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

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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.

REPLY BRIEF FOR APPELLANT

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PRELIMINARY STATEMENT

This Reply Brief on appeal is submitted on behalf of Appellant, State of New York, in further support of its appeal of the Memorandum and Judgment 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.

As set forth in Appellant's Brief to this Court, Appellant respectfully submits that the Third Department erred in determining that the setting of examination application fees by the New York State Department of Civil Service ("DCS"), with approval by the New York State Director of the Budget ("DOB"), pursuant to Civil Service Law § 50(5)(b), is a mandatorily negotiable term and condition of bargaining under Civil Service Law Article 14, commonly referred to as the "Taylor Law." The plain language of Civil Service Law § 50(5)(b), which leaves no room for negotiation, renders the setting of application fees for examinations administered by DCS a permissive or prohibited subject of bargaining. *See e.g., Matter of City of Watertown v. PERB*, 95 N.Y.73, 78 (2000).

This Reply Brief is submitted to address Respondent PERB's implicit request for the Court to review whether the Appellate Division, Third Department, erred when it determined based upon substantial evidence that PERB's finding that an enforceable past practice existed wherein affected bargaining unit employees reasonably believed that there was an unequivocal practice that DCS and DOB would not modify the application fee amount. If this Court accepts PERB's insertion of this question into this proceeding – *pertinent only if the Court determines that DCS and DOB's setting of the application fee pursuant to Civil Service Law § 50(5) is a mandatory subject of bargaining* – Appellant respectfully submits that the Decision must be reversed, and the First Board Decision and Second Board Decision annulled because PERB's past practice finding is not supported by the competent record evidence.

LEGAL ARGUMENT

POINT I

PERB'S DETERMINATION THAT AN ENFORCEABLE PAST PRACTICE EXISTED THAT DCS AND DOB WOULD NEVER EXERCISE THE STATUTORY DISCRETION TO MODIFY THE AMOUNT OF THE APPLICATION FEES FOR PROMOTION EXAMINATIONS IS NEITHER BASED UPON SUBTANTIAL EVIDENCE NOR CONSISTENT WITH PERB PRECEDENT

Although Respondent PERB repeatedly asserts to this Court that a "past practice" existed based upon DCS and DOB assessing no application fees for a ten-year period, PERB fails to present to the Court the actual standard upon which PERB precedent requires a charging party to successfully establish an enforceable past practice under the Taylor Law. To the extent that PERB seeks in its brief to shift this Court's attention away from the foundational legal question upon which the Court granted Appellant's motion for leave to appeal, i.e., whether Civil Service Law § 50(5)'s plain and clear vesting of the setting of examination application fees with DCS and DOB renders the fees a non-mandatory subject of bargaining, and has instead inserted the question of the validity of the past practice finding into this proceeding, Appellant asserts that it is appropriate for the Court to review whether PERB's finding of an enforceable past practice is supported by

substantial evidence.[1] As the First Board Decision and Second Board Decision each disregard necessary evidence adduced during the required fact hearing held about the implementation of the application fees, Appellant asserts that PERB's past practice determination is flawed and must result in annulment of the PERB decisions.

PERB's standard for an enforceable past practice requires that a charging party establish four specific elements. First, as with any improper practice charge asserting a violation of CSL § 209-a.1(d), a charging party must establish that the term and condition of employment at issue is a mandatory subject of bargaining. *See e.g., Matter of Aeneas McDonald Police Benevolent Assn. v. City of Geneva*, 92 N.Y.2d 326, 331 (1998). If the subject of the improper practice charge does not involve a mandatorily negotiable term and condition of employment, PERB's analysis must end and any facts about the history of that subject between the parties are not relevant because the employer is permitted to act without negotiation. So, in the present case, should the Court agree with Appellant that Civil Service Law § 50(5) renders the subject of application fees for prospective employment examination opportunities to be non-mandatory, whether permissive or prohibited, both PERB's and the Court's analysis should cease as facts related to

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[1] Respondent New York State Correctional Officers Police Benevolent Assoc., Inc. ("NYSCOPBA"), also raised the question of past practice within its submission to this Court. *See* NYSCOPBA Brief, pp.36-37.

a purported practice become not relevant and wholly superfluous. This is the element of the four-part standard to which this Court granted Appellant's request for leave to appeal the Third Department's Memorandum and Judgment. PERB's brief seeks to lead the Court away from this foundationally required question for any Civil Service Law § 209-a.1(d) case – founded solely upon a determination of competing statutes to which PERB is entitled no deference – and to erroneously convince the Court to focus its attention only upon the 10-year period during which DCS and DOB "chose to exercise its authority to not charge exam fees." *Respondent PERB Brief*, p.4. PERB's strenuous efforts to have the Court gloss over the primary legal issue and, instead, focus on the secondary and allegedly pertinent fact-based issue should be disregarded.

PERB's analysis based upon the period when DCS and DOB choose not to charge application fees does not matter until after the Court determines the legal question of whether application fees set by DCS and DOB pursuant to Civil Service Law § 50 are a mandatory subject of bargaining in the context of the competing statutory provisions.

If the subject matter of a failure to bargain improper practice charge addresses a mandatorily negotiable term and condition of employment, PERB's long-enunciated past practice standard then requires a charging party to meet a *prima facie* burden to demonstrate with competent record evidence that the

practice was "(1) unequivocal and (2) continued uninterrupted for a period of time (3) sufficient under the facts and circumstances to create a reasonable expectation among the affected unit employees that the practice would continue." *Second Board Decision*, R.37 [numbers inserted for emphasis]; *see also, Town of Islip v. PERB*, 23 N.Y.3d 482, 492 (2014) *citing Matter of Chenango Forks Cent. Sch. Dist. v. PERB*, 21 N.Y.3d 255, 263 (2013) *quoting Matter of County of Nassau*, 24 PERB ¶ 3029, 3058 (1991); *see also, Spence v. New York State (Department of Transportation)*, 167 A.D.3d 1188, 1190 (3rd Dept., 2018)[2] (hereinafter referred to as "*Spence*").

The record evidence does not support PERB's finding that the discretionary action of DCS and DOB, pursuant to statutory authority, to set the application fee at no-cost was unequivocal under circumstances that bargaining unit employees could possess a reasonable expectation that DCS and DOB would not choose to exercise the discretionary authority to set the application fee at a different cost.[3]

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[2] *Confirming* PERB's decision *Matter of Public Employees Fed'n v. State of New York (Dept. of Transportation)*, 50 PERB ¶ 3004 (2017).

[3] Implicit in the Stipulation of Facts agreement that for a 10-year period State employees were not required to pay application fees for promotion examinations is the fact that, at some point, DCS and DOB choose to reduce to zero the $5 fee otherwise required by Civil Service Law § 50(5)(a)(4). *See*, R.115, 121. As confirmed by PERB within its brief, at some point, DCS "chose to exercise its authority [pursuant to statute] to not charge exam fees." *Respondent PERB Brief*, p.4.

Respectfully, both the plain language of the statute and PERB's own precedent show that the no-cost fee was subject to change, i.e., equivocal, and would prevent unit employees from reasonably believing that DCS and DOB would always exercise its discretion to set the application fee at no-cost.

PERB's application of the standard in this case is knowingly inconsistent with its own precedent. For example, recently, the Appellate Division, Third Department, affirmed a PERB determination that an enforceable practice did not exist under circumstances where an agency policy reserved discretion for the agency to change a benefit. (*Spence*, 167 A.D3d 1188, *confirming Matter of Public Employees Fed'n v. State of New York (Dept. of Transportation)*, 50 PERB ¶ 3004). In *Spence*, the Appellate Division, Third Department, found that "although the vehicle requests were routinely approved, such fact did not create a past practice nor divest [the employer] of its right to exercise its discretion in granting or denying the requests." 167 A.D.3d at 1191. Similarly, in the PERB determination underlying the Third Department's *Spence* decision, which involved use of an employer owned vehicle for commuting to/from work, PERB explained that "when a benefit is granted under an express reservation of right, which remains unchanged by subsequent negotiations, the modification or cessation of the benefit cannot be considered an impermissible change." 50 PERB ¶ 3004, at 3020. PERB continued, in the Board decision, to explain that because the agency

(State of New York Department of Transportation) retained discretion to annually evaluate the benefit, "employees could not have formed a reasonable expectation that they would always be assigned a vehicle" for commuting. 50 PERB at 3020. In *Spence*, discretion was retained based upon an internal agency policy. Here, discretion is vested to DCS based upon a statute which has always defined and delineated the conditions upon which application fees are set for promotion examinations administered by DCS.

Similarly, in *Matter of Public Employees Federation v. PERB*, the Appellate Division, Third Department affirmed a PERB determination which held that despite evidence that a benefit, i.e., permitting release time without charge to leave accruals to attend a picnic, had been in place for many years, an enforceable past practice was not created based upon the agency's retention of the discretion on the subject within an agency policy. 195 A.D.2d 930, 932 (3rd Dept. 1993) *lv. denied* 85 N.Y.2d 661 (1993) *confirming* 25 PERB ¶ 3005 (1992). As a "state-wide policy memorandum" reserved "unfettered discretion to the chief executive officer of each agency to decide whether the planned social activity will be in the agency's best interests," PERB held that a past practice could not exist in favor of the employee's expectation that they were entitled to attend a picnic during work hours without charge to leave accruals. 25 PERB ¶ 3005, 3018. In another 2017 decision, PERB found that an employee "could not have had a reasonable expectation that

he would always be assigned a take home vehicle" based upon an agreement that provided that the employer could "at any time elect to terminate this agreement." *Matter of New York State Correctional Officers Police Benevolent Assoc. v. State of New York (Office of Parks, Recreation and Historic Preservation*, 50 PERB ¶ 3024 (2017).

This Court acknowledged previously that in a past practice case, any "expectation of the continuation of the practice is something that may be presumed from its duration with consideration of the specific circumstances under which the practice has existed." *Town of Islip v. PERB*, 23 N.Y.3d at 492. Accordingly, the specific circumstances are relevant, not just the duration of the purported benefit. Each of the PERB cases cited herein demonstrate that when the specific circumstances under which an individualized practice exists are defined by an express statement that the employer retains authority to change such practice, no reasonable expectation can exist amongst affected employees that the practice will unequivocally continue uninterrupted without the employer choosing to exercise that authority in a different manner. This is logical: when employees are on notice that the employer may change a practice, no reasonable expectation can exist that the practice will continue unchanged. PERB, in this case, acknowledges that bargaining unit employees are on notice, as is everyone, that DCS and DOB have discretionary authority to change the amount of application fees. But, PERB's

determination is then founded upon the Board's conclusion that a statutory provision, unlike policy statements, cannot influence the analysis of whether it is reasonable for bargaining unit employees to forever expect that the DCS and DOB will exercise the legislatively granted authority to change the amount of the fee. Once again, PERB's decision renders the statutory language meaningless while, in other cases, determines policy language of lower magnitude, i.e., agency policy, to be more esteemed in PERB's administrative hierarchy of factual assessments.

The sum of PERB's other precedent demonstrates the consistent fact that bargaining unit employees in this case cannot establish that the no-cost application fee existed so unequivocally under circumstances that they could reasonably expect DCS and DOB would never exercise the discretion granted in Civil Service Law § 50(5) to modify the amount of an examination application fee. However, in this case, PERB's determination irrationally means that employees cannot garner a reasonable expectation of an unequivocal practice when the terms at issue are subject to agency policy statements of retained discretion to act, but, in stark contrast, can garner such a reasonable expectation of an unequivocal practice when the term at issue is subject to express statutory authority stating that an agency is privileged to act.

Both the facts of the inconsistent application of a long-enunciated standard and the corresponding inconsistency of outcomes rendered by PERB cannot

possibly be what the Legislature intended in either the passage of Civil Service Law § 50 or of the Taylor Law. On this point, even the initially assigned ALJ found it implausible for a policy memorandum to be placed at a higher value in setting employees' reasonable expectation than a legislative enactment. *See* R.146-147.[4] PERB's Board disagreed with that finding.

Compounded upon the inherent truth exposed by PERB's other precedent that employees cannot garner such a reasonable expectation of an unequivocal practice to which DCS and DOB would never exercise the statutory discretion to change the amount of the fees charged to apply for promotion examination opportunities, PERB wholly disregarded the hearing evidence. As highlighted by PERB within its brief to this Court, PERB's entire cited evidentiary basis to determine that an *enforceable past practice* exists about application fees is one sentence contained in a Stipulation of Facts presented at the initial hearing before

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[4] The ALJ in the First ALJ Decision opined:

> Finally, the charging parties' claim that they have no knowledge of the State's deliberation is not relevant. It does not alter my finding that, factually, there has been no change in past practice. Here, the State was exercising its discretion pursuant to statute. That this discretion is grounded in statute rather than policy memorandum does not compel a different outcome than [*Matter of Public Employees Fed'n v. PERB*], which I find is not factually distinguishable from these cases.

R.146-147 *citing* the 'picnic case,' 195 A.D.2d 930, 932 (3rd Dept. 1993) *lv. denied* 85 N.Y.2d 661 (1993) affirming 25 PERB ¶ 3005 (1992).

PERB. *See Respondent PERB Brief,* pp.11-12; *see also* R.15, at ¶10.[5] Although PERB repeats this one sentence over and over within its submission, this one sentence constitutes the entirety of the Respondent unions' proof in this case and the sole evidentiary basis upon which PERB claims that its decision is supported by substantial evidence. PERB's brief demonstrates the only proof used to determine whether the unions met the *prima facie* burden was this scant evidentiary underpinning which only addresses the period during which DCS chose not to charge a fee. PERB ignores the full context of the source of the setting of the fee and the hearing evidence about DCS and DOB's practice to determine the appropriate fee amount. Respectfully, even without Civil Service Law § 50 informing bargaining unit employees that DCS and DOB possess authority to modify the amount of the application fee, this one sentence cannot demonstrate that the no-cost fee was so unequivocal to create a reasonable expectation that the fee paid by an individual who chooses to apply for a promotion examination opportunity would never be changed. Rather, this sentence exists only to show that DCS did not assess a fee for a 10-year uninterrupted period.

Finally, PERB's presentation to this Court also omits the voluminous record evidence before it beyond the one sentence which supports its entire determination

[5] The Charging Parties' entire case, across the several improper practice charges, consisted only of the Stipulation of Facts. R.113-129.

of an enforceable past practice. Namely, PERB omits the facts deemed foundational by the initially assigned ALJ who held that DCS and DOB's annual actions, made in accordance with Civil Service Law § 50(5), defined the pertinent past practice resulting in the ALJ's dismissal of each improper practice charge. *See* R.130-147. The ALJ accurately found that the "State's evidence indicates that DCS has either considered or proposed a promotion exam fee for four consecutive years immediately preceding the change alleged in the instant charges, that it has submitted the promotion exam fee proposals to the Division of Budget for three consecutive years immediately preceding the change alleged in the instant charges, and that discussions regarding exam fees in general were engaged in by the State both prior to, and during, the period of 1999-2004." R.146. Based upon that ALJ's review of the complete record, the ALJ opined that "I find that this evidence illustrates enough regularity and consistency, in the time period immediately preceding the alleged change at issue in the charges, to demonstrate that the State's actions in 2008-2009 were consistent with its actions in the past." R.146. Unlike the PERB Board, the ALJ competently reviewed the full record and, in doing so, correctly reasoned that a simple factual statement about the passage of time is not the sole factor upon which PERB must assess its long-enunciated standard regarding the terms of an enforceable past practice.

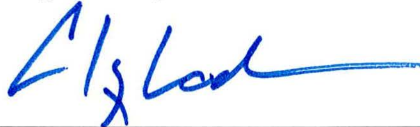
Consistent with the recent findings of the Appellate Division, Third Department, in *Matter of Albany Police Benevolent Assoc. v. PERB*, PERB's determination in this case must be annulled because of PERB's "disregard of the actual hearing testimony." -- N.Y.S.3d --, 2022 N.Y. Slip Op. 01215 (3rd Dept., January 4, 2022). The ALJ's findings in the First Board Decision alone demonstrates that the PERB Board, in this case, engaged in a purposeful disregard of the full hearing testimony and documents.

Respectfully, if the Court first determines that the application fees are mandatorily negotiable, Appellant welcomes this Court's review of PERB's inconsistent implementation of the applicable standard and its failure to base its determination upon the complete record presented in the necessary two-part hearing. Appellant submits that under such review, the two PERB Board decisions must be annulled even if this Court determines that the setting of examination application fees by DCS and DOB is a mandatory subject of negotiation to which the Governor's Office of Employee Relations ("GOER") must now bargain with the individual unions prior to change.

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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CERTIFICATE OF COMPLIANCE

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

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