STATE OF NEW YORK
COURT OF APPEALS

Time requested: 5 minutes
To be argued by: Steven M. Klein

In the Matter of the

STATE OF NEW YORK,

Appellant,

No. APL-2021-00167

-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 RESPONDENT CSEA, INC.

DAREN J. RYLEWICZ
Attorney for Respondent CSEA Inc.
Civil Service Employees Association, Inc.
Box 7125, Capitol Station
143 Washington Avenue
Albany, New York 12224
Phone: (518) 257-1443; Fax: (518) 449-1525
steven.klein@cseainc.org

Steven M. Klein, of counsel
Date Completed: February 9, 2022

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 500.1(f) of the Rules of Practice of the Court of Appeals of the State of New York, the Civil Service Employees Association, Inc., Local 1000, American Federation of State, County and Municipal Employees, American Federation of Labor – Congress of Industrial Affairs ("CSEA"), a Respondent herein, states that it is a labor organization organized as a not-for-profit corporation under the laws of New York State. CSEA is a local of the aforementioned American Federation of State, County and Municipal Employees ("AFSCME") and is a member of the aforementioned American Federation of Labor – Congress of Industrial Affairs ("AFL-CIO"). There is no publicly held corporation that owns any stock in CSEA.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Court Cases

Statutes

Administrative Case

PRELIMINARY STATEMENT

The State of New York ("State" or "Appellant") brought this Article 78 special proceeding seeking judicial review of two Decisions, dated October 15, 2013, and October 23, 2018, respectively, that were issued by the State Public Employment Relations Board ("PERB") in PERB Case Numbers U-29047, *et al.* (R. 5-208) PERB found that a 2009 decision by the State Department of Civil Service ("DCS") to begin charging fees for State workers to take promotional examinations violated Section 209-a.1(d) of the Public Employees Fair Employment Act ("Act") (Civil Service Law §§200 *et seq.*), because the State failed to negotiate in good faith with those employees' unions, including the Respondent Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO ("CSEA"), before unilaterally deciding to charge such fees. (R. 39-40)

CSEA and the two other respondents separately answered the verified petition, all asserting, *inter alia*, that the two PERB Decisions were not arbitrary, capricious, or contrary to law. (R. 592, 599, 617) By Order of Transfer dated March 5, 2019, and entered March 11, 2019, this proceeding was transferred to the Appellate Division, Third Department. (R. 631)

By Memorandum and Judgment decided and entered on May 14, 2020, the Appellate Division dismissed Appellant's petition and confirmed the two PERB Decisions. (R. ii) After the Appellant's motion for reargument and/or leave to appeal

before the Appellate Division was denied, it moved before this Court for leave to appeal, and that motion was granted by this Court by Decision and Order decided and entered on October 14, 2021. (R. i)

CSEA now asks this Court to deny this final appeal and find that the Appellate Division correctly confirmed the two PERB Decisions at issue in this Article 78 proceeding because those Decisions are neither irrational nor contrary to any provision of law.

QUESTION PRESENTED

Q: Did the Appellate Division, Third Department, err by confirming the two PERB Decisions at issue in this proceeding, which found that the State violated Civil Service Law §209–a.1(d) when in 2009 it unilaterally imposed promotional examination fees on State employees without first negotiating with their union representatives?

A: No.

STATEMENT OF THE CASE

On or about March 16, 2009, DCS issued a policy requiring the assessment of fees for applications for all Civil Service promotion/transition examinations announced on or after March 13, 2009, and administered on or after May 30, 2009. (R. 55) This action affected current State employees, and therefore affected CSEA's bargaining unit members, as well as bargaining unit members of other State unions.

In response, CSEA filed with PERB an amended employer improper practice charge on or about April 15, 2009, pursuant to Section 209-a.1(d) of the Act. (R. 57) For a period of at least 39 years prior to this action, CSEA's charge alleged, the State had not required such fees from such State employees. (R. 59) The State answered CSEA's charge on or about May 29, 2009. (R. 60) The matter was consolidated with similar charges filed by District Council 37 ("DC-37") in case number U-29137 and with similar charges filed by the New York State Correctional Officers Police Benevolent Association ("NYSCOPBA") in case number U-29179. (R. 72, 92) The unions and the Governor's Office of Employee Relations ("GOER"), the State's statutory bargaining representative in such matter pursuant to Executive Law §653, signed a stipulation of facts that was marked and admitted at a March 16, 2010, hearing as Joint Exhibit 1. (R. 113, 133)

In a Decision dated December 11, 2012, PERB's Administrative Law Judge ("ALJ") dismissed all the charges in their entirety. (R. 147) The unions and GOER

filed exceptions and cross-exceptions to the ALJ's Decision with PERB. (R. 148-168) In a Decision and Order dated October 15, 2013, PERB reversed the ALJ's decision and found that the unions had proved there was an unequivocal practice by the State of not charging certain State employees fees to take DCS-administered promotional and transitional examinations. PERB further found that because this practice continued uninterrupted for at least ten years, it demonstrated that those employees had a reasonable expectation that the practice would continue, and remanded the case for a determination: (1) whether the unilateral imposition of promotion/transition examination fees is a mandatory subject of negotiation; and (2) whether the unilateral change in practice also applied to the public or whether the impact was solely limited to State employees. (R. 32-39)

A hearing was scheduled for October 21, 2015, to address the three issues raised in PERB's Decision and Order. (R. 172) At the hearing, one witness testified for the State, and it introduced three exhibits into evidence: a bargaining units description chart; a series of charts purporting to show promotion exam applicants for the years 2004 through 2008; and a chart purporting to show promotion exam applicants for the years 2009 through 2014. (R. 393, 474)

In a Decision dated November 22, 2017, the PERB ALJ found that the State had violated Section 209-a.1(d) of the Act when "it unilaterally began requiring employees to pay a fee for promotion/transition examinations." (R. 169, 184) The

ALJ ordered the State to, among other things, cease and desist from requiring unit employees represented by CSEA to pay such fees, and to reimburse any employees who had paid such a fee, with interest. (R. 184)

On or about January 23, 2018, the State filed seven Exceptions to the ALJ's Decision. (R. 186) CSEA and the other two unions filed Responses opposing those Exceptions. (R. 192, 196, 208) In a Decision and Order dated October 23, 2018, PERB denied the State's Exceptions in their entirety and affirmed the Decision of the ALJ. (R. 40)

The State commenced this Article 78 proceeding on November 30, 2018 (R. 5), and the matter was transferred to the Appellate Division on March 5, 2019, by a stipulated Order of Transfer pursuant to CPLR §7804(g). (R. 629-632) In a Memorandum and Judgment decided and entered on May 14, 2020, the Appellate Division confirmed PERB's determinations and dismissed the State's petition. (R. ii)

In confirming PERB's determinations, the Appellate Division noted the Taylor Law requirement that a public employer bargain in good faith with its employees regarding all terms and conditions of employment and, like PERB below, recited this Court's standard for overcoming this presumption which, as was announced in *Matter of City of Watertown v. State of New York Public Employment Relations Board*, 95 N.Y.2d 73, 711 N.Y.S.2d 99 (2000), is that "[t]he presumption in favor of bargaining may be overcome only in special circumstances where the legislative

intent to remove the issue from mandatory bargaining is plain and clear...." *Id.*, at 78, 711 N.Y.S.2d at 101. (R. iv)

The Appellate Division then correctly relied on prior precedent from this Court in holding that if a statute contains no express prohibition on bargaining but, rather, gives the employer discretion over the decision, PERB could find the decision to be mandatorily negotiable, stating that:

> We are unpersuaded by petitioner's contention that, under Civil Service Law § 50(5), the creation of a fee schedule was a prohibited or permissive subject of bargaining. As PERB noted, this statute contains no express prohibition on the bargaining of application fees (see Matter of Board of Educ. of City School Dist. of City of N.Y. v New York State Pub. Empl. Relations Bd., 75 NY2d 660, 668, 670 [1990]; Matter of State of New York [Div. of Military & Naval Affairs] v New York State Pub. Empl. Relations Bd., 187 AD2d at 82). The statute also gives petitioner discretion to charge or abolish fees (see Civil Service Law § 50 [5] [b]) and, therefore, is not "so unequivocal a directive to take certain action that it leaves no room for bargaining" (Matter of Board of Educ. of City School Dist. of City of N.Y. v New York State Pub. Empl. Relations Bd., 75 NY2d at 668). Furthermore, the decision to impose an application fee for promotional and transitional examinations is not an inherent or fundamental policy decision related to petitioner's primary mission (see Matter of New York City Tr. Auth. v New York State Pub. Empl. Relations Bd., 19 NY3d 876, 880 [2012].

(R. v)

It is CSEA's contention that the Appellate Division correctly confirmed PERB's two Decisions, and that the State's appeal should therefore be dismissed.

ARGUMENT

POINT I

THE APPELLATE DIVISION DID NOT ERR IN SUSTAINING PERB'S FINDING THAT PROMOTIONAL EXAMINATION FEES ARE TERMS AND CONDITIONS OF EMPLOYMENT AND, THEREFORE, ARE MANDATORILY NEGOTIABLE.

It is the State's position in this appeal that the imposition of the fees at issue herein is not a mandatory subject of bargaining under the Act. CSEA submits that PERB's two Decisions to the contrary are not irrational or contrary to law. Thus, the Appellate Division's finding that PERB's determination had a rational basis was correct and should be affirmed by this Court.

A court's inquiry when asked to review a PERB determination interpreting and applying the Act is limited to whether that determination is supported by substantial evidence "which, in turn, depends on whether there exists a rational basis in the record as a whole to support the findings upon which such determination is based." *State v. PERB*, ___ A.D.3d ___, 2019 WL 6168294 (3d Dep't 2019), citing *Manhasset UFSD v. PERB*, 61 A.D.3d 1231, 1233-1234, 877 N.Y.S.2d 497, 500 (3d Dep't 2009) (internal quotation marks, brackets and citations omitted).

This Court has further stated that in "cases involving the issue of mandatory or prohibited bargaining subjects under the Civil Service Law, we have defined our review power as a limited one: '[s]o long as PERB's interpretation is legally permissible and so long as there is no breach of constitutional rights and protections,

the courts have no power to substitute another interpretation.' (*Matter of West Irondequoit Teachers Assn. v. Helsby*, 35 N.Y.2d 46, 50, 358 N.Y.S.2d 720, 315 N.E.2d 775.)." *Board of Educ. of the City School Dist. of the City of New York v. PERB*, 75 N.Y.2d 660, 666, 555 N.Y.S.2d 659, 662 (1990).

While it is true that "where the issue is one of statutory interpretation, dependent on discerning legislative intent, judicial review is not so restricted, as statutory construction is the function of the courts, not PERB [*Id.*; citation omitted]," this does not absolutely preclude PERB from interpreting the statute. In *Board of Educ. of the City School Dist. of the City of New York, supra,* for example, PERB out of necessity had to interpret Education Law §2590–g(14) in order to determine if the employer's decision to require financial disclosure was mandatorily negotiable. *Id.* at 663-665, 555 N.Y.S.2d at 660-661. This Court did not hold that PERB lacked the authority to do so; rather, it reviewed PERB's interpretation to determine whether it was "irrational, unreasonable nor affected by any error of law [*Id.* at 671, 555 N.Y.S.2d at 665]," the same standard applied in this case by the Appellate Division.

The State's main argument in this proceeding is that Civil Service Law §50(5) renders the subject of promotion/transition exam fees a non-mandatory or prohibited subject of bargaining and, therefore, such fees are not a term and condition of employment. (Appellant's Brief, Point I) It is CSEA's position, however, that in finding to the contrary, PERB followed its own, well-settled legal precedent that, in

order to find that the Legislature has removed this subject from the realm of collective bargaining, Civil Service Law §50(5) must evince a clear legislative intent to have done so. CSEA further submits that PERB's finding that nothing in Civil Service Law §50(5) preempts bargaining on the subject was not irrational.

Where there are no explicit or implied prohibitions on collective bargaining in a statute, or where the statute leaves a public employer discretion regarding terms and conditions, negotiation over an issue is not automatically preempted and, if it is otherwise a term or condition of employment, it must be bargained. *Newark Valley Central School Dist. v. PERB*, 83 N.Y.2d 315, 610 N.Y.S.2d 134 (1994); *Webster City School Dist. v. PERB*, 75 N.Y.2d 619, 555 N.Y.S.2d 245 (1990); *Board of Educ. of City School Dist. of City of New York v. PERB, supra.*

The State's statutory argument in this matter, based on the language in Civil Service Law §50(5), is misplaced. The State's position is that because the statute affords DCS the discretion to impose the promotional and transitional examination application fees, the decision whether to impose the fees must be either a prohibited or, at a minimum, a non-mandatory subject of bargaining. However, in *Board of Educ. of City School Dist. of City of New York, supra,* this Court was faced with essentially the same argument and held that just because a statute provides discretion to a public employer to take an action that might otherwise be mandatorily negotiable, that grant of discretion does not automatically render the action a

prohibited or non-mandatory subject of negotiation that would relieve a public employer of its bargaining obligations. *Id.* at 668, 555 N.Y.S.2d at 663.

The fact pattern in *Board of Educ. of City School Dist. of City of New York, supra,* is instructive. In 1975, the Legislature amended Education Law §2590-g to permit, but not require, the New York City School Board ("Board") to obtain certain financial disclosures from its officers and employees. After doing nothing for nine years, the Board invoked its authority under the law and adopted regulations that required certain Board employees to submit detailed annual financial disclosure statements. Some employees were also required to undergo in-depth background investigations and consent to hold the City harmless for all damages arising out of the investigation, save for those resulting from a breach of confidentiality. The failure to comply could result in termination or denial of appointment, assignment, or promotion. *Id.* at 663-665, 555 N.Y.S.2d at 660-661.

The unions for the affected employees then challenged the Board's unilateral implementation of the regulations through the filing of improper employer practice charges with PERB, which ultimately held that nothing in Education Law §2590-g, including its grant of discretionary power to the Board, rendered the imposition of the new financial disclosure rules either a prohibited or non-mandatory subject of bargaining. This Court agreed, finding PERB's analysis to be rational. *Id.* at 671, 555 N.Y.S.2d at 665.

In the instant matter, PERB found that Civil Service Law §50(5) evinces no preemption from the requirement to bargain in good faith. (R. 48) As PERB's ALJ found, the statute is broad, lacks any clear deadlines, requires no collaboration with other entities, and contains no remedy. (R. 180) In sum, the language is clearly permissive, not mandatory. Therefore, the State's argument that Civil Service Law §50(5) automatically renders the negotiability of promotional and transitional examination fees to be non-mandatory was properly and rationally rejected by PERB.

Moreover, the record clearly shows that the underlying topic, fees that current State employees would have to pay to take a DCS promotional or transitional examination, would otherwise be a term and condition of employment and, therefore, mandatorily negotiable. The Act mandates that public employers and their employees' union negotiate in good faith over terms and conditions of employment. Civil Service Law §204. The Act further defines terms and conditions of employment to include salaries and wages. Civil Service Law §201.4.

PERB has long held that the provision by an employer of a financial benefit to bargaining unit employees is a term and condition of employment. Thus, for example, a demand that the employer pay for education or training courses is mandatorily negotiable. *Board of Educ. of Union Free School Dist. No. 3, Town of Huntington v. Assoc. Teachers of Huntington*, 30 N.Y.2d 122, 331 N.Y.S.2d 17 (1972).

Because "PERB is accorded deference in matters falling within its area of expertise such as cases involving the issue of mandatory or prohibited bargaining subject", PERB's finding that the negotiability of the promotional and transitional examination fees assessed by the State is not preempted by statute should not be disturbed by this Court. *State v. PERB,* 2019 WL 6168294, *supra*, citing *Town of Islip v. PERB*, 23 N.Y.3d 482, 492, 991 N.Y.S.2d 583, 589 (2014) (internal quotation marks and citations omitted).

POINT II

THE STATE'S ARGUMENT THAT PERB LACKED JURISDICTION OVER DCS IS WITHOUT MERIT.

The State also claims that PERB was somehow divested of jurisdiction over this matter because DCS was not acting as the employer when it announced imposition of the promotional and transitional examination application fees in January 2009. (Appellant's Brief, p. 43) It is CSEA's position that this argument should be rejected because it ignores the fact the record shows the State acted improperly through DCS. Additionally, the State never raised this argument to either of the PERB ALJs who held fact-finding hearings and initially ruled on all of the State's defenses and, therefore, it was not preserved for appellate review by PERB or this Court.

The State's claim ignores several undisputed facts. First, CSEA's amended improper practice charge clearly alleges that it was the State, as the employer, and not DCS, that was legally responsible for violating the Act through the unilateral imposition of the at-issue examination fees. (R. 57) That PERB chose to put DCS in parenthesis in its caption on the Decisions in this proceeding (R. 32, 40) is of no legal relevance – the employer named in CSEA's charge was the State.

Second, DCS is part of State government and, therefore, is an agent of the State that can certainly subject the State to liability under the Act. Sections 5 and 7 of the Civil Service Law state that DCS is a part of State government, that its head is the

President of the Civil Service Commission, and that the President of the Civil Service Commission is appointed by the Governor. Moreover, the State agency representing the State in this proceeding, GOER, is the same State agency that represented the State at PERB. Statutorily, GOER, an Executive Branch agency, is the State's representative for all labor relations functions, including representation in all proceedings under the Act. See Executive Law §653. GOER's appearance is further evidence that it was the State who was and is the employer in this matter.

To the extent that the State's argument is seen as challenging PERB's remedial order in this proceeding, it is well-settled that a remedy fashioned by PERB for an improper practice will be upheld if it is reasonable. *CSEA v. PERB,* 2 A.D.3d 1197, 1198, 770 N.Y.S.2d 197, 199 (3d Dep't 2003); *see also City of Albany v. Helsby*, 29 N.Y.2d 433, 328 N.Y.S.2d 658 (1972). It is only where a reviewing court determines that unique circumstances cause PERB's remedial order to be unreasonable that the court may intervene and not enforce the order. *Manhasset UFSD v. PERB, supra* at 1235, 877 N.Y.S.2d at 501.

Finally, as PERB noted in its 2018 Decision, the State never raised this argument to the ALJ in the evidentiary hearings held in 2015. (R. 52) Thus, PERB's rejection of this argument in its second Decision was not irrational.

POINT III

THE STATE'S FINAL ARGUMENT PROVIDES NO BASIS FOR OVERTURNING EITHER PERB DECISION.

The State's final argument, which encompasses two sentences at the end of its Brief (Appellant's Brief, p. 44), is that the unions could have demanded impact bargaining over the unilateral imposition of the fees at issue in this proceeding but did not. This is certainly factually correct, but this does not constitute a legal claim for vacating PERB's two Decisions. There is simply no requirement in the Act that a union demand impact bargaining as a condition precedent to filing a charge alleging a unilateral change in a term and condition of employment. *County of Nassau*, 35 PERB ¶ 4556 (2002), *aff'd* 35 PERB ¶3036 (2002). Therefore, this argument should be rejected by the Court.

CONCLUSION

For all the reasons stated in this Brief, the State's appeal should be denied, and the May 14, 2020, Memorandum and Judgment of the Appellate Division should be affirmed.

Dated: February 9, 2022
Albany, New York

Respectfully submitted,

DAREN J. RYLEWICZ
Attorney for Respondent CSEA, Inc.

By: 

Steven M. Klein, of counsel
Civil Service Employees Association, Inc.
Box 7125, Capitol Station
143 Washington Avenue
Albany, New York 12224
(518) 257-1443
steven.klein@cseainc.org

PL/20-0962/SMK/ks/Brief.body#1049492

CERTIFICATE OF COMPLIANCE

Pursuant to 22 NYCRR 202.8-b, the foregoing brief was prepared on a computer. A proportionally spaced typeface was used as follows:

Name of typeface: Times New Roman
Point size: 14
Line Spacing: Double

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 authorities, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is 3365.

STEVEN M. KLEIN

PL/20-0962/SMK/ac/Cert. of Compliance #1050782

STATE OF NEW YORK
COURT OF APPEALS

In the Matter of the Application of the

STATE OF NEW YORK,

Appellant,

AFFIDAVIT OF SERVICE

-against-

No. APL-2021-00167

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.

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

Kathy Smail, being duly sworn, deposes and says: I am employed by the Civil Service Employees Association, Legal Department, I am not a party to this action, and I am over 18 years of age. On the 10th day of February, 2022, I served three true copies of the BRIEF FOR RESPONDENT CSEA, INC. on behalf of Respondent CSEA by mailing same in a sealed envelope, with postage prepaid thereon, in a post office or official depository of the U. S. Postal Service within the

State of New York, addressed to the last known address of the addressee(s) as indicated below:

Clay J. Lodovice, Esq.
Attorney for Appellant
Governor's Office of
Employee Relations
Agency Building 2, 13th Flr.
2 Empire State Plaza
Albany, New York 12223-1250

Kevin P. Hickey, Esq.
Attorney for Respondent NYSCOPBA
Lippes Mathias, LLP
54 State Street, Suite 1001
Albany, New York 12207

Ellen M. Mitchell, Esq.
and John Wirenius
Attorney for Respondents PERB
NYS Public Employment
Relations Board
Empire State Plaza,
Agency Building 2
Floors 18 & 20
P.O. Box 2074
Albany, New York 12220-0074

Erica Gray-Nelson, Esq.
Attorney for Respondent DC-37
District Council 37-AFSCME, AFL-CIO
Local 1359
125 Barclay Street
New York, New York 10007-2179

Kathy Smail

Sworn to before me this
10th day of February, 2022.

Notary Public -- State of New York

PL/20-0962/SMK/ks/Affid.Service #1052347

THOMAS M. MORELLI
NOTARY PUBLIC, STATE OF NEW YORK
NO. 02MO6371419
QUALIFIED IN QUEENS COUNTY
COMMISSION EXPIRES FEBRUARY 26, 2022