

## Attention Faulkner Mayor-Council Plan Municipalities: Council Had Better Not Be Your Police Force “Appropriate Authority”

The Appellate Division issued an interesting decision for municipal police administrators on June 15, 2007, in the matter of *Durkin v. City of Paterson*. The decision is perhaps most interesting for its consideration of the affect of separation of powers doctrine on municipal police disciplinary matters.

The case involved Paterson police officer James Durkin, who was disciplined for allegedly fraudulent actions relating to continuing his ex-wife’s insurance coverage after they were no longer married. The insurance coverage for Durkin’s ex-wife continued between 2000 and 2004, and an internal affairs investigation resulted in disciplinary charges in February, 2005.

In the meantime, Paterson’s enabling ordinance relating to the police department as required by N.J.S.A. 40A:14-118 changed in October, 2003. Prior to October, 2003, Paterson had a Department of Public Safety, headed by a Public Safety Director, containing the Police division and the Fire division. The change in October, 2003 split the Public Safety Department into two separate departments, Police and Fire, and on the police side created the position of Police Director, to whom the Chief of Police was directly responsible.

However, the October, 2003 ordinance also purported to give the City Council the power, “for the appointment of committees or commissions to conduct investigations of the operation of the police force... or to conduct such hearing or investigation authorized by law.” The ordinance had additional language arguably suggesting that the City Council was being designated the “appropriate authority”, the statutory designation under N.J.S.A. 40A:14-118 for the person or entity directly responsible for certain oversight functions with respect to the police department.

Durkin thus took the position that the City Council was the appropriate authority to bring disciplinary charges against police officers, or in the alternative that there was some conflict in the ordinance as to which person or entity was the appropriate authority. While Durkin’s precise position is not entirely clear from the Appellate Division decision, Durkin reasoned that in either case, these provisions with respect to the appropriate authority designation rendered the disciplinary proceedings against him null and void.

The separation of powers aspect of the case emanates from the “separation of powers” language of N.J.S.A. 40A:14-118. Every municipality is required, by that statute, to establish the lines of authority governing the police force by ordinance, and the ordinance must establish a person or entity as the “appropriate authority.” That appropriate authority designation, however, must be “consistent with the degree of separation of executive and administrative powers from the legislative powers provided for in the charter or form of government” of the municipality.

Paterson operated under the Faulkner Act's mayor-council plan of government. The Appellate Division noted that under this form of government, "concentration of power is in the hands of a highly-visible, independently-elected Chief Executive who has substantial power over the administration," referring of course to the mayor. In this form of government, any legislative and investigative functions of the governing body must be exercised by the council.

Under this form of government, the Appellate Division thus held that the Council ***could not lawfully be the statutory (under N.J.S.A. 40A:14-118) appropriate authority.*** While not directly so stating, the clear implication is that the appropriate authority is an executive function that cannot be allocated to the legislative branch of a Faulkner Act municipal government. Based upon that holding, the Appellate Division interpreted Paterson's ordinance to designate the Police Director as the appropriate authority in any event, such that Durkin's disciplinary matter was not voided.

The Durkin case thus makes clear that every municipality should review its police ordinance to consider whether the designated appropriate authority is consistent with the separation of powers inherent in the form of government under which the municipality operates. Prior to this Durkin decision, there was a dearth of case law addressing the various designations of appropriate authorities in the various forms of municipal government which are, or are not, consistent with the separation of powers associated with the various forms of municipal government. While the appropriate authority designation in Paterson was sufficiently ambiguous to allow the Court to determine that the Police Director was so designated, the case makes it clear that a more clear appropriate authority designation in violation of the required level of separation of powers will be invalidated.

One of the obvious potential dangers of an appropriate authority designation which suffers this defect, violation of separation of powers doctrine, is the fact that the Rules and Regulations of the police department would not be enforceable in disciplinary actions. A number of cases over the years have held that Rules and Regulations for a police force cannot be enforced in an administrative disciplinary action against a police officer where those Rules and Regulations have not been adopted by the lawfully designated (by ordinance) appropriate authority. In addition to the unenforceability of the Rules and Regulations, however, one can imagine a wide range of actions by an appropriate authority that could be rendered null and void, where that appropriate authority designation violates separation of powers doctrine. Promotion decisions, policies, final decisions in disciplinary matters, and all other actions of appropriate authorities could be in jeopardy under such circumstances.