerk for the Town of Putnam Valley. While working for the town she pursued her law degree from New York Law School's part-time evening division. Following her graduation, she accepted a position with the Putnam County district attorney's office, where she handled a wide variety of cases including grand larceny, felony DWI, and special victims cases. She left the district attorney's office to follow a new path in the private sector in March of 2020. Like many, the path was negatively impacted by the COVID-19 pandemic and she found herself landing on her feet again with the Putnam County Personnel Department in October of that year.

I found myself lucky enough to be working for the longest employed personnel officer in New York State. Under his guidance, I have learned that there is no single source of information to rely on in the human resources field. When people hear "human resources or personnel department," they think of hiring, firing, and benefits administration. Largely, that is accurate, if not as simple as it sounds. However, the New York State Civil Service Law does not hold all the answers. Learning to work in this field often feels like an exercise in becoming a jack of all trades and master of none.

New York State Civil Service Law

Staff in this office often open up a presentation about civil service employment by saying, "If you receive a government paycheck, you are either in the military service or the civil service. And, if you're in civil service in New York State, you are either in the classified or unclassified service."

The unclassified service comprises numerous categories, such as elected officials, members of boards and commissions, certified teachers, and many other types of employees outlined in New York Civil Service Law § 35. However, the vast majority of employees at the local government and district levels are in positions in the classified service, which will be our focus here.

The New York State Civil Service Law contains provisions to implement the intent of the New York State Constitution, which states:

> Appointments and promotions in the civil service of the state and all of the civil service divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained as far as practicable, by examination which, as far as practicable, shall be competitive.[1]

The provisions contained within the Civil Service Law govern the rights and obligations of public employers and their employees and apply to a wide variety of positions and employees at all levels of state and local government. The law covers jurisdictional classification, recruitment, layoff, and numerous other elements related to the public employment career system.

Jurisdictional Classification

There are four jurisdictional classes in the "classified" civil service system: competitive, non-competitive, exempt, and labor.[2] The jurisdictional class under which a position falls determines its hiring and separation process.[3] In many ways, it is classification around which everything revolves. The law assumes that all appointments are competitive unless not practicable to be tested. Therefore, the majority of positions fall into the competitive class requiring a written examination, an evaluation of a candidate's training and experience, and an oral and/or practical examinations, or any combination of these. Article III of the Civil Service Law outlines definitions of positions that fall into the individual jurisdictional classes.[4]

Minimum Qualifications

Hiring an employee starts with a question—is this person qualified for this position? For municipalities, that answer may be complicated. All competitive and non-competitive positions require a job specification.[5] This is a document that contains a description of the job, typical work activities, required knowledge, skills, abilities, personal characteristics, and, most importantly, minimum qualifications.

There are many positions within municipal governments that have qualifications that are set by state laws, codes, and regulations. Some positions also require prior state approval of a candidate before they are appointed. Many positions, considered public officers, also have residency requirements outlined in the New York State Public Officers Law.

Creating or updating a job specification may require the interpretation of multiple state laws. There is no single place a specification writer can turn to that will indicate where or how a state law or laws apply. Instead, human resources or personnel department employees must endeavor to do the research necessary to have properly written qualifications.

Laws that personnel department staff need to review to meet minimum qualifications include New York State Social Services Law, Mental Hygiene Law, Public Health Law, Executive Law, Real Property Tax Law, Agriculture and Markets Law, Education Law, and numerous others. This typically requires a review of any related codes and regulations for these sections of law as well.

Looking at the Public Health Law provides a good example. Public Health Law § 351 and § 604 cover the appointment of commissioners of health. The New York State Sanitary Code § 11.11 outlines the minimum qualifications. A county will require a candidate to read both of these laws to ensure that they qualify to be appointed. In fact, the New York State commissioner of health must approve all municipal commissioners of health across the state prior to appointment.[6]

Just in the New York State Public Health Law and Sanitary Code alone, many positions exist with statutory minimum qualifications. This includes areas such as nursing, water treatment, epidemiology, and more.

When a county department or local municipality we serve inquires about a job specification or minimum qualifications, our first step is to always look at the existing specification requirements to see if there is any language about a specific statute. If a statute is cited, the next step is to review the statute to ensure that our job specification reflects current law, codes, and regulations.

When a new job specification is required, and it is unknown if there are any controlling laws, researching the job specifications of other municipalities for a similar position can be a helpful starting point. This can provide a clue as to whether a specific law applies. In either scenario, it is wise to conduct a search to ensure a requirement is not overlooked.

It is always important to read the specification language carefully. There can be different minimum qualifications based on factors like population or caseload. Let's revisit the commissioner of health appointment. New York State Sanitary Code § 11.180 states that counties with less than 250,000 population can have a public health director in lieu of a commissioner. Like the commissioner of health, the public health director has specific minimum qualifications, and any potential appointee must be approved by the New York State commissioner of health, prior to appointment.[7]

County and Town Law

In addition to the New York State Civil Service Law, municipalities must follow laws specific to their level of government.

A deputy town clerk appointment exemplifies how this works at the town government level. In order for a town to properly appoint a deputy town clerk, they must read both Town Law Section 30 and Civil Service Law § 41.

The town law states that the town clerk may appoint up to three deputies; a first deputy and two additional deputies. The town clerk shall establish the duties of the first deputy, and the town board shall establish the duties of the other two.[8]

Civil Service Law § 41(1)(b) reads, "The following offices and positions shall be in the exempt class: the depu-

ties of principal executive officers authorized by law to act generally for and in place of their principals." When a position is in the exempt class, appointees are not required to participate in a civil service examination. Instead, the hiring authority sets the qualifications and selects the individual for the position. Additionally, as all positions are assumed to be in a competitive class, only positions approved by the New York State Civil Service Commission and maintained in the local county, city, or town's civil service rules and appendices may be filled in a class other than competitive.[9]

Several years ago, a town reached out to our personnel department wishing to hire a third exempt-class deputy town clerk. The two deputy positions that already existed were designated within the exempt class. The question we posed to the town clerk was: will the third deputy have the power to act for and in place of the town clerk as had been given to the other two deputies? Here, the town clerk did not want to grant that power to the third deputy. A true exempt-class "deputy" must have the authority to "act generally for and in place of" their principal.[10] Without granting this authority, however, the third position in the town clerk's office would be required to be in the competitive class and subject to testing.

Public Officers Law

Oaths of Office

The oath of office is something most people can picture in their head: an elected official with his or her hand on a bible swearing to uphold the United States and New York State Constitutions. However, it is not just elected officials who must take and file an oath of office.

Public Officers Law § 10 covers official oaths. Covered officers are divided into two categories—state and local officers. The following officers are required to take an oath of office under Public Officers Law § 10:

- State officers
  - includes every officer for whom all the electors of the state are entitled to vote
  - members of the Legislature
  - justices of the Supreme Court
  - regents of the university, and
  - every officer, appointed by one or more state officers, or by the legislature, and authorized to exercise his official functions throughout the entire state, or without limitation to any political subdivision of the state, except United States senators, members of congress, and electors for president and vice-president of the United States
- Local officers
  - officers who are elected by the electors of a portion only of the state,
  - every officer of a political subdivision or municipal corporation of the state, and
  - every officer is limited in the execution of his official functions to a portion only of the state.

Pursuant to POL § 10, an oath of office must be taken and filed before the officer performs any official duties. The office of a public officer becomes vacant when the public officer neglects or forgets to take and file their oath of office before or within 30 days of the commencement of appointment or term of office.[11]

The Civil Service Law also covers oaths of office, and municipal personnel departments must be familiar with both areas of law. Civil Service Law, § 62 requires an oath of office be taken *by every person employed by the state or any of its civil divisions*, except an employee in the labor class. It is required only upon original appointment or upon a new appointment following an interruption of continuous service. The Civil Service Law also has alternative methods for taking the oath of office, such as written oaths or alternative language.[12]

Residency

Public Officers Law § 3 covers the qualifications for holding public office in New York State. Officers must be citizens of the United States and, with limited exception, at least 18 years old. More importantly for local municipalities, this section also requires that public officers are residents of New York and "if it be a local office, a resident of the political subdivision or municipal corporation of the state for which he or she shall be chosen, or within which the electors electing him or her reside, or within which his or her official functions are required to be exercised."[13] Residency requirements are occasionally included in specific laws dictating the qualifications of certain positions. Otherwise, if a person is a public officer, they generally must reside in the municipality they serve.

However, there are exceptions. Municipalities may go through the process of amending Public Officers Law § 3 to allow for broader residency requirements.[14] Here in Putnam County, we have several positions included in subsections of Public Officers Law § 3 that allow officers to live in adjoining counties within the State of New York. These positions are the assistant district attorneys, deputy sheriffs,

deputy county attorneys, and correction officers.[15] While our Eastern border is shared with Connecticut, we share our other borders with Westchester, Dutchess, Rockland, and Orange counties, allowing for a much greater pool of applicants for these vital positions.

Because so many municipalities have sought amendments to the Public Officers Law through the New York State Legislature, the courts now consider the New York State Public Officers Law to be a special state law as opposed to a general state law.[16] Municipalities may now provide for broader residency requirements for a public office position by the passage of a local law.

Labor Law

Minimum Wage, Labor Law Article 19

The minimum wage is an important item for all employers to consider when making hiring decisions. New York State Labor Law outlines a clear plan for raising the minimum wage across the state, contemplating each region's needs and abilities to escalate wages. On its face, it seems like all employers in New York State must meet these requirements. However, that is not the case for all employers. Turning to the definitions section is an important step in understanding and interpreting laws, and in this particular section of the law, the definition of employee is a critically important piece of the puzzle. New York Labor Law § 651(5)(m) states:

> "Employee" includes any individual employed or permitted to work by an employer in any occupation, but shall not include any individual who is employed or permitted to work: . . . by a federal, state or municipal government or political subdivision thereof (emphasis added).[17]

Therefore, municipal governments and subdivisions are not subject to the state's minimum wage requirements for their employees. However, all New York State public employers are subject to federal minimum wage requirements.

This often comes as a surprise to people. It is assumed that the New York State Labor Law would apply to all employers and their employees across the state, but that is not the case. This is not the only area of labor law that specifically excludes public workers. Notably, the New York Paid Family Leave Law, which includes parental leave, leave to care for sick family members and leave to assist military families, applies only to private employers and *public employers who opt-in*.[18]

Our office has often given presentations on "Civil Service and Related Laws" to help personnel and human resources staff have an awareness of the interplay of laws, rules, and regulations as they apply in the public sector and civil service environment. The practice of law is often rife with "what ifs" and grey areas. Employment matters are nuanced and often case-specific, and this is only complicated by the myriad of additional laws that practitioners must consider in the public sector employment arena.

Endnotes

1. N.Y. Const. Art. V, Sec. 6.
2. N.Y. Civil Service Law § 40 (Looseleaf Publications 2022).
3. N.Y. Civil Service Law § 41, § 42, § 43, § 44, § 75(1) (Looseleaf Publications 2022).
4. N.Y. CLS Civ S, Art. III.
5. Putnam County Rules and Appendices, Rule XXII, 2021.
6. N.Y. State Sanitary Code § 11.11(b), New York Codes, Rules, and Regulations.
7. N.Y. State Sanitary Code § 11.2 (b), New York Codes, Rules, and Regulations.
8. N.Y. Town Law § 30 (10)(a) (Consol. 2022).
9. N.Y. Civ. Serv. Law § 20 (Consol. 2022).
10. N.Y. Civ. Serv. Law § 41(1)(b) (Consol. 2022).
11. N.Y. Pub. Off. Law § 30 (h) (Consol. 2022).
12. N.Y. Civil Service Law § 62 (Looseleaf Publications 2022).
13. N.Y. Pub. Off. Law § 3 (Consol. 2022).
14. Municipal Home Rule Law § 10 (1)(i).
15. N.Y. Pub. Off. Law § 41, § 42, § 55 (Consol. 2022).
16. Municipal Home Rule Law § 2 (5).
17. N.Y. Lab. Law § 651(5)(m) (Consol. 2022).
18. N.Y. Lab. Law § 190 (Consol. 2022).

Big Brother Is Watching: Police Departments and the Attorney General's Office

By Stanley J. Sliwa

As a result of the George Floyd incident and other police-related incidents, the New York State Legislature made a number of changes and additions to the New York State Executive Law that relate to law enforcement agencies.[1] These provisions created an Office of Special Investigation (OSI) in the New York State Office of the Attorney General (OAG)[2] and the Law Enforcement Misconduct Investigation Office (LEMIO).[3] Both provisions went into effect in 2021.[4]

Office of Special Investigations

OSI is charged with the investigation and prosecution of any alleged criminal offense committed by a person, whether or not on duty, who is a police officer or specified peace officers, concerning any incident when the death of a person, whether in custody or not, is caused by an act or omission of such police officer/peace officer, or in which the attorney general determines there is a question as to whether the death was caused by an act or omission of such police officer/peace officer.[5]

The statute establishing OSI required OSI to issue a report about its investigations within six months of the passage of the statute, and to issue annual reports thereafter.[6] The first such report was released on October 1, 2021.[7]

OSI's investigative authority and jurisdiction is solely delegated to the attorney general's office.[8] If the attorney general decides that an incident is not in fact covered by the law, the attorney general shall provide written notice of this fact to the district attorney for the county in which the incident occurred.[9]

Stanley J. Sliwa has served as the Amherst Town Attorney since January 4, 2016. In that role, he provides legal advice to all town officials, the town's Zoning Board of Appeals and the town's planning board. Stan also represents the town in negligence claims involving property damages, FOIL requests and appeals of denial of same, re-zoning, zoning and land use. He oversees and actively supervises all litigation involving the town, including cases handled by outside counsel. Prior to serving as Amherst town attorney, Stan was a member and a founding partner of Sliwa & Lane; a litigation attorney at Cohen & Lombardo, P.C.; and a criminal defense lawyer at Lipsitz, Green, Fahringer, Schuller & James (now Lipsitz Green Scime and Cambria LLP).

In investigating any particular incident, OSI is empowered to conduct a full, reasoned and independent investigation, including the following:

- gathering and analyzing evidence;
- conducting witness interviews;
- reviewing and commissioning any necessary investigative and scientific reports; and,
- reviewing audio and video recordings.[10]

OSI is empowered to issue subpoenas to witnesses, compel their attendance, and examine them under oath.[11] OSI can also require that any books, records, documents or papers relevant to the inquiry be turned over for inspection.[12] The statute requires the attorney general to designate a deputy attorney general to investigate and prosecute any violations of the statute.[13]

OSI is also required to inform the public through its website whenever it determines that:

- not to present evidence to a grand jury, or
- when evidence is presented to a grand jury but the grand jury declines to return an indictment.[14]

The reports shall include results of the investigation and the following information:

- an explanation as to why the Office of Special Investigation declined to present evidence to a grand jury; and
- any recommendations for systemic or other reforms arising from the investigation.[15]

As noted above,[16] OSI must issue annual reports that contain information about its investigations. The following materials should be included:

- the county and geographic location of each matter investigated;
- a description of the circumstances of each case;
- racial, ethnic, age, gender and other demographic information concerning the persons involved or alleged to be involved;

- whether criminal charges or charges were filed against such person;
- the nature of such charges; and
- the status, where applicable, of those criminal charges. This report shall also include recommendations of any systemic or any or other reforms recommended.[17]

Law Enforcement Misconduct Investigative Office

Section 75 of the Executive Law established the Law Enforcement Misconduct Investigative Office (LEMIO) within the Attorney General's Office.[18] LEMIO has the following duties:

- receive and investigate complaints from any source or upon its own initiative, concerning allegations of corruption, fraud or use of excessive force, criminal activity, conflicts of interest or abuse in any police department;
- inform the heads of those police entities of such allegations and the progress of the investigations related thereto, unless special circumstances require confidentiality;
- determine whether disciplinary action, civil or criminal prosecution, or further investigation by an appropriate federal, state or local agency is warranted, and to assist in such investigations requested by the federal, state or local agency;
- prepare and release to the public written reports of investigations, as appropriate, subject to redaction to protect the confidentiality of witnesses and other information that would be exempt from disclosure under Article 6 of the state Public Officers Law;
- review and examine periodically the policies and procedures of all police agencies with respect to the prevention and detection of corruption, fraud, use of excessive force, criminal activity, conflicts of interest and abuse;
- recommend remedial action to prevent or eliminate corruption, fraud, use of excessive force, criminal activity, conflicts of interest and abuse;
- investigate patterns, practices, systemic issues, or trends identified by analyzing actions, claims, complaints, and investigations, including any patterns or trends regarding any specific department, or command; and

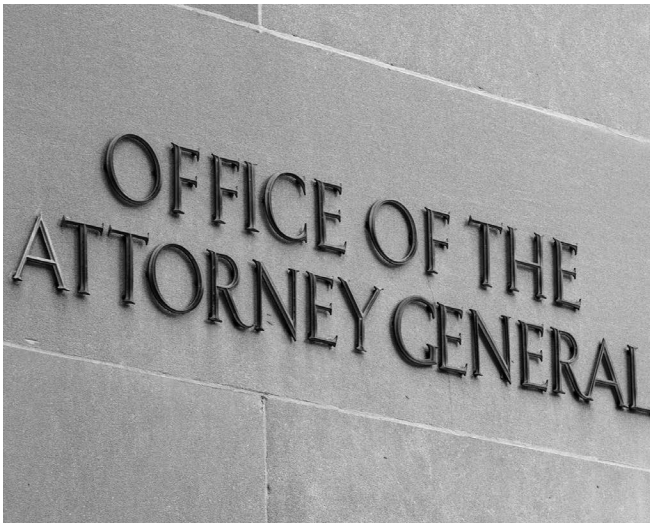
- on an annual basis, submit to the governor, the attorney general, the Senate president, the speaker of the Assembly, the minority leaders, and the minority leader of the Assembly, no later than December 31 of each year, a report summarizing the activities of the office and recommending specific changes to the state law to further the mission of the Law Enforcement Misconduct Investigative Office.[19]

The law also gives LEMIO the ability to:

- subpoena and enforce the attendance of witnesses;
- administer oaths;
- require the production of any books and papers deemed relevant or material to any investigation;
- examine and copy or remove documents or records of any kind prepared, maintained or held by any police agency;
- require any officer/employee of a police agency to answer questions concerning any matter related to the performance of his/her official duties under oath;[20] and
- monitor the implementation by covered agencies of any recommendations made by the LEMIO.[21]

Each police agency is required to report promptly to the LEMIO any information concerning corruption, fraud, use of excessive force, criminal activity, conflicts of interest or abuse by a police officer relating to his/her office or employment.[22] The knowing failure of any officer or employee to so report shall be cause for removal from office or other appropriate penalties.[23] Any official who acts pursuant to the provision by making a report to LEMIO shall not be subject to dismissal, discipline or other adverse personnel action.[24]

Upon receiving at least five complaints from five or more individuals relating to at least five separate incidents involv-



ing the same officer within two years, the head of the police agency must refer such complaints to LEMIO for review.[25] LEMIO shall investigate such complaints to determine whether the subject officer has engaged in a pattern or practice of misconduct, use of excessive force, or acts of dishonesty.[26] Any referral shall be in addition to and shall not supersede any civil, criminal, administrative or other action or proceedings relating to such complaints or the subject officer.[27]

The head of the police agency is to advise the Governor, the Senate President, the Speaker of the Assembly, the Minority Leader of the Senate, and the Minority Leader of the Assembly within ninety (90) days of the issuance of a report by the LEMIO as to the remedial action that the agency has taken in response to any recommendation contained in such report.[28]

The Deputy Attorney General in charge of LEMIO must inform the Division of Criminal Justice Services (CJS) of any alleged misconduct and the progress of any investigations commenced by his or her office, unless special circumstances require confidentiality. [29]

Finally, the statute states that nothing therein shall be construed to diminish employees' rights under Article 14 of the state Civil Service Law,[30] which addresses employee unions and similar labor law issues.[31]

Endnotes

1. *See,* Obiamaka P. Madubuko et. al., *New York State Police and Criminal Justice Reforms Enacted After George Floyd's Death,* National Law Review, June 24, 2020, at https://www.natlawreview.com/article/new-york-state-police-and-criminal-justice-reforms-enacted-following-george-floyd-s.
2. *Id.*
3. *Id.*
4. *See* N.Y. Exec. Law § § 70-b (effective April 1), 75 (effective October 16).
5. *See* Letitia James, Office of Special Investigation, at https://ag.ny.gov/osi.
6. N.Y. Exec. Law § 70-b(7).
7. *See,* Office of the New York State Attorney General Letitia James, First Report Pursuant to Executive Law Section 70-b, https://ag.ny.gov/sites/default/files/2021-osi-annual-report.pdf.
8. N.Y. Exec. Law § 70-b(2).
9. *Id.*
10. *Id.* § 70-b(3).
11. *Id.*
12. *Id.*
13. *Id.* § 70-b(5).
14. *Id.* § 70-b(6)(a).
15. *Id.* § 70-b(6)(b).
16. *See supra* note 7 and accompanying text.
17. N.Y. Exec. Law § 70-b(7).
18. *Id.,*§ 75.
19. *Id.,* § 75 (3).
20. The statute adds that such statements may not be used against these officers or employees in any criminal prosecution, except one for perjury or contempt arising from such testimony. *Id.,* § 75 (4)(e). However, an employee who refuses to answer questions under this statute may be removed from office or suffer other penalties. *Id.*
21. *Id.* at § 75 (4).
22. *Id.* at § 75 (5)(a).
23. *Id.*
24. *Id.*
25. *Id.*, § 75 (5) (b).
26. *Id.*
27. *Id.*
28. *Id.*, § 75 (5) (c).
29. *Id.,* § 75 (3)(b) (1).
30. *Id.*, § 75 (5) (d).
31. Article 14 is located at N.Y. Civ. Serv. Law, § § 200-214.

Does the Climate Leadership and Community Protection Act Preempt Local Decarbonization Efforts? A Lawsuit Challenging New York City's Local Law 97 Seeks To Find Out

By Alicia R. Legland

On May 18, 2022, a group of cooperative corporations, mixed-use building owners, and residents ("Plaintiffs") filed a lawsuit against New York City ("City" or NYC), the Department of Buildings (DOB), and the DOB Commissioner in New York County Supreme Court seeking to annul Local Law 97 of 2019 ("Local Law 97")—the centerpiece of the City's building decarbonization efforts.[1] Among Plaintiffs' claims is the assertion that Local Law 97 is preempted by the Climate Leadership and Community Protection Act (CLCPA) (Environmental Conservation Law § § 75-0101, *et seq*.). On July 28, 2022, the City responded with a Motion to Dismiss and supporting brief seeking dismissal of the Complaint in its entirety. Although some of Plaintiffs' claims are persuasive—namely that the potential penalties under Local Law 97 violate building owners' due process rights and levy an unauthorized tax on building emissions—the preemption argument may not go far.

But the issue of CLCPA preemption is an important one, not just for Local Law 97. Numerous municipalities across the state are adopting their own versions of building decarbonization laws, relying in part upon the policies established in the CLCPA as support. If the CLCPA creates a comprehensive regulatory scheme preempting the field of building emissions as Plaintiffs proclaim, similar efforts across the state could fail.

Preemption in New York

Although New York municipalities are "invested with substantial powers both by affirmative grant and by restriction on State powers in matters of local concern, the overriding limitation of the preemption doctrine embodies 'the untrammeled primacy of the Legislature to act * * * with respect to matters of State concern.'" *Albany Area Builders Ass'n v. Town of Guilderland*, 74 N.Y.2d 372, 377 (1989) (quoting *Wambat Realty Corp. v. State of New York*, 41 N.Y.2d 490, 497 (1977)). The Court of Appeals specifically recognizes two types of state preemption of local statutes:

> Conflict preemption prohibits a local government from adopting a law that is "inconsistent with" state law (*New York State Club Assn. v. City of New York*, 69 N.Y.2d 211, 513 N.Y.S.2d 349, 505 N.E.2d 915 [1987]). Field preemption prohibits a local govern-

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ment from legislating in a field or area of the law where the "[l]egislature has assumed full regulatory responsibility" *(DJL Rest. Corp. v. City of New York*, 96 N.Y.2d 91, 95, 725 N.Y.S.2d 622, 749 N.E.2d 186 [2001]). *People v. Torres*, 37 N.Y.3d 256, 265, 177 N.E.3d 973, 979, *reargument denied*, 37 N.Y.3d 1131, 157 N.Y.S.3d 410 (2021). Field preemption is the basis of Plaintiffs' claim.

Plaintiffs' Preemption Claim

Plaintiffs claim that Local Law 97 is preempted by the CLCPA because the state's intention was to "occupy the field" with a comprehensive regulatory scheme to address the climate crisis through reductions of greenhouse gas (GHG) emissions. As proof, they point to the statute's legislative findings, public statements of state legislators and then-Governor Cuomo, and specific provisions of the CLCPA that authorize only state agencies to act. *See* CLCPA § 10 ("Nothing in this act shall limit the existing authority of a state entity to adopt and implement greenhouse gas emissions reduction measures."). But Plaintiffs miss a few points on this score, which the City adequately points out. First, the CLCPA itself states that "[n]othing in this act shall relieve any person, entity, or public agency of compliance with other applicable federal, state, or local laws or regulations[] . . . and other requirements for protecting public health or the environment." CLCPA § 11. And there is no language in the CLCPA suggesting existing municipal regulations must give way to the state's effort. Second, Plaintiffs make no mention of the provisions in the Executive Law and Energy Law expressly granting authority to municipalities to enact building and energy codes stricter than those of the State. *See* N.Y. Exec. Law § 379 (McKinney 2020); N.Y. Energy Law § 11-109 (McKinney 2004). The ability of municipal building and energy codes to be more stringent than state law works against an argument that the CLCPA occupies the field and thereby preempts stricter local laws regulating building emissions.

Predictably, in its brief supporting the Motion to Dismiss, the City argues that Local Law 97 is not preempted by the CLCPA because (1) there is no express or implied intent on behalf of the state to occupy the field of regulating GHG emissions and (2) there is no conflict between Local Law 97 and the CLCPA.

Intent (or Lack Thereof) To Occupy the Field

The City points to the legislative findings and declarations in the CLCPA that indicate an intent *not* to preempt stricter local laws regulating building emissions. The City argues that the state intended to avoid interference with the implementation and enforcement of local decarbonization laws like Local Law 97 because the CLCPA actually mandates continued compliance with local laws protecting public health and the environment. As noted above, CLCPA § 11 directly disavows any intent to relieve compliance with other applicable local laws or regulations. The City asserts that "emissions reductions" need not be included in such provision to apply to local decarbonization laws enacted as part of building, energy, and public health codes. The City also uses this opportunity to mention Energy Law § 11-109 and Executive Law § 379, noted above, which reflect the state's grant of authority to localities to enact building and energy regulations stricter than that of the State. *See* N.Y. Energy Law § 11-109 (authorizes counties, cities, towns, villages, school districts, and district corporations to enact local energy conservation codes more stringent than the Uniform Fire Prevention and Building Code ("Uniform Code") and State Energy Conservation Construction Code ("Energy Code")); N.Y. Exec. Law § 379 (authorizes municipalities to enact local laws imposing more restrictive standards than the Uniform Code and Energy Code). The City argues that the CLCPA does nothing to disrupt this preexisting grant of authority.

Further, in its establishment of the New York State Climate Action Council (CAC), the City highlights the intent of the state to use local emissions reductions schemes as guides for establishing the statewide standards. *See* Envtl. Conserv. Law § 75-0103(16) (McKinney 1997) (The CAC "shall identify existing climate change mitigation and adaption efforts at the federal, state, and local levels and may make recommendations regarding how such policies may improve the State's efforts."). In the Draft Scoping Plan published on December 30, 2021, the CAC even specifically cites to Local Law 97, stating that compliance standards to be established "will be informed by statewide benchmarking data and *align with New York City's Local Law 97* across the State and local government requirements where appropriate." N.Y. State Climate Action Council, Draft Scoping Plan (Dec. 30, 2021) at 128 (emphasis added). Thus, NYC argues that the CLCPA does not preempt Local Law 97, but rather, looks to it as a model for implementation of statewide standards and intends for the two laws to work in concert to achieve the overall emissions reductions goals of the state.

Finally on this point, the City asserts that the CLCPA is not such a comprehensive regulatory scheme as to entirely occupy the field of GHG emissions reductions, most importantly, because the CLCPA does not regulate GHG emissions at all. The text of the CLCPA does not establish emissions reduction requirements on individuals or entities. Instead, the City argues, it sets out overall GHG emis-

sions reduction goals for the State (e.g., 60% reduction of 1990 emission by 2030) and created the CAC to prepare a scoping plan to "identify and make recommendations on regulatory measures and other state actions that will ensure the attainment of the statewide [GHG] emission limits." Envtl. Conserv. Law §§ 75-0107(1); 75-0103(13). The crux of the City's argument here is that the CLCPA only tees up implementation of future policy measures and regulations on GHG emissions—it does not impose such measures itself—and thus it cannot constitute a comprehensive regulatory scheme occupying the field.

Express or Implied Conflict Between the CLCPA and Local Law 97

Lastly, the City maintains that because the state does not occupy the field, there must be a direct conflict between the CLCPA and Local Law 97 in order to find the latter preempted. The City argues that Plaintiffs failed to make such a showing because no such conflict exists. The CLCPA does not impose any legal obligations on building owners; the owners of covered buildings will only need to comply with Local Law 97, as there is no mechanism for individuals or entities to comply with the CLCPA. Thus, the argument follows, Local Law 97 does not impose any additional restrictions on building owners already imposed by the CLCPA. And, as the City points out, local municipalities are permitted to enact stricter building and energy codes than that of the state pursuant to preexisting state law.

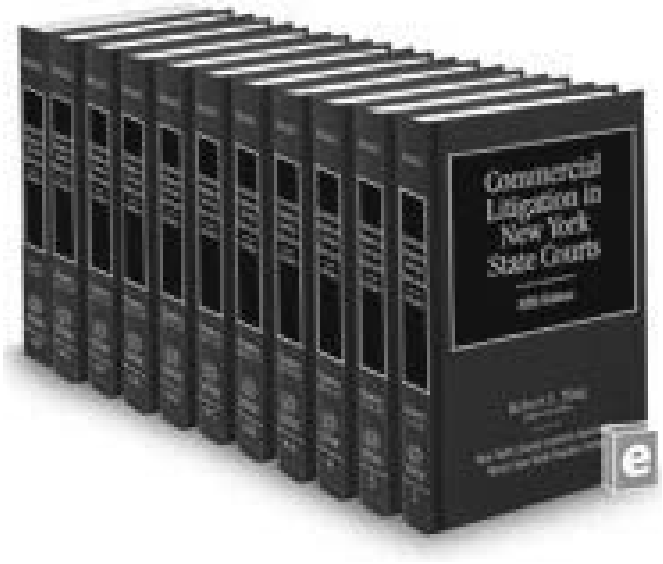
As such, it appears the City has the stronger argument on the issue of preemption in this case. It remains to be seen how the court will decide, but it is likely that preemption will not be Plaintiffs' winning argument. However, Plaintiffs have more arrows in their quiver, which might help them to at least survive the Motion to Dismiss on one or more claims. Looking forward, Plaintiffs' most effective challenges to Local Law 97 is how the law affects specific properties. If the law as a whole is not annulled, numerous challenges alleging specific unavoidable harms may follow. As a result, this could be just the first case in a series of lawsuits seeking to annul what is often considered one of the most aggressive local decarbonization laws in the country.

Endnote

1. *Glen Oaks Village Owners, Inc., et al. v. City of New York, et al.*, Index No. 154327/2022 (May 18, 2022).

Continuing the Tradition of Excellence:
Commercial Litigation in New York State Courts, 5th, Edited by Robert L. Haig

Reviewed by A. Thomas Levin



Since the publication of the first edition of *Commercial Litigation in New York State Courts* in 1995, this treatise has been recognized as the most outstanding work of its kind, comprising a unique compilation of New York law as it is applied in the commercial context.

Over the ensuing years, the publication has been updated by periodic supplements and new editions, and its scope has expanded to encompass additional practice areas, and to include developing fields of law. More than two years in preparation, the fifth edition is now available. It is a worthy successor to the previous editions, and a valuable resource which New York practitioners should have in their library, either in hard copy or electronically.

A. Thomas Levin is a shareholder and general counsel at Meyer, Suozzi, English & Klein P.C., with offices in Garden City, New York City and Washington D.C. He is a former president of the New York State Bar Association, the Nassau County Bar Association and the National Conference of Bar Presidents. With a law practice largely devoted to representing public and private sector clients in the fields of governmental administration and operations, land use regulation and development, and environmental review compliance, he often lectures on related professional topics. For more than 40 years he was the editor, and senior editor, of the *New York Bench Book for Trial Judges*, published by the Office of Court Administration and Thomson-Reuters

From its inception, this impressive work has addressed commercial litigation in both procedural and substantive aspects and has served as a valuable guide to the commercial litigator. Over the years since its original publication, it has expanded through new editions to incorporate new subject areas, and to recognize the expanding reach of the commercial courts in New York.

This newest edition gathers the work of 256 principal authors, including distinguished members of the New York judiciary at all levels and an array of talent from the litigation bar, all edited with the wisdom and guidance of Robert L. Haig. Jam-packed with knowledge collected by the authors over years of experience, there is literally something for everyone in this publication.

The fifth edition continues the tradition of its predecessors by including updates and expansion of previously published material, and the introduction and study of new subjects. Each previous edition has itself achieved the status of a new work, and this certainly is true of the newest iteration.

In *The Municipal Lawyer,* vol. 28. no. 3 (2014), Patricia Salkin reviewed the third edition, and gave testimony to the extent to which that edition would provide answers to problems and issues which municipal attorneys encounter on a daily basis. Linda Kingsley reviewed the fourth edition in *The Municipal Lawyer,* vol. 32, no. 1 (2018), making the case for why this publication belongs in the library of every municipal law practitioner. It is my privilege and pleasure to be able to review the now available fifth edition, which successfully builds upon its predecessors, updates the previously published material, and ventures into new legal fields of particular interest to devotees of government law.

It is a credit to the authors of the respective chapters of this treatise, and in particular to the editor, that each of the subsequent editions has reached out beyond traditional concepts of commercial litigation (corporate, contract and real estate) and embraced the scope of the publication to encompass many other litigated subjects. Of particular value to members of the Local and State Government Law Section is the inclusion of materials specifically related to government law practitioners.

Designed to be a practice guide covering all aspects of commercial litigations, this work has from its inception been replete with practical advice and analysis. The fifth edition continues in this tradition, containing 28 new chapters, encompassing titles and subjects that have particular relevance to government law, including: Artificial Intelligence; Civil Justice Reform; Declaratory Judgments; Diversity and Inclusion; Fraud; Gaming; Negligence; Personal Injury; and Valuation of Real Property. The new edition also enhances previous treatments of subjects relevant to the government law practitioner such as: Social Media; Information Technology Litigation; CPLR Article 78 Challenges to Administrative Determinations; Governmental Entity Litigation; Commercial Real Estate; Tax; Land Use Regulation; Construction Dispute Resolution; Energy; Environmental and Toxic Tort Litigation; Licensing; Entertainment; and Commercial Leasing.

Notwithstanding its incomparable value as a practice resource, and the excellent compilation of content in the various subject areas, this publication should not be misunderstood to be a complete compendium of all areas of law relevant to practitioners of government law. As is the case with any publication containing separate works from an assortment of authors, some chapters are more valuable and insightful than others. But in every instance, the coverage of subjects from both procedural and substantive points of view, and the insights provided from years of experience, serves at a minimum as an incomparable road map and overview. In most chapters it provides wider and deeper coverage, rapidly and skillfully leading the reader to specific answers to specific questions. Rarely does it fail to lead the user to detailed citations, practical advice and analysis, and it always points the way to other available resources for yet more detail.

There is no doubt that this is a valuable research tool that belongs in every municipal law library. With the costs of acquiring and maintain a complete law library soaring beyond stratospheric levels, it should come as no surprise that cost-conscious practitioners are always on the lookout for resources which provide a solid return for the investment. Although the cost of a full set of this publication is significant, and may give pause to many practitioners and law firms cognizant of their library budgets, this is that necessary resource. Perhaps some comfort can be found from the extent to which this publication delivers value, and that it is available from the publisher, Thomson-Reuters, both in hard copy and on Westlaw.

It is well worth the investment.

Government Ethics Quiz Answer

N.Y. Gen. Mun. Law § 801 (Conflicts of interest prohibited) is violated if three elements are established: (1) the existence of a "contract" with the municipality, (2) an "interest" (i.e., a benefit) accruing to an officer or employee of the municipality as a result of the contract, and (3) the "power or duty" of the interested officer or employee to negotiate, prepare, authorize or approve the contract, either "individually or as a member of a board"; and if none of the exceptions in N.Y. Gen. Mun. Law § 801 apply. All elements are present in the first case, but not in the second.

Case No. 1 Analysis

The Statutory Definition of 'Contract'

The statutory definition of "contract' for purposes of N.Y. Gen. Mun. Law § 801 is clear and explicit. A contract is defined as "any claim, account or demand against or agreement with a municipality, express or implied." N.Y. Gen. Mun. Law § 800(2). The town board member's personal injury lawsuit is a claim against the town, and thus is a contract with the town for purposes of N.Y. Gen. Mun. Law § 801.

The Legislature declared in N.Y. Gen. Mun. Law § 800(2) that the term "contract," as used in the entirety of Article 18, shall have the meaning given to it by the Legislature "unless otherwise expressly stated or unless the context otherwise requires." No other meaning is stated in the statute; nor does the context require a different meaning than the one given by the Legislature.

The Statutory Definition of 'Interest'

N.Y. Gen. Mun. Law § 800(3) defines the term "interest" as "a direct or indirect pecuniary or material benefit accruing to a municipal officer or employee as the result of a contract with the municipality which such officer or employee serves." Because a direct pecuniary benefit would accrue to the board member if she were to prevail in the lawsuit, she has an interest in a contract with the town.

The 'Power or Duty' To Approve the Claim

As a member of the governing body, a town board member has the "power or duty" to approve claims and demands against the town, to determine which claims or demands the town will defend, and to settle claims and demands when warranted.

Recusal Will Not Cure the Violation

N.Y. Gen. Mun. Law § 802 sets forth exceptions to § 801. Recusal is not among them. In *Lexjac, LLC v. Bd. of Trs. of the Inc. Vill. of Muttontown*, 708 Fed. Appx. 722, 726 (2d Cir. 2017), the Second Circuit held that recusal will not cure a violation of N.Y. Gen. Mun. Law § 801.

'Willful' Claims Are Void

N.Y. Gen. Mun. Law § 804 provides that: "[a]ny contract willfully entered into by or with a municipality in which there is an interest prohibited by this article shall be null, void and wholly unenforceable."

The term "willful" is not defined in Article 18 of the N.Y. Gen. Mun. Law nor in the cases interpreting the statute. Black's Law Dictionary 1737 (9th ed. 2009) defines the term "willful" as "voluntary and intentional, but not necessarily malicious."

In *Bryan v. United States*, 524 U.S. 184, 191 (1998), the Supreme Court noted that "[t]he word 'willfully' is sometimes said to be a word of many meanings whose construction is often dependent on the context in which it appears. Most obviously, it differentiates between deliberate and unwitting conduct." The *Bryan* Court further noted that "[t]he word often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose." *Id.* at 191, fn. 12.

The meaning of the term "willful" as used by N.Y. Gen. Mun. Law § 804 may be understood by comparing N.Y. Gen. Mun. Law § 804 to N.Y. Gen. Mun. Law § 805. The latter section provides that "[a]ny municipal officer or employee who willfully *and knowingly* violates the foregoing provisions of this article shall be guilty of a misdemeanor." (Emphasis added.) The element of "knowledge" required for the commission of a misdemeanor under N.Y. Gen. Mun. Law § 805 is absent from N.Y. Gen. Mun. Law § 804, which requires only that the contract be "willfully entered into" in order for the contract to be void.

In *Lexjac, LLC v. Bd. of Trs. of the Inc. Vill. of Muttontown*, *supra,* the Second Circuit, citing a 1985 opinion of the New York State comptroller, rejected the argument that a violation is "willful" within the meaning of N.Y. Gen. Mun. Law § 804 only if the interested municipal officer acted in bad faith or intended to violate the statute. The comptroller, citing *Landau v. Percacciolo*, 66 A.D.2d 80 (1978), *aff'd* 50 N.Y.2d 430 (1980), opined that:

> A contract is "willfully" entered into by a party if, at the time of making the contract, he had *knowledge of facts* which, under General Municipal Law, Article 18, constitute a prohibited interest in the contract on the part of a municipal officer or employee. . . . Clearly, the former supervisor's spouse was aware that her husband was the supervisor of the town when she agreed to prepare the report for compensation. As a result the claim of the former supervisor's spouse for six hundred dollars is rendered null and void by General Municipal Law, § 804 and should not be paid by the town. 1985 N.Y. St. Comp. 11 (emphasis added, citation omitted).

May the Town Board Member Resign and Then Sue the Town?

The town board member in Case No. 1 is not prohibited by N.Y. Gen. Mun. Law § 801 from making claims or demands against the town after her resignation from the town board. She is only prohibited from doing so while she is a member of the body that has the power or duty to negotiate or approve her claim, or to appoint an officer or employee with the power or duty to do so. *See,* N.Y. Gen. Mun. Law § 801.

Case No. 2 Analysis

Not every claim or demand by a town board member would violate N.Y. Gen. Mun. Law § 801. A violation of N.Y. Gen. Mun. Law § 801 will not occur unless all three elements are present (i.e., a claim or demand against the municipality, an interest on the part of a municipal officer or employee, and the power or duty of the interested officer or employee to approve the claim or demand either individually or as a member of a board). For example, a claim or demand brought by a town board member whose sole interest was in vindicating the duties of her office rather than in advancing her personal interest would lack an essential element of a statutory violation—the element of an interest (i.e., a benefit) accruing to an officer or employee of the municipality as a result of the claim.

Unlike the town board member in the first case, who is suing to vindicate her personal interest in recovering money damages for her personal injuries, the supervisor in the second case is suing to vindicate her official duty to ensure that the town acts lawfully. The necessary element of an "interest" (i.e., "a direct or indirect pecuniary or material benefit…*")* is absent.

Do you have a fact pattern that you would like to see as an Ethics Quiz? Let us know at: steven@lmbesq.com.

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Mark Davies is a former chair of the Section, retired as the executive director of New York City's ethics board, and is an adjunct professor of law at Fordham Law School. He is the author of numerous publications on government ethics and New York practice, is co-chair of the Section's Ethics Committee, serves as an adviser on the Amer**i**can Law Institute's Principles of Law, Government Ethics, and is currently an M.Div. student at Union Theological Seminary.

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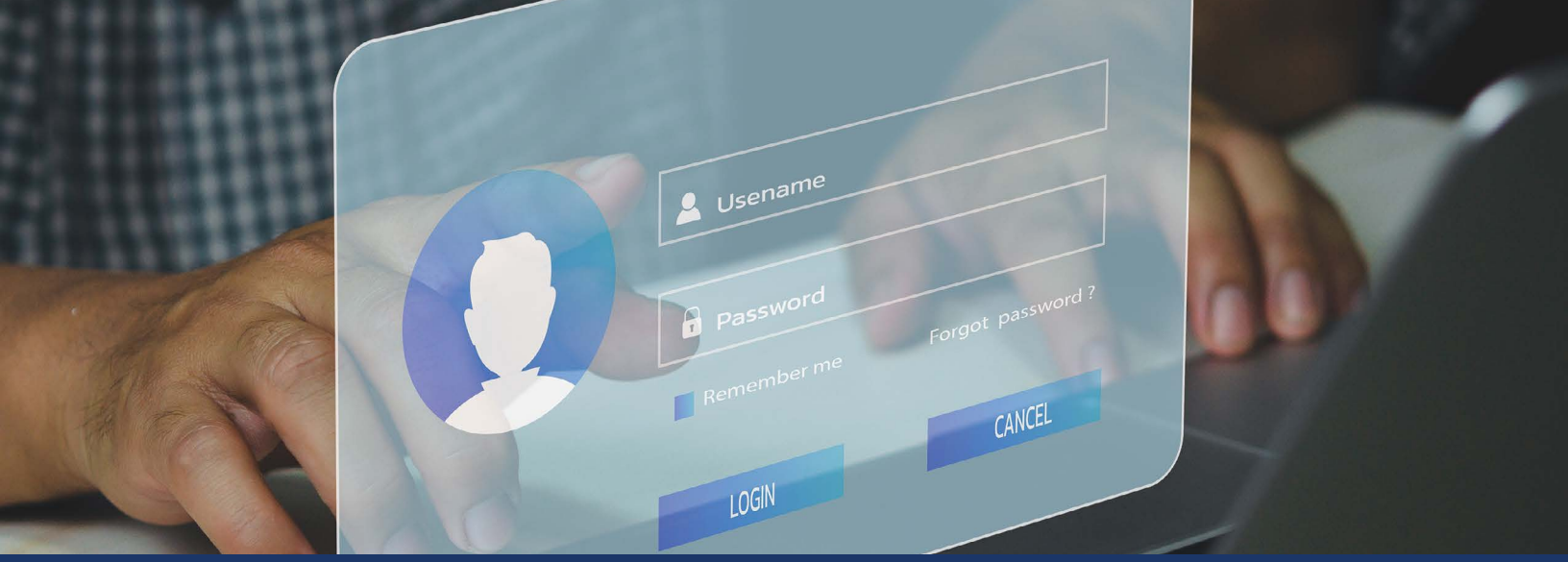

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