ASSOCIATION OF TOWNS
OF THE STATE OF NEW YORK

150 State Street Albany, New York 12207 ● Phone: (518) 465-7933 ● Fax: (518) 465-0724 ● www.nytowns.org

S.5205 Introduced by Senator Gounardes
A.7624 Introduced by MofA Abbate

Memorandum of Opposition

AN ACT to amend the Civil Service Law, in relation to hearing procedures for certain public employees

The Association of Towns recommends that the Legislature not adopt this legislation, which seeks to amend Section 75 of the Civil Service Law, thereby imposing new costs and mandates upon the statutory procedure for discipline, suspension and termination of covered civil service employees.

Public sector employers value their employees and endeavor to treat them fairly. The courts have already determined that the disciplinary process afforded to public employees through the Civil Service Law is constitutional (*Munafo v. Metro. Transp. Auth.,* 285 F.3d 201, 212 (2d Cir.2002).

Section 75 of the Civil Service Law created a constitutional process that balances the due process rights of public sector employees and the need for their employers to provide for the orderly delivery of public services free from the high cost of bureaucratic inefficiency. Covered employees may therefore only be disciplined, suspended or terminated upon a finding of incompetence or insubordination after notice of the charges and a hearing subject to judicial or administrative review by the local civil service commission. In addition, during this process, where warranted, an employer may suspend an employee up to 30 days without pay. Limiting suspension without pay to 30 days provides an incentive to address the issue in a timely manner to ensure fairness for the employee charged with misconduct or incompetence and for the provision of public services in a competent and orderly manner.

This legislation will upset this balance at taxpayer expense by requiring the appointment of American Arbitration Association (AAA) arbitrators, requiring public employers to implement their determinations and limiting suspension without pay to only those employees charged with drug-related felonies.

Requiring taxpayers to fund AAA member arbitrators will result in higher costs due to travel, lodging and required fees as well as potential delays in the process. These additional costs and delays are currently avoided by the appointment of a local attorney, arbitrator, mediator or an administrative law judge, who possesses the required skills even though they may not be members of the AAA. Most employees wishing to use the services of an AAA arbitrator are free to negotiate an alternative procedure through the collective bargaining process (11 PERB 7003; *Dye v. New York City Tr. Auth*., 88 A.D.2d 899, affd. 57 N.Y.2d 917 [1982]).

In addition to the expense of requiring the appointment of a AAA member arbitrator, this legislation requires the employer to implement the arbitrator's decision rather than review and take into consideration the arbitrator's recommendation, findings and the record. This is contrary to public policy and the balance imbedded in the current Section 75 process. As noted by the Court of Appeals, "It makes sense that the decision whether sanctions against an employee are warranted should be made by an official that has knowledge of the employee's duties and responsibilities, as well as an understanding of what disciplinary measures have been previously imposed on other employees for similar types of infractions," (*Matter of Gomez v. Stout,* 13 N.Y.3d 182 [2009]). Moreover, where the officer with decision-making authority has a conflict of interest, the law provides for the appointment of a person in the chain of command to make the decision (*Matter of Gomez v. Stout,* 13 N.Y.3d 182 [2009]). Regardless of whether the decision is made by the officer or another officer in the chain of command, the decision must be based on the record after the Section 75 process has been completed. Transferring the authority to make a decision from the employer who is familiar with the employee, the work environment and the totality of the circumstances to an unaccountable arbitrator hired to proceed over an administrative hearing is not in the public interest.

Finally, this legislation would limit an employer's authority to suspend an employee without pay unless the employee is charged with a drug-related felony. The authority to suspend an employee without pay is limited to 30 days, which provides an incentive to complete the disciplinary review process in a timely manner. Employees who are reinstated are reimbursed back pay. There is no justification provided for why a public employer should be limited to suspending an employee without pay to charges associated with drug-related felonies. There are numerous other reasons why an employer might need to suspend an employee pending the resolution of the Section 75 process unrelated to drug felonies, such as theft of public property, assault or harassment. Requiring the taxpayers to provide paid leave during such a suspension strains the public fisc and limits a critical deterrent to employee misconduct and malfeasance.

Mandating an additional cost on the statutory disciplinary process while eliminating a deterrent to follow the rules does not serve the public interest, and we therefore strongly recommend against adoption of this legislation.