To be Argued by: Clay J. Lodovice
(*Time Requested: 10 Minutes)*

APL-2021-00167
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Appellate Division – Third Department Docket No. 528783

COURT OF APPEALS
of the
STATE OF NEW YORK

In the Matter of

STATE OF NEW YORK,

Appellant,

- against –

NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD, JOHN WIRENIUS as Chairperson of the New York State Public Employment Relations Board, and CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 1000, AFSCME, AFL-CIO, and DISTRICT COUNCIL 37, AFSCME, AFL-CIO, LOCAL 1359, and NEW YORK STATE CORRECTIONAL OFFICERS AND POLICE BENEVOLENT ASSOCIATION, INC.,

Respondents.

BRIEF FOR APPELLANT

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PRELIMINARY STATEMENT

This Brief is submitted on behalf of Appellant State of New York ("State") in support of its appeal of the decision and order of the Appellate Division, Third Department, in *Matter of State of New York v. New York State Public Employment Relations Board et al.*, 183 A.D.3d 1061 [3d Dept 2020] ("Decision"). (R.ii). The Third Department confirmed a final administrative Decision and Order of the New York State Public Employment Relations Board ("PERB"), *CSEA, et al. v. State of New York,* 51 PERB ¶ 3027 (2018) ("Second Board Decision"). (R.32).

The crux of the appeal is whether Civil Service Law § 50, which vests to the New York State Department of Civil Service ("DCS"), subject to approval by the New York State Director of the Budget[1] ("DOB"), the authority to establish, waive or otherwise abolish application fees for promotional examinations conducted by DCS to assess the merit and fitness of applicants for State employment (and employment with other public employers who are subject to the jurisdiction of the DCS) has been effectively repealed by the Public Employees' Fair Employment Act, Civil Service Law Article 14, commonly referred to as the "Taylor Law." The State respectfully submits that the Third Department incorrectly affirmed the administrative determination of the PERB which, in effect, held the Taylor Law's

[1] The Director of the Budget is the "head of the division of the budget … who shall be appointed by the governor." Executive Law Article 8, at § 180.

general command that public employers collectively bargain terms and conditions of employment with public employee unions renders null and meaningless the specific, pre-existing language of Civil Service Law § 50(5)(b) that gives DCS, subject only to approval by DOB, the authority to set uniform application fees for promotional examinations administered by DCS to assess the merit and fitness of applicants for State employment.

The instant dispute arose when DCS, after satisfying Civil Service Law 50(5)(b)'s requirement that it obtain DOB approval, issued on March 16, 2009, *General Information Bulletin No. 09-01*, that established a schedule of uniform fees to be paid by candidates applying to sit for a merit and fitness examination administered by DCS for a potential promotional/transitional ("promotion") job opportunity. ("GIB 09-01," R.55). The fee to be paid by candidates submitting applications for the examinations is charged by DCS to "defray the cost of processing applications." (R.55). Within GIB 09-01, DCS, with DOB approval, also increased the amount of the fee to be paid by candidates applying for open-competitive examinations. (R.55) The application fee increase for open-competitive examination applications was not challenged by the unions in this matter.

Thereafter, four unions representing six separate bargaining units of State employees each filed an improper practice charge pursuant to Civil Service Law §

209-a.1(d) asserting that the State, through the Office of Employee Relations, (commonly referred to as "GOER"), unilaterally altered a term and condition of employment, i.e., imposing the examination application fee, without negotiating the matter pursuant to the Taylor Law. (R.57, 72, 92 and 239). The group of respondent unions represent only a portion of the several bargaining units with employees who may choose to apply for a promotion examination covered by GIB 09-01. (*See* R.491). The improper practice charges filed by Respondent Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO ("CSEA"), Respondent District Council 37, AFSCME, AFL-CIO, Local 1359 ("DC-37"), Respondent New York State Correctional Officers and Police Benevolent Association, Inc. ("NYSCOPBA"), and the New York State Public Employees Federation, AFL-CIO,[2] were consolidated for hearing. The consolidated hearing resulted in four administrative determinations that culminated in the Second Board Decision.[3] The Second Board Decision incorrectly held that the fee charged to an

[2] The improper practice charge filed by the New York State Public Employees Federation ("PEF") was dismissed as untimely within the Second ALJ Decision. 50 PERB ¶ 4584, 4734. PEF did not file exceptions to the dismissal with the PERB Board. Accordingly, PEF is no longer a party to this proceeding.

[3] The consolidated proceeding resulted in two Decisions of Administrative Law Judge ("First ALJ Decision" and "Second ALJ Decision," reported at 45 PERB ¶ 4620 (2012) and 50 PERB ¶ 4584 (2017), respectively) and two Board Decision and Orders issued by the PERB Board ("First Board Decision" and "Second Board Decision", reported at 46 PERB ¶ 3032 (2013) and 51 PERB 3027 (2018), respectively). (R.130, 169, 32 and 40, respectively).

applicant for examination for a promotional employment position in the competitive class derived from Civil Service Law § 50(5) was a term and condition of employment under the Taylor Law, and that Civil Service Law § 209-a.1(d) prohibited DCS, even upon approval by DOB, from setting a uniform application fee schedule without prior negotiation – to conclusion – of such fee schedule between GOER and each respective respondent union.

As explained, *infra*, PERB's determination has the practical effect to vitiate the plainly worded legal authority of Civil Service Law § 50(5)(b) by newly requiring a different State agency not named therein, *i.e.* GOER, to become the operative legal entity in the process of establishing, waiving or otherwise abolishing application fees paid by State employees who choose to sit for a promotional opportunity examination. As PERB has determined that application fees paid by applicants for promotional examinations conducted by DCS are subject to collective negotiations, GOER, as the Governor's agent in conducting collective negotiations, must now stand in the stead of DCS and DOB to establish, waive, etc., examination application fees, thereby contravening the procedure which is legislatively limited to DCS and DOB. (*See* Executive Law §§ 650, 653; *compare* Civil Service Law § 50(5)(b)). Furthermore, PERB's determination contradicts the express language of Civil Service Law § 50(5)(b) by mandating that

any change to such fees be, for the first time since its enactment, *subject to the approval* of each public employee union. The obligation created by PERB that the fee paid by applicants for examinations for prospective future employment opportunities be agreed upon by GOER and multiple public employee unions, rather than set by DCS and DOB, is neither contemplated by the specific language of CSL § 50(b)(5) nor the Taylor Law's general command that public employers negotiate with public employee unions about terms and conditions of employment.

The Taylor Law does not grant PERB the authority to intervene in DCS's administration of the merit and fitness system. PERB, in this case, usurped the function and power of the Legislature by writing GOER, unions, and other public employers, into the administration of the merit and fitness system. Plain language shows that the Legislature had given the function of setting the application fees exclusively to DCS, subject only to DOB approval. PERB acted beyond its role as an administrative body governed by the Taylor Law which limits PERB's authority to only address alleged improper practices tied to terms and conditions of employment. Because it has effectively rewritten and repealed a provision of the Civil Service Law, and incorrectly determined that an examination application fee is a term and condition of employment, PERB acted beyond its statutorily defined jurisdiction. Accordingly, the Third Department's Decision must be reversed and the PERB determinations rendered null.

QUESTIONS PRESENTED

Q1: Did the Appellate Division, Third Department, err when it held that the uniform schedule of examination application fees established by DCS, and approved by DOB, pursuant to Civil Service Law § 50(b)(5) must be negotiated between the State, as employer, and each individual bargaining unit/union?

A1: Yes.

Q2: Did the Appellate Division, Third Department, err when it determined that an application fee established pursuant to Civil Service Law § 50(b)(5) paid by a candidate for examination for a promotional position is a term and condition of employment under the Taylor Law that is mandatorily negotiable?

A2: Yes.

Q3: Did the Appellate Division, Third Department, err when it did not address the question of whether PERB's statutory authority, set forth at Civil Service Law § 209-a, to address improper employer and employee organization practice charges grants it the authority to control and enjoin the actions of DCS, with approval of DOB, that were made based upon a specific statutory grant of authority to DCS and DOB?

A3: Yes.

STATEMENT OF THE CASE

GOER is an office within the executive department of the State of New York and is the entity filing the at-issue petition. GOER is established under Article 24 of the Executive Law and is charged with assisting the Governor with labor relations between the State and its employees. Such assistance may include acting as the Governor's agent in discharging the powers and duties conferred on the Governor by the Taylor Law, as amended, including, without limitation, conducting collective negotiations with recognized or certified employee organizations (hereinafter referred to as the "public employee unions") and executing agreements reached pursuant thereto. Executive Law § 653. This assistance includes, among other things, acting as the State's representative, as an employer, in matters before PERB.

GOER does not administer or implement rules for examinations, appointments, or promotions for employees in the civil service of the State. That responsibility is legislatively vested with the State Civil Service Commission. Civil Service Law § 6.

DCS is a department of the State of New York established under Article 2 of the Civil Service Law. The president of the Civil Service Commission is the head of DCS. Civil Service Law § 7. The Civil Service Commission is tasked with the responsibility to "proscribe and amend suitable rules and regulations for carrying

into effect the provisions [of the Civil Service Law] and section six of article five of the constitution of the state of New York, including … rules for examinations, promotions, … of employees in the classified service of the state." (Civil Service Law § 6; *see also* New York State Constitution, Article 5, Section 6).

DCS does not conduct collective negotiations with public employee unions with respect to terms and conditions of employment for employees of the State. That responsibility is legislatively vested with GOER. (Executive Law § 653).

Respondent PERB is a board within DCS established under the Taylor Law. Civil Service Law § 205(1). Pertinent to this proceeding, PERB's authority is limited to establishing procedures "for the prevention of improper employer and employee organization practices as provided in [Civil Service Law § 209-a]." Civil Service Law §§ 205(5)(d), 209-a.[4]

[4] As PERB is a board within the DCS, the Legislature acted to ensure their functions remained independent. Acknowledging that PERB, by statute, is included within DCS, Civil Service Law § 205(6) provides that "notwithstanding any other provisions of law, neither the president of the civil service commission nor the civil service commission or any other officer, employer, board or agency of the [DCS] shall supervise, direct, or control the board in the performance of any of its functions or the exercise of any of its powers under [Article 14]; provided, however, that nothing herein shall be construed to exempt employees of the board from the provisions of the civil service law."

This provision is designed to prevent DCS interference with PERB functions; it did not empower PERB to act upon and enjoin the statutory rights and obligations of DCS.

The factual genesis of this proceeding occurred in March 2009 when DCS, after receiving approval from DOB, published GIB 09-01 which established a uniform schedule of fees for the processing of applications for examinations administered by DCS. (R.55). A document listing the **multiple public employers** and **multiple public employee unions**, most of which are not parties to this proceeding, with employees that applied for promotion examinations administered by DCS and paid fees subject to GIB 09-01 is placed in the Record, at page 491.

This appeal presents to the Court an issue of statutory interpretation with respect to the legislatively defined authority and roles for these three separate and distinct offices and department of the State of New York – GOER, DCS and PERB – in the context of setting uniform application fees for promotional merit and fitness examinations taken by State employees seeking new employment positions, a subject codified at Civil Service Law § 50(5). This issue of statutory interpretation presents whether the Legislature intended unions to be a necessary entity for the administration of merit and fitness examinations.

This appeal challenges the Third Department's affirmation of PERB's holding that the Taylor Law takes precedence over Civil Service Law § 50(5)(b). This holding has the effect of removing from DCS and DOB the legislatively prescribed authority to determine and set uniform application fees and newly transfers that responsibility to GOER and several unions, subject to the Taylor

Law's general command to collectively bargain terms and conditions of employment with public employee unions. Put simply, if the PERB Decision is upheld, DCS will no longer be the entity responsible for determining the amount of an examination application fee.

Civil Service Law § 50(5)(b) provides, in pertinent part, that:

> (b) Notwithstanding the provisions of paragraph (a) of this subdivision, **the state civil service department, subject to the approval of the director of the budget**, a municipal commission, subject to the approval of the governing board or body of the city or count, as the case may be, or a regional commission or personnel officer, pursuant to government agreement, **may elect to waive application fees, or to abolish fees for specific classes of positions or types of examinations or candidates, or to establish a uniform schedule of reasonable fees different from those prescribed in paragraph (a)** of this subdivision, specifying in such schedule the classes of positions or types of examinations or candidates to which such fees shall apply; provided, however, that fees shall be waived for candidates who certify to the state civil service department, a municipal commission or a regional commission that they are unemployed and primarily responsible for the support of a household, or are receiving public assistance.

(emphasis added).[5]

[5] PERB's determination, if upheld, will similarly mean that the authority vested in over ninety (90) **municipal or regional civil service commissions** will lose their statutory authority to "elect to waive application fees, or to abolish fees for specific classes of positions or types of examinations or candidates, or to establish a uniform schedule of reasonable fees different from those proscribed in [§ 50(5)(a)]". Civil Service Law § 50(5)(b). Rather, each of the public employers whose merit system is administered by a municipal or regional commission must

Civil Service Law § 50(5)(b) directs that DCS and DOB are tasked with the exclusive role to establish uniform application fees. In this case, the record shows that after obtaining approval from DOB, DCS established "a uniform schedule of reasonable fees different from those prescribed in paragraph (a) of this subdivision, specifying in such schedule the classes of positions or types of examinations or candidates to which such fees shall apply." (R.55, 85-86). Civil Service Law § 50(5)(b). And, consistent with Civil Service Law § 50(5)(b), which does not contemplate GOER or each public employee union's approval in the setting of uniform application fees, the record confirmed that neither GOER nor any public employee union interfered in the statutory process. (*See e.g.* R.114-115).[6]

The fees established in GIB 09-01 also comply with the statute's requirement that DCS establish a **uniform** schedule of reasonable fees. Civil Service Law § 50(5)(b). As detailed, *infra*, the *quid pro quo* give and take nature of collective bargaining across multiple employers and unions will prohibit DCS from ever again establishing a uniform schedule of reasonable fees.

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newly negotiate and reach agreement with each of its public employee unions prior to any change being made to the established schedule of examination application fees.

[6] Similarly, the other public employers and their several respective bargaining units of employees did not participate in DCS's and DOB's deliberation process prior to issuance of GIB 09-01.

Despite record evidence demonstrating that DCS and DOB annually engaged in an application fee review process as directed by Civil Service Law § 50(5)(b), PERB determined that the actions of DCS and DOB were improper because the Taylor Law's general command to negotiate terms and conditions of employment required that the subject of application fees for promotion examinations be mandatorily negotiated. (*See* R.137-142, 146).[7] To reach its determination, PERB necessarily held that PERB's authority under the Taylor Law supersedes DCS's authority provided by Civil Service Law § 50(5)(b) and, therefore, PERB held that it was administratively permitted to insert GOER and several public employee unions into the merit and fitness statutory scheme.

STANDARD OF REVIEW

The Third Department erred when it gave deference to PERB's statutory interpretation that the Legislature's enactment of the Taylor Law constituted a legislative rescission of the pre-existing express authority granted to DCS, with only DOB's necessary consent, within Civil Service Law § 50(5)(b) to establish a uniform schedule of reasonable application fees for promotion examinations

[7] Within the First ALJ Decision, the ALJ painstakingly detailed the annual process engaged in by DCS and DOB prior to 2009 for the setting of examination applicant fees. The ALJ's analysis demonstrates that DCS and DOB acted consistent with Civil Service Law § 50(5)(b). (R.137-142, *see also* R.474-489).

different than the fee structure mandated to be paid by applicants in CSL § 50(5)(a).

As the core legal question here is one of statutory construction dependent only upon an accurate comprehension of legislative intent, there is no need to determine the reasonableness of PERB's determination assessing the policies presented between the Civil Service Law and the Taylor Law. *See Webster Ctr. Sch. Dist. v. PERB,* 75 N.Y.2d 619, 626 (1990) (reiterating that "PERB is accorded no special deference in interpretation of statutes"); *Matter of Rosen v. PERB,* 72 N.Y.2d 42 (1988); *Matter of Newark Valley Cent. Sch. Dist. v. PERB*, 83 N.Y.2d 315, 320 (1994) (expressing that "deference to PERB is not required, however, if the issue is one of statutory interpretation, dependent on discerning legislative intent as statutory construction is a function of the courts"); *Matter of Board of Educ. of the City School Dist. of City of N.Y. v. PERB*, 75 N.Y.2d 660, 666 (1990). Thus, rather than defer to PERB and merely review whether its decision was reasonable, the Court should address the issue presented *de novo*.

THE COMPETING STATUTES – CIVIL SERVICE LAW § 50 VERSUS CIVIL SERVICE LAW §§ 205 and 209-a

The question presented is whether the enactment of the Taylor Law, as amended, manifested a legislative intent to remove the authority of the DCS, subject to approval of DOB, to set the uniform fee charged to applicants seeking to demonstrate their merit and fitness for employment in the classified service through competitive examination, and transfer that authority to the give and take of the collective bargaining process between public employers and unions.

DCS's primary core responsibility is the administration of the merit and fitness system in New York State. This responsibility is set forth both within the State Constitution and the Civil Service Law. *See generally*, New York Constitution, Article 5, §6; Civil Service Law §§ 5, 6, 7, and Civil Service Law Article IV). Article 5, § 6 of the State Constitution requires "that, as far as practicable, the merit and fitness of candidates for appointments and promotions in the civil service shall be ascertained by competitive examination." *McGowan v. Burstein*, 71 N.Y.2d 729, 732 (1988). To that end, Civil Service Law § 50(1) provides that "the merit and fitness of applicants … shall be ascertained by such examinations as may be prescribed by the state civil service commission or the municipal commission having jurisdiction." Within Civil Service Law § 50(5)(b), both DCS and municipal civil service commissions are granted the authority to

determine the appropriate fee to be paid by applicants seeking to demonstrate their merit and fitness for prospective employment in positions within the competitive class. Similar to the subject of police discipline presented recently in *Matter of City of Schenectady v. PERB*, Civil Service Law § 50(5(b) "specifically commits" the setting of examination application fees to DCS, subject only to DOB approval. 30 N.Y.3d 109, 115 (2017) (hereinafter "*City of Schenectady"*).

The pertinent provisions of Civil Service Law § 50(5), detailed herein, were contained within the enactment of a new, revised Civil Service Law, which took effect on April 1, 1959. (L.1958, c.790, § 1). This amendment permitted DCS, with DOB approval (or a municipal civil service commission with approval of the local governing board or body) to waive, abolish or establish a uniform schedule of fees different than the fees prescribed by law for all examinations. Prior to the 1958 revision of the Civil Service Law, DCS was permitted only to waive application fees for promotion examinations. *See* L.1956, c.639.

After the 1958 amendments which committed the sole authority to modify the statutory application fee with DCS and DOB, the Legislature enacted the Taylor Law. L.1967, Ch.392. In doing so, the Legislature made no express statement in either enactment indicating an intention that the Taylor Law removed from DCS, with approval of DOB, the statutory authority to waive, abolish or establish a uniform schedule of application fees for examinations, regardless of the

examination's nature as either open or promotional. Nor did the Legislature indicate that the administration of the merit and fitness system for applicants to competitive positions within the State, including the administration of competitive examinations set forth in Civil Service Law § 50, fell within the definition of a "term and condition of employment" subject to mandatory collective bargaining.

At its original enactment, the Taylor Law did not contain a procedure for PERB to address alleged improper employer or employee organization practices. Rather, Civil Service Law § 209-a was created via a 1969 amendment to the Taylor Law. *See* L.1969, Ch. 24. Once again, the Legislature voiced no intention to insert the newly formed PERB into the merit and fitness system which is both Constitutional and statutorily committed to DCS. Although PERB will repeatedly claim in its submission that the presumption in favor of collective bargaining is 'strong and sweeping,' it will not cite to any statutory language demonstrating a specific intent by the Legislature to insert public employers and unions, along with the necessary give and take of collective bargaining, into the fair and unbiased administration of the merit and fitness system. By newly inserting an obligation for the State's agent, i.e. GOER, for collective bargaining into DCS's examination administration role, PERB is necessarily placing interests unrelated to the assessment of *candidates* for public employment into the subject of the merit and

fitness system. PERB has not established its authority to make such an impactful determination in this case.

After enactment and amendment of the Taylor Law in 1967 and 1969, the Legislature amended Civil Service Law § 50(5) on five separate occasions and continued to vest the sole authority to waive, abolish or establish a uniform schedule of application fees for examinations with DCS, subject only to the approval of the DOB.[8] At no time did the Legislature expressly remove the responsibility to determine appropriate application fees from DCS and transfer that responsibility to GOER to individually negotiate the setting of uniform application fees with the multiple bargaining units of State employees.

During the same legislative session that added the concept and procedures for an improper employer or employee organization practice within the Taylor Law, the Legislature created GOER and designated that office "as the governor's agent in discharging the powers and duties conferred on the governor by the [Taylor Law]." Executive Law § 653; *see also* L.1969, Ch.491. When the Legislature empowered GOER to negotiate on behalf of the Governor for purposes of the Taylor Law, the Legislature did not disturb the sole discretion vested in DCS, with approval from DOB, to modify examination application fee schedules.

[8] *See* L.1985, Ch.845, § 1; L.1989, Ch. 61, § 195; L.2006, Ch.449, § 1; L.2017, Ch.404, § 1; and L.2018, Ch.35 § 1.

The Legislature chose to leave the authority to set a uniform schedule of fees with DCS, instead of tasking GOER with negotiating those fees with each of the State employee unions.

Juxtaposed against the Legislature's consistent acts of leaving the sole authority to determine appropriate uniform fees with DCS, subject only to the approval of the DOB, the Legislature continuously amended other provisions of the Civil Service Law to give way and account for collective bargaining rights established under the Taylor Law. In fact, seventeen other individual statutes within the Civil Service Law (excluding the Taylor Law itself) reference the application of the Taylor Law to their internal provisions.[9] Although approximately 10 percent of the individual statutes contained in the Civil Service Law (Articles 1 to 13) reference or incorporate the bargaining obligation of the Taylor Law (*i.e.* Article 14), the Legislature chose not to incorporate Article 14 within the structure of the administration of "examinations" provided in Civil Service Law § 50, *et seq*. This readily apparent pattern of inclusion versus exclusion of reference to the Taylor Law throughout the Civil Service Law demonstrates that the Legislature purposefully delineated which provisions of the Civil Service Law were to be subject to the collective bargaining obligation created

[9] *See* Civil Service Law §§ 65, 70, 75, 79, 82-a, 100, 132, 134, 135, 140, 158, 159, 159-a, 161-a, 163, 163-a, and 167.

by the Taylor Law. Despite the Legislature's selective reference to the Taylor Law throughout the Civil Service Law, both PERB and the Appellate Division have by implication imposed within CSL § 50 the mandate of collective bargaining. By doing so, GOER and each of the several Respondent unions (along with multiple other public employers and unions not a party to this proceeding) become necessary parties to the determination of the appropriate and uniform application fees in the stead of DCS and DOB. The State respectfully submits that this outcome contravenes plainly worded authority granted to DCS and DOB by CSL § 50(5)(b).

With this Legislative history as backdrop, Civil Service Law § 50(5), entitled "Application Fees," provides, at subsection (a), that "**[e]very applicant for examination for a position** in the competitive or non-competitive class, or in the labor class when examination for appointment is required, **shall pay a fee to the civil service department** or appropriate municipal commission at a time determined by it." Civil Service Law § 50(5)(a) (emphasis supplied).

The statute provides two exceptions to the mandatory application fee. First, as relevant to the current dispute, the mandatory fee may be waived or abolished for specific classes of positions or types of examinations or candidates or otherwise established by DCS, subject to the approval of DOB. Civil Service Law § 50(5)(b). This statutory provision grants DCS flexibility to determine the appropriate

application fee for either all examinations administered by it or for individual classes of examinations for positions for which it may be difficult to ensure recruitment. In the context of Statutes, § 76, for construction and interpretation, the words used by the Legislature in Civil Service Law § 50(5)(b) "are free from ambiguity and express plainly, clearly the legislative intent." Statutes § 76. Namely, the ability to establish a uniform fee schedule is limited only to the involvement of DCS and DOB. Second, application fees are specifically waived for candidates who certify that they are unemployed and primarily responsible for the support of a household, or are receiving public assistance, or a veteran. Civil Service Law § 50(5)(b). All fees collected by DCS shall be paid into the state treasury in the manner prescribed by the State Finance Law. Civil Service Law §50(5)(c).

The provisions of Civil Service Law § 50 apply equally to open-competitive and promotion/transition examination application fees. The three improper practice charges, and PERB's decisions, address only the implementation of application fees for promotion examinations. Despite PERB's assertions, this Court's interpretation of Civil Service Law §50 should be viewed in the context of the complete purpose of that statute – administration of the merit and fitness system – which involves administration of both open-competitive and promotion/transition examinations. A review of the statute through the limited prism asserted by the

PERB and unions is an obfuscation of the detailed statutory structure created by the Legislature that requires DCS to administer and implement the New York Constitution's required merit and fitness system.

LEGAL ARGUMENT

POINT I

APPLICATION FEES FOR MERIT AND FITNESS EXAMINATIONS ARE NOT TERMS AND CONDITIONS OF EMPLOYMENT

The foundational question presented to this Court is whether the Legislature manifested an intention to remove the discretion to set application fees for promotion examinations administered by DCS, a right specifically granted to DCS within Civil Service Law § 50(5), and place it under the general command of the Taylor Law for public employers to negotiate terms and conditions of employment. The State respectfully submits that the plain language of Civil Service Law § 50(5) evidences the Legislature's intent that the determination of appropriate uniform application fees is vested solely within the discretion of DCS, subject only to the approval of DOB, and that this determination by DCS is not a mandatorily negotiable term and condition of employment. Accordingly, PERB's decision which newly compels GOER, as the State's statutory bargaining agent, and each union to negotiate application fees charged for the administration of civil service examinations in the place of DCS and DOB is contrary to law.

It is undisputed that as a general command under the Taylor Law, the obligation to bargain all terms and conditions of employment is the strong and sweeping policy of the State. *Board of Educ. Of the City School Dist. of New York v. PERB*, 75 N.Y.2d 660, 667. However, "what may otherwise be negotiable terms and conditions of employment are prohibited from being collectively bargained." *Id*. A **prohibited** subject of bargaining has been defined in *Matter of Village of Lynbrook v. PERB* as subjects "forbidden by statute or otherwise from being embodied in a collective bargaining agreement." 48 N.Y.2d 398, 402 (1979). While, according to PERB's decision in *State of New York – Unified Court System*, the relevant issue is "whether the Legislature has plainly and clearly evidenced intent to remove a subject which would otherwise be mandatorily negotiable from the scope of compulsory bargaining" (28 PERB ¶ 3044, 3103 (1995)), an express declaration regarding negotiability is not required as legislative intent may also be implied from the words of an enactment. *Webster Cent. School Dist. v. PERB*, 75 N.Y.2d 619, 627. Any implied intention prohibiting a subject from bargaining must be "plain and clear" or "inescapably implicit" in the statute. *Syracuse Teachers Assoc., Inc., v. Board of Ed.*, 35 N.Y.2d 743, 744 (1974); *Cohoes City School Dist. v. Cohoes Teachers Assn.*, 40 N.Y.2d 774, 778 (1976). The language of the statute need not be "express" to remove the subject from the arena of

mandatory negotiations. *Syracuse Teachers Assoc. Inc. v. Board of Ed.*, 35 N.Y.2d at 744; *Mahopac Cent. School Dist.*, 28 PERB ¶3045, 3103 (1995).

Even if a subject is not prohibited from collective bargaining, certain terms and conditions of employment may be **permissive** subjects of negotiation. *See Board of Educ. of City School Dist. of the City of New York v. PERB*, 75 N.Y.2d 660, 669-670. Where the Legislature "has manifested an intention to commit these decisions to the discretion of the public employer… there is no absolute bar to collective negotiations over such decisions, but the employer cannot be compelled to negotiate them." 75 N.Y.3d at 669; *Webster Cent. School Dist. v. PERB*, 75 N.Y.2d at 627.

In this case, as "statutory construction is a function of the courts, PERB is accorded no special deference in the interpretation of statutes." *Webster Cent. School Dist. v. PERB*, 75 N.Y.2d at 626. Here, the pertinent legal issue is the interpretation of Civil Service Law § 50 which DCS is charged with implementing, not PERB. PERB's interpretation of Civil Service Law § 50 is accorded no special deference. If the Court is to defer to the judgment of any agency implicated by this proceeding, such deference must only be afforded to DCS's interpretation and implementation of the Civil Service Law as administrator of the merit and fitness system. Here, the actions of DCS as approved by DOB, "'involves knowledge and understanding of underlying operational practices or entails an evaluation of

factual data' within the agency's particular expertise" wherein "great deference is accorded the agency's judgment." *Matter of Rosen v. PERB*, 72 N.Y.2d 42, 47 (1988); *quoting Kurcsics v. Merchants Mut. Ins. Co*, 49 N.Y.2d 451, 459 (1980); *see also McGowan v. Burstein*, 71 N.Y.2d 729, 733. The Court should accord deference to DCS's interpretation, not PERB's as it "relies upon the special competence the agency is presumed to have developed in its administration of the [Civil Service Law § 50]." *Id.*

A. Application fees for promotion examinations are not a term and condition of employment.

The legal issue presented to the Court is based upon the arbitrary PERB conclusion that an application fee paid for the opportunity to take a promotion examination administered by DCS to assess the merit and fitness for a future job is a "term and condition of employment."[10] Civil Service Law § 201(4) defines a term and condition of employment as "salaries, wages, hours, and other terms and conditions of employment." (Civil Service Law § 201(4)). The application fee is neither salary nor wages for a public employee in his or her employment position with the State. PERB did not establish the basis upon which a fee charged to examination applicants for a future employment position falls within the Taylor

[10] Note, "Qualifications for appointment is a management prerogative and not a mandatory subject of negotiations." *Police Benevolent Assoc. of Hempstead v. Incorporated Village of Hempstead*, 11 PERB ¶ 3072, 3112 (1978).

Law definition of "other terms and conditions of employment." PERB's determination that the payment or non-payment of a statutory fee to apply "for examination for a position in the competitive class" is an 'economic benefit' is arbitrary and contrary to law. Under this broad and all-encompassing measure, any change to a fee paid, or not paid, by a public employee to a governmental entity would be a term and condition of employment. Although it is true that most of the individuals who pay the fee are public employees, it is also true that the fee is tied to an examination to demonstrate whether the individual, as an applicant, is qualified for a new employment position that is potentially with a different public employer. (*See e.g.* R.20). For the individual applicant, the "employment" tethered to the prospective examination is, at that time, aspirational and yet to be obtained. A fee tied to aspirational and potential employment is not a "term and condition of employment" pursuant to Civil Service Law § 201(4).

Accordingly, as the fee paid by individual applicants to sit for examination to demonstrate fitness for a future, not yet realized, employment position does not constitute a term or condition of employment as defined by the Taylor Law, PERB is without authority pursuant to Civil Service Law § 209-a to intervene upon DCS's setting of a uniform schedule of reasonable application fees.

B. The uniform schedule of application fees established by DCS, as approved by DOB, is a prohibited or permissive subject of bargaining based upon the plain language of Civil Service Law § 50.

Assuming this Court finds that an application fee to take a promotion examination is a term and condition of employment under the Taylor Law, the pertinent language of Civil Service Law § 50(5) qualifies under both standards for determining prohibited subjects of bargaining. First, there is the express legislative intent that mandates that "[e]very applicant for examination for a position … **shall pay a fee** to the civil service department", with only four exemptions to the mandatory fee. (Civil Service Law § 50(5)(a) [emphasis supplied]). The mandatory fee set in the statute (1) may be waived, abolished or otherwise established by DCS, with approval of DOB, or (2) are specifically waived for candidates who certify they are unemployed and primarily responsible for the support of a household, or (3) are specifically waived for candidates who are on public assistance or (4) are specifically waived for candidates for original appointments who are veterans. Civil Service Law § 50(5)(b). Similar to the Court of Appeals' recent *City of Schenectady* decision involving police discipline, Civil Service Law § 50 specifically commits the sole discretion to "establish a uniform schedule of reasonable fees different from those prescribed in [§ 50(5)(a)]" with DCS, subject only to approval by DOB. *See* 30 N.Y.3d 109, 115. The plain language of the

statute demonstrates the Legislature's intention that the determination of the appropriate examination application fee be placed in the hands of the agency statutorily required to administer the merit and fitness system mandated under the NYS Constitution. *See* Civil Service Law §§ 5 and 7. Moreover, the plain language of § 50(5)(b) vitiates PERB's determination that the Taylor Law implies a legislative pronouncement that application fees for examinations administered by DCS be collectively negotiated by a separate State office, GOER, and other public employers vis-a-vis multiple employee organizations (encompassed within those several public employers). PERB's newly created interpretation that the setting of application fees requires negotiation across employers and bargaining units contradicts the language and the intent of the 70-year-old statute. Contrary to PERB's legal conclusion, Civil Service Law § 50(5) commits the authority to modify the statutorily set application fee to a single entity – specifically DCS – subject only to DOB approval.

Other language of the Civil Service Law supports the conclusion that there is a plain legislative intent that examination application fees – whether for open-competitive or promotion examinations – be a prohibited subject of bargaining. For example, Civil Service Law § 50(5)(b) grants the same authority to waive, abolish or establish a uniform schedule application fees to a local governmental entity's

municipal civil service commission, subject only to approval by its governing board.

A comprehensive review of all terms set forth in Civil Service Law §50 demonstrates that DCS is tasked with the sole responsibility and corresponding discretion to ensure recruitment of competent personnel under the Constitutionally required merit and fitness system. Subsection (1) states that merit and fitness for relevant positions "shall be ascertained by such examinations as may be prescribed" by DCS. Subsection (2) correspondingly grants latitude to DCS with respect to certain contents of the examination announcement. Also, subsection (4) states that DCS "may refuse to examine an applicant, or after examination to certify an eligible [candidate]" under conditions listed therein. Similarly, Civil Service Law § 52 grants discretion to DCS on certain elements to implement the promotion examination process. By reading Civil Service Law sections 5, 7, 50, and 52, and in conjunction with the overall function of the Civil Service Law, it is apparent that the Legislature intended to grant DCS broad authority and sole discretion in the proper administration of the merit and fitness system mandated by the New York Constitution (Article 5, § 6) and that such discretion is not limited by a collective bargaining obligation or GOER's involvement. PERB's new determination mandating the negotiation of application fees would also encroach on the many areas in which the Legislature has statutorily vested discretion to

administer the merit and fitness system with DCS. Under PERB's view, a multitude of determinations set forth in the Civil Service Law would arguably become newly negotiable, i.e. when, where, or how often an examination occurs for each or any position.

Notably, the express authority for DCS to impose fees contained in Civil Service Law § 50 has been acknowledged by the NYS Court of Appeals. In *Barclay v. Bahou*, the Court of Appeals declared "both the State Civil Service Commission and municipal civil service commissions **are authorized by section 50 of the Civil Service Law to impose application fees on persons applying to take civil service examinations**." 55 N.Y.2d 338, 341 (1982) (emphasis added; note, in making this declaration, the Court of Appeals did not distinguish between open-competitive and promotion/transitional examination application fees). In *Barclay*, the Court of Appeals reviewed the relative rights and obligations under Civil Service Law § 23 between DCS and municipal civil service commissions when DCS provides aid to the local entity. Although the *Barclay* decision did not address the question presented herein, the decision does highlight the overall statutory scheme for administration of the State's merit and fitness system.

However, even if the Court does not find an express legislative intention to prohibit civil service application fees from mandatory negotiations, the conclusion that such fees are a prohibited subject of bargaining is inescapably implicit in the

language of the statute. The fact that the Legislature did not intend for these application fees to be collectively bargained is aptly demonstrated by two necessary and logical outcomes if PERB's determination is upheld.

First, the plain wording of the statute requires only that DCS and DOB be involved in the process of setting the uniform schedule of reasonable fees. The statute makes no provision for involvement by any other party. There is no ambiguity on the fact that the Legislature only contemplated two entities, DOB and DCS, to be involved in the setting of a uniform fee schedule. If PERB's determination is upheld, DCS and DOB are no longer relevant to the setting of the uniform fee schedule. Rather, to accomplish the fee schedule set forth in GIB 09-01, DCS must wait until GOER negotiates to conclusion with all the relevant State employee unions and until several other public employers negotiate to conclusion with all their relevant employee unions. This unwieldly and inescapable result means the following employers and unions must negotiate to conclusion the fee schedule for all represented groups covered by GIB 09-01:

<u>GOER as State's Representative – Unions/Units that it Must Negotiate with for DCS to Reach GIB 09-01 Schedule</u>

- NYSCOPBA – Security Services Unit
- NYSCOPBA – Security Services Unit (Non-arbitration eligible)
- CSEA – Administrative Services Unit
- CSEA – Operational Services Unit
- CSEA – Institutional Services Unit
- PEF – Professional Scientific & Technical Services Unit
- PBANYS – Agency Law Enforcement Services Unit

- DMNA CSEA – Military and Naval Affairs Unit
- Council 82 – Security Supervisors Unit
- Council 82 – Security Supervisors Unit (Non-arbitration eligible)
- District Council 37 – Housing and Community Renewal
- United University Professionals (UUP) – Lifeguards

Public Employers other than the State – Unions/Units that they Must Negotiate with for DCS to Reach GIB 09-01 Schedule

- TRS – NYS Teachers Retirement System
- TWAY-MNT – NYS Thruway Authority – MNT-TO Unit (Teamsters)
- TWAY-TEC – NYS Thruway Authority – TEC-SP Unit (CSEA)
- CANAL CSEA – NYS Canal Corporation – Negotiating Unit III
- CANAL PEF – NYS Canal Corporation – PEF Division 504

(*See* R.491, R.492-567). No reading of the statute supports the outcome now mandated by PERB.

Second, PERB's decision also conflicts with the statutory mandate that DCS "establish a **uniform schedule of reasonable fees** different from those prescribed in [§ 50(5)(a)]." Civil Service Law § 50(5)(b) (emphasis added). PERB's decision will necessarily prevent DCS from establishing a uniform schedule of fees for any "specific classes or positions or types of examinations or candidates" and nullify the statutory requirement that a "uniform schedule" of application fees be established.

As a practical example, reference is made to the interdepartmental title of "Secretary 1" exam presented in 2005. (R.484). In order for DCS to establish a uniform schedule of fees for that specific examination, DCS must now request that:

(1) GOER negotiate with Respondent CSEA vis-a-vis the CSEA represented units of State employees; (2) GOER negotiate with PEF; (3) GOER negotiate with Respondent NYSCOPBA; (4) GOER negotiate with Respondent DC-37; (5) the New York State Teachers' Retirement System negotiate with CSEA vis-à-vis the CSEA represented unit of Teachers' Retirement System employees; (6) the Thruway Authority negotiate with the Teamsters; (7) the Bridge and Tunnel Authority negotiate with CSEA vis-à-vis the CSEA represented unit of Bridge and Tunnel Authority employees; and (8) the Canal Corporation negotiate with CSEA vis-à-vis the CSEA represented unit of Canal Corporation employees. **Each employer-union combination must then agree to the same fee schedule**. PERB's decision is apparently founded upon the absurd premise that through this hodgepodge of negotiations, a uniform schedule of application fees will be created, let alone in a timely manner. The nonsensical outcome demonstrated by the "Secretary 1" exam presented in 2005 is repeated across a multitude of promotion examinations administered by DCS.[11]

Even if PERB is correct that the term "uniform schedule of reasonable fees" is dispensable and without consequence for the implementation of Civil Service

[11] *See* R.484, for the additional titles of "Keyboard Specialist 2," "Keyboard Specialist 2 (Spanish Language)," "Secretary 1 (Spanish Language)," "Senior Employment Security Clerk," and "Senior Licensed Practical Nurse 1" presented for exam in 2005.

Law § 50(5)(b), DCS will be newly burdened with the administrative accounting of what specific fee is appropriately paid by each of the tens of thousands of individual applicants per year, dependent solely upon what the several employers and unions negotiated across the spectrum of multiple collective bargaining agreements.[12]

As a further complication, questions will necessarily be presented of which union(s) is permitted to negotiate for which position(s). For example, is the fee negotiated by the union that represents the bargaining unit within which the individual applying for examination currently sits? Or is the fee negotiated by the union that represents the job position for which the individual applying seeks to obtain? Or is the fee negotiated by both, or several, unions who may fall into a "Venn Diagram" of possibilities for each title or individual applicant?

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[12] For the period covering 2004 through 2008, DCS processed approximately 239,000 promotion examination applications. (R.523). For the period covering 2009 through 2014, DCS processed approximately 149,000 promotion examination applications. (R.567).

Civil Service Law § 50(2) requires that DCS issue an announcement for each competitive examination that sets forth the minimum qualifications, subjects of the examination and "such other information as they may deem necessary." The administrative burden placed upon DCS will further include stating, and anticipating, within each individual announcement the pertinent myriad of fee schedules negotiated by GOER, other employers, and the several unions that may have members apply for the examination.

In the alternative, even if the Court determines that the plain language of Civil Service Law § 50(5) does not prohibit collective bargaining, the statutory structure provides that the subject of application fees is a permissive – not mandatory – subject of negotiations. *See Board of Educ. of City School Dist. of the City of New York v. PERB*, 75 N.Y.2d 660, 669-670. In this case, even if the subject of application fees may be negotiated by GOER with respect to State bargaining units, the terms of Civil Service Law § 50 demonstrate that the State cannot be compelled to negotiate the setting of application fees. The Legislature manifested an intention that the fees be set by DCS, with approval from DOB, based upon the specific area of expertise that DCS is vested with in accordance with the Civil Service Law. Namely, the statutory obligation to oversee the recruitment and selection of qualified employees through administration of merit and fitness examinations. PERB's rationale arbitrarily rejects the Court of Appeals determination that certain subjects fall in the permissively negotiable category, as opposed to simply mandatory or prohibited categories.

PERB's analysis incorrectly assessed whether the 1958 enactment of Civil Service Law § 50(5) presented a Legislative intent, at that time, that the subject of examination fees be nonmandatory. R.49. Clearly, the Legislature at that time had no intention to write a "clear manifestation of intent to remove" the subject of examination fees from a collective bargaining statute that would not exist for

another decade. Rather, at the time of enactment of the new Civil Service Law, the Legislature declared the public policy that the determination to abolish, waive or establish a uniform schedule of fees different than that already set in statute is given to DCS, subject only to approval by DOB. The revised Civil Service Law carried forward the statutorily enunciated policy that DCS had the authority to set or change fees for promotion examinations conducted by it to assess the merit and fitness of potential employees. The authority of DCS, subject only to DOB approval, to set application fees was placed within the extensive statutory scheme designed by the Legislature for DCS to administer the merit and fitness system required of public employees under the New York Constitution. Similar to the Education Law provision deemed nonmandatory by the Court of Appeals in *Webster Central School District*, which unlike the current case involved a statute enacted *after* the creation of the Taylor Law, Civil Service Law § 50(5) is part of an overall statutory scheme. *See* 75 N.Y.2d 619, 628.

PERB's analysis also improperly focused upon the question of whether Civil Service Law § 50(5) was written with an intent to exclude it from the terms of the Taylor Law written a decade later. (R.49-50). Rather, the pertinent question that should have been addressed by the Board was whether the Taylor Law clearly demonstrated a legislative intent to vitiate the Legislature's preexisting declared public policy that DCS, subject only to DOB approval, abolish, waive or establish

examination fees different that those already set in statute. PERB has not cited to the specific Taylor Law statutory provision that supports the effective repeal of, or that supersedes, the Civil Service Law provision.

PERB's Second Board Decision references, without citation, to *Schenectady Police Benevolent Association v. PERB,* to assert that the Court of Appeals held matters related to the implementation of General Municipal Law § 207-c ("GML § 207-c") were deemed negotiable despite that law's enactment in 1961. R.49; *see* 85 N.Y.2d 480 (1995). In doing so, PERB omitted reference to the Court's determination in that case that matters specifically covered by GML §207-c were not mandatory subjects of bargaining. Rather, the Court held that because GML § 207-c authorized the City to require light duty and, under the appropriate circumstances, even surgery, those issues are not subject to mandatory bargaining. 85 N.Y.2d 480, 486. It is only the subjects not covered by GML § 207-c that have been found to be mandatorily negotiable. *See City of Watertown v. PERB*, 95 N.Y.2d 73 (2000). Contrary to PERB's obfuscated reference to *Schenectady Police Benevolent Association v. PERB*, when this line of cases is applied to the instant proceeding, the setting of examination uniform application fees must be found to be a non-mandatory subject of bargaining.

Here, had the Legislature intended for the Taylor Law to implicitly repeal the statutorily prescribed role of DCS and DOB on this subject, it would have

drafted appropriately worded legislation for that purpose. In contrast to Civil Service Law § 50, multiple other statutes within the Civil Service Law by their very terms are founded on or give way to the collective bargaining provisions of the Taylor Law. *See* Footnote 9, *supra*. This intentional exclusion of reference to the Taylor Law within Civil Service Law § 50, while doing so in other Civil Service Law statutes, shows the Legislature's intent that the preexisting authority of DCS to determine the amount of application fees remains intact and was not overwritten by the Taylor Law's "general command" for collective negotiations. Put simply, nothing contained within the Taylor Law shows that the Legislature intended to take away the discretion to set the amount of application fees which it had "specifically committed" to DCS. Accordingly, PERB's decision that newly transfers the discretion from DCS to an obligation that GOER separately reach an agreed upon uniform application fee schedule with several different unions covering many different bargaining units through the give and take of collective negotiations is arbitrary and has no foundation in law.

C. PERB's Decision repeals by implication Civil Service Law § 50(5)(b)

While the PERB Board correctly opined that the public policy of the State of New York is "in favor of collective bargaining,"[13] the PERB Board failed to account for the fact that "'[t]he repeal of a statute by implication is not favored by

[13] 50 PERB at 4584.

law, for when the legislature intends to repeal an act it usually says so expressly.'" *City of Schenectady*, 30 N.Y.3d 109, 117, *quoting Matter of Tiffany*, 179 N.Y. 455, 457 (1904). In this case, PERB effectively repealed the plain language of Civil Service Law § 50(5)(b) which has been in place without a collective bargaining obligation for seven decades.

The Court of Appeals decision in *City of Schenectady* demonstrates the error of PERB's determination holding that the Legislature manifested an intention that the State be compelled to negotiate application fees. In that case, the Court of Appeals held that the Taylor Law's "general command regarding collective bargaining is not sufficient to displace the more specific authority granted under the Second Class Cities Law." 30 N.Y.3d 109,116. Similar to the Second Class Cities Law which specifically commits police discipline to the local commissioner, Civil Service Law § 50(5)(b) specifically commits the setting of examination fees to DCS (or municipal commission, as appropriate), subject only to approval by the Director of the Budget (or local governing board or body). Accordingly, the Taylor Law's "general command" cannot be read to displace the specific authority committed to DCS and DOB, under Civil Service Law § 50(5)(b). Rather, PERB failed to apply the rule of statutory construction recently restated by the Court of Appeals which directs that "if a reasonable field of operation can be found for each statute, that construction should be adopted." 30 N.Y.3d at 117, *quoting Alweis v.*

Evans, 69 N.Y.2d 199, 204 (1987). When this rule is properly applied, it is evident that Civil Service Law § 50(5)(b) and the Taylor Law should not be deemed irreconcilable. Rather, Civil Service Law § 50(5)(b) governs the setting of examination application fees whereas the Taylor Law generally requires public employers to negotiate terms and conditions of employment but does not specifically require that the setting of pre-employment application fees be a mandatory subject of bargaining. *See* 30 N.Y.3d at 117. As there is no statutory conflict between the two laws, just a "conflict [ ] in the policies they represent," the public policy enunciated in Civil Service Law § 50(5)(b) must be upheld and not be deemed implicitly repealed by the Taylor Law. Furthermore, PERB fails to establish the basis upon which the "general command" of the Taylor Law overrules the specific statutory grant of discretion to DCS. If the Legislature intended for the Taylor Law to consume the subject of setting application fees and remove it from the purview of DCS, it could have accomplished this result with specificity upon enactment of the Taylor Law (or upon one of the four subsequent occasions wherein the Legislature amended § 50(5)(b), or at any other time, or when the Legislature created GOER).

The PERB Decision also conflicts with the plain language of Civil Service Law § 50(5)(b). First, PERB's decision necessarily means that **DCS and DOB are removed** from the actual process of setting application fees. Rather, in the case of

the State as employer (which is only a portion of the employer/employees covered by GIB 09-01), the setting of application fees will newly be reached only through negotiations conducted by GOER with the unions that represent multiple State employee bargaining units. As PERB is fully aware, the authority to act on behalf of the Governor to negotiate terms and conditions of employment for State employees is delegated to GOER. *See* Executive Law § 653. DCS has no authority to collectively bargain. For the other employees covered by GIB 09-01, their public employers (i.e. Thruway Authority, etc.) must newly and independently negotiate the setting of fees with several bargaining units prior to DCS being permitted to set or collect an application fee that would also apply to State employees. Once again, DCS (and GOER) has no authority to collectively bargain for those non-State employers implicated by GIB 09-01. It is self-evident that PERB's decision removes DCS and DOB from the process of setting application fees for civil service examinations. PERB's determination to transfer the setting of application fees to GOER and other affected employer agents vis-à-vis negotiations with multiple unions, without legal justification, has the effect of implicitly repealing the specific grant of authority to DCS to establish a uniform schedule of application fees.

Outside of the current proceeding, the PERB Decision also necessarily means that each individual public employer – i.e. each town, village, city, county,

and authority – will be newly compelled to negotiate on a unit by unit basis the setting of examination fees, thereby removing that statutory right from the municipal commissions and the local governing board or body. This negotiation obligation placed on the non-State public employers would be newly imposed.

At the municipal commission level, this determination also has the potential to result in non-uniform fees for any given "specific classes or positions or types of examinations or candidates," dependent solely upon the outcome of the individualized give and take of collective bargaining, thereby contradicting the statutory mandate that the municipal commission implement a **uniform** schedule of reasonable fees. The absence of PERB precedent on this subject for five decades suggests that the many municipal commissions have acted pursuant to Civil Service Law § 50(5)(b) without being mandated by PERB to negotiate application fees.

The effective repeal of Civil Service Law § 50(5)(b) leads to the conclusion that application fees are a prohibited or permissive subject of bargaining under the Taylor Law. The outcome of PERB's Decision renders it impossible to give effect to the plain meaning of the statute. PERB has now arbitrarily dictated a new procedure and result for the setting of uniform application fees which directly contradicts the plain language of Civil Service Law § 50(5)(b). Accordingly,

PERB's Decision that application fees for civil service examinations are mandatorily negotiable is untenable.

PERB's decision also now requires that application fees established pursuant to Civil Service Law § 50 for open-competitive examinations (no obligation to negotiate)[14] be treated differently than promotion examinations (new obligation to negotiate). No such distinction on the scope of DCS's right to set uniform application fees can be found within the plain language of Civil Service Law § 50. Such a distinction could lead to wildly inconsistent schedules of fees for examinations for positions, work units or agencies.

In summary, the State respectfully submits that PERB's determination that the setting of uniform application fees for promotion examinations administered by DCS is a mandatory subject of negotiations is arbitrary, capricious, and contrary to law. PERB's Decision implicitly repeals and replaces the plain language of Civil Service Law § 50(5)(b). Accordingly, PERB's decision must be reversed and deemed null.

[14] *See Civil Service Employees Assoc., Inc. v. State of New York*, 13 PERB ¶ 3099.

POINT II

PERB LACKS JURISDICTION TO HEAR THE CURRENT DISPUTE AS DCS WAS NOT ACTING AS EMPLOYER

PERB acted in excess of its jurisdiction when it administratively reviewed the actions of DCS, as approved by the DOB, which were indisputably made in accordance with Civil Service Law § 50(5)(b). PERB's authority, in pertinent part, under the Taylor Law is to prevent and remedy improper "employer" practices. Civil Service Law § 205(5)(d). Civil Service Law § 209-a.1 then lists the "improper employer practices" PERB is empowered to prevent and remedy. Foundational to PERB's jurisdiction is an action by the government as employer.

Here, the facts and statutory scheme demonstrate that DCS was not acting as the "public employer" vis-à-vis the individuals who may apply to sit for examinations to determine their 'merit and fitness' for future promotional employment positions. (*See* Civil Service Law § 50(1)). Rather, DCS acted in its role as the statutory department required to administer the Constitutionally required merit and fitness system for the State and additional public employers. (Id.; *see also* New York Constitution Article 5, § 6). As DCS acted upon its independent statutory authority, it was not acting as the public employer under the Taylor Law. Therefore, PERB lacked jurisdiction to administratively review and enjoin the action taken by DCS and approved by DOB.

On this point, the Petitioner respectfully submits that the State neither waived the defense that PERB acted in excess of its jurisdiction nor that PERB may be permitted to act in excess of its jurisdiction in this case, even if the Court determines that the jurisdiction defense was raised after the administrative hearing process had begun.

Rather than file an improper practice charge with PERB, the appropriate legal proceeding for each respondent union to file was a petition pursuant to the Civil Practice Law and Rules, Article 78, to review the legal question of whether the action taken by DCS and approved by DOB was arbitrary and capricious. *See e.g. Crossfield v. Schuyler County*, 151 A.D.3d 1448 (3rd Dept.2017).

Accordingly, PERB's decision must be vacated as PERB acted in excess of its limited jurisdiction.

POINT III

UNIONS MAY DEMAND TO BARGAIN THE IMPACT OF APPLICATION FEES SET BY DCS AND APPROVED BY DOB

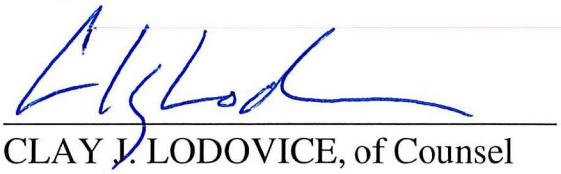
Absent from either the Third Department's analysis or PERB's analysis is an acknowledgement that if application fees for promotion examinations are deemed a nonmandatory (prohibited or permissive) subject of negotiation, the unions with members that pay such fees pursuant to GIB 09-01 may be permitted to demand negotiation of the *impact* of those application fees upon unit members. None of the

bargaining representatives in this proceeding sought to negotiate the impact of DCS's act, after receiving DOB approval, of establishing the uniform schedule of examination application fees in GIB 09-01.

CONCLUSION

For all the foregoing reasons, this Court should reverse the Memorandum and Judgment of the Appellate Division, Third Department, *Matter of State of New York v. New York State Public Employment Relations Board, et al.,* (R.ii), annul the First Board Decision and Second Board Decision of Public Employment Relations Board, 46 PERB ¶ 3032 (R.32) and 51 PERB ¶ 3027 (R.40), respectively, together with such other relief as the Court deems just.

Respectfully submitted,



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Dated: December 13, 2021
Albany, New York

CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR § 500.13(c)(13) that the foregoing brief was prepared on a computer using Microsoft Word. A serifed, proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman
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The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules regulations, etc. is 10356.

Dated : December 13, 2021
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STATE OF NEW YORK)
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Robert Manginelli, being duly sworn, deposes and says:

On the **13th day of December 2021**, I served a true copy of three copies of the State of New York's Brief on Appeal and three copies of the Record on Appeal in the annexed proceeding titled STATE OF NEW YORK v. NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD, ET AL., (APL-2021-00197), by sending the same in a sealed envelope, with postage prepaid thereon, by special mail service thought the **United Parcel Service** ("UPS"), addressed to the attorneys at the addresses listed below:

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Notary Public

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