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# Memorandum from Paul T. Rephen to Eric Lane

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**MEMORANDUM**

TO: ERIC LANE
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New York City
Charter Revision Commission

FROM: PAUL T. REPHEN PTR
Chief
Legal Counsel Division

RE: Substantial Evidence

At our meeting last Wednesday you advised me that the Charter Revision Commission is considering whether to require that all determinations made by City agencies following hearings under the proposed City Administrative Procedure Act be supported by a preponderance of the evidence. It is my understanding that the Commission intends that this standard of review be applied by the courts in proceedings seeking review of such determinations.

CPLR §7803(4), however, specifically states that a court may only inquire

> ***whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.

The Charter Revision Commission cannot supersede a general statute of statewide applicability. Therefore, it is our view that the Commission is preempted from imposing a standard of review which differs from that set forth in CPLR §7803(4).

As you are aware, the Court of Appeals has specifically held that the substantial evidence standard does not require a showing that the administrative determination be supported by a preponderance of the evidence. 300 Gramatan Ave. Associates v. State Division of Human Rights, 45 NY2d 176, 180-181 (1978). In that case, the Court held that substantial evidence:

> ***is related to the charge or controversy and involves a weighing of the quality and quantity of the proof; it means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact. Essential attributes are relevance and a probative character. Marked by its substance -- its solid nature and ability to inspire confidence, substantial evidence does not rise from bare surmise, conjecture, speculation or rumor. More than seeming or imaginary, it is less than a preponderance of the evidence, overwhelming evidence or evidence beyond a reasonable doubt. (Emphasis added and citations omitted.)

The substantial evidence standard as delineated by the Court in 300 Gramatan Ave. Associates has been the rule in this State for almost fifty years (see Matter of Stork Restaurant v. Boland, 282 N.Y. 256, 273-275 [1940]; 1 Benjamin, Administrative Adjudication in New York 328-340 [1942]), and reflects the fact that the Legislature

has assigned to administrative agencies rather than the courts responsibility for conducting specified hearings. Under this standard, the court decides questions of law but limits itself to the test of reasonableness in reviewing findings of facts made by the administrative agency. The substantial evidence rule is a test of rationality, taking into account all the evidence on both sides.

The rule is applied under CPLR §7803(4) to determinations made following hearings by all agencies of the State, its counties, municipalities, school districts and other public entities. Its constitutionality has never been questioned, and we are unaware of any recognized authority which has criticized the rule as applied in this state. Indeed, I am unaware of any prior effort, either in the Legislature or in the City Council, to alter this standard of review of administrative determinations.

The Commission has thus far offered no reason for its unprecedented proposal, which would subject New York City to a more burdensome standard of review to which neither the State of New York nor any other governmental entity in this state is subjected. The vast majority of our substantial evidence cases are police officer and correction officer disciplinary cases, and we prevail in well over ninety percent of them. If the Commission's proposal is adopted, the task of disciplining or removing police officers and correction officers who have engaged in serious misconduct would become greater. Undoubtedly, some officers whose dismissals are presently sustained by the appellate courts under the substantial evidence rule would prevail under a preponderance of the evidence

standard. I fail to understand how the public interest would be served by a rejection of this traditional and accepted standard of review.

The proposal might have additional serious consequences. CPLR §7804(g) states that where an issue is raised under §7803(4) (i.e., whether a determination following a hearing is supported by substantial evidence), the Supreme Court, without reviewing the case, shall transfer the proceeding to the appropriate Appellate Division. The rationale for this section is that the petitioner has already had his or her trial before the administrative agency and should, therefore, proceed directly to appellate review. If a preponderance of the evidence standard is imposed by the Commission, it is not clear whether City administrative determinations could continue to be transferred directly to the Appellate Division for review because no issues concerning substantial evidence would be involved. If these cases can no longer be transferred to the Appellate Division, the cost to all parties (and the courts) of litigating them will be increased and the time required to finally resolve them will be lengthened.

Under the substantial evidence rule set forth in CPLR §7803(4), a determination may be made on the basis of evidence which would be inadmissible in a jury trial. The only requirement is that the evidence be reliable and substantial. See 300 Gramatan Ave. Associates v. State Division of Human Rights, supra at 45 NY2d 180 note; 8 Weinstein-Korn-Miller, NY Civ. Prac., par 7803.09. Thus, a police officer may be disciplined on the basis of reliable and

substantial hearsay evidence or on the uncorroborated testimony of an accomplice. See Matter of Berenhaus v. Ward, 70 NY2d 436 (1987). If the Commission attempts to alter the substantial evidence test, it is doubtful whether this more liberal evidentiary rule would continue to be applicable in City administrative hearings. The Commission should avoid the bizarre result whereby evidence which would sustain the removal of a corrupt police officer of Albany or Buffalo would not sustain the removal of a corrupt officer in New York City.

In summary, it is our view that the Charter Revision Commission has no legal authority to impose a standard of review which is more burdensome on the City than the substantial evidence rule. The Commission has not presented any evidence which suggests that the application of that rule is unfair or leads to abuse. To the contrary, the substantial evidence rule, as described by the Court in Gramatan, is protective of the rights of those who participate in administrative adjudications. In order for evidence to be substantial, it must be "solid" and "inspire confidence" and cannot be "conjecture", "surmise", or "rumor". In view of these facts, the imposition of a more burdensome standard on the City, even assuming that the Commission possessed such power, would be totally unjustified and contrary to the public interest.