To be Argued by: Erica C. Gray-Nelson
(*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

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 ON BEHALF OF RESPONDENT DISTRICT COUNCIL 37, LOCAL 1359, AFSCME, AFL-CIO

ROBIN ROACH
GENERAL COUNSEL
Attorney for Respondent
District Council 37, AFSCME, AFL-CIO
125 Barclay Street
New York, New York 10007
Tel: (212) 815-1450
Fax: (212) 815-1497
Dated: February 8, 2022

Erica C. Gray-Nelson
Senior Assistant General Counsel
of Counsel

DISCLOSURE STATEMENT

Pursuant to Rule 500.1(f) of the Court's Rules of Practice, District Council 37, American Federation of State, County and Municipal Employees, AFL-CIO ("DC37"), an amalgam of 62 local unions, is a labor organization organized as a not-for-profit corporation under the laws of the State of New York. There is no publicly held corporation that owns any stock in DC37.

STATUS OF PENDING RELATED LITIGATION

There is no known related pending litigation.

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PRELIMINARY STATEMENT

Respondent District Council 37, AFSCME, AFL-CIO, Local 1359 ("DC37" or "the Union") submits this Brief in response to Appellant State of New York ("State") appeal of the Memorandum and Order of the Appellate Division, Third Department, Docket No. 528783 ("Decision").

In the Decision, the Third Department found substantial evidence exists to support the Public Employment Relations Board's ("PERB") determination that Appellant State engaged in an improper practice when it failed to negotiate with Respondent DC37 prior to unilaterally imposing promotional or transitional examinations fees on Respondent's incumbent bargaining unit members.

In this appeal before the Court, Appellant argues that the "crux" of this appeal is whether in affirming PERB's determination, the Third Department effectively held that Civil Service Law, Article 14, the Public Employees' Fair Employment Act ("the Taylor Law"), repealed the statutory authority vested in the New York State Department of Civil Service ("DCS"), pursuant to Civil Service Law § 50 (5) (b), to establish, waive or otherwise abolish application fees for promotional examinations. Respondent DC37 submits that the Third Department, neither directly nor indirectly, made such determination; in addition, the Decision did not effectively nullify DCS's discretionary authority to set, waive or abolish fees.

In the proceedings below, the Record on Appeal[1] established that for many years Respondent's bargaining unit members, incumbent public sector employees of Appellant State, were not required to pay an application fee for promotional or transition examinations, an economic benefit for bargaining unit members. PERB agreed, issuing an order to Appellant State to negotiate over the fees and to make Respondent's bargaining unit members whole, accordingly.

The Appellate Division, Third Department affirmed PERB's determination that the at-issue fees were a term and condition of employment, and were mandatorily negotiable. Moreover, the statutory construct of Civil Service Law, Section 50, which provides DCS with discretionary authority to charge or abolish fees and, as such, does not preclude bargaining over said fees. As such, the Third Department found no error in PERB's determination. Respondent submits that this Court should so find and dismiss the instant appeal.

[1] Citations to the Record on Appeal are hereinafter cited to "R. ___".

QUESTIONS PRESENTED

1. Did the Appellate Division, Third Department correctly find, pursuant to the Public Employees' Fair Employment Act ("Taylor Law"), that PERB was well within its authority to determine that promotion and transition examination fees, established pursuant to Civil Service Law § 50(5), constituted a term and condition of employment and were a mandatory subject of bargaining, over which the Governor's Office of Employee Relations had an obligation to bargain?

A1. Yes

2. Did the Appellate Division, Third Department, correctly find that DCS's discretionary authority, pursuant to Civil Service Law § 50(5), to charge, waive or abolish fees did not prohibit collective negotiations over promotion or transition examination application fees for incumbent employees?

A2. Yes

3. Did the Appellate Division, Third Department correctly hold that PERB's jurisdiction was proper and that there was substantial evidence to support the determination that Appellant engaged in an improper practice when it failed to negotiate with Respondent union over the imposition of promotion or transition examination fees?

A3. Yes

STATEMENT OF THE CASE

Respondent DC37 is an amalgam of sixty-two (62) labor unions that represent approximately 120,000 public-sector workers in addition to approximately 17,000 members employed in the nonprofit sector.[2] DC37 is a public employee organization within the meaning of Section 201(5) of the Taylor Law. Local 1359 is an affiliate of DC37 with approximately 300 bargaining unit members employed with Appellant State in its Division of Housing and Community Renewal. (R. 231). Respondent DC37 is the certified bargaining agent for Local 1359 bargaining unit members. (R. 133).

Appellant State of New York is a public employer within the meaning of Section 201(6)(a) of the Taylor Law. (R. 134). Pursuant to Executive Law § 650, *et seq.*, the Governor's Office of Employee Relations ("GOER") is the statutory collective bargaining agent for Appellant State. (R. 134).

The salient facts underlying the parties' dispute are undisputed. In a General Information Bulletin Number 09-01, dated March 16, 2009, DCS' Director of Staffing Services announced fees for the processing of applications for promotion/transition examinations and began to assess said fees. (R. 134). It is undisputed that for a period of at least ten (10) years, Appellant did not require

[2] Since the original filing date of the improper practice petition in 2009, DC37 has expanded its membership to include members employed in the nonprofit sector.

State employees to pay an application fee for a State promotion or transition examination. (R. 134). Appellant did not seek to negotiate with Respondent DC37 over the promotion/transition examination fees. (R. 134).

Hence, the filing of the at-issue improper practice charge with PERB. (R. 229-234), which after a protracted litigation process, has led to the instant appeal before this Court. The Record provides more details regarding the proceedings below. Note, however, PERB' second Board Decision and Order ("Second Board Decision"), which was the basis of Appellant's appeal to the Appellant Division, Third Department, expressly found no "plain" and "clear" legislative intent to remove the subject fees from mandatory negotiation. (R. 50). Furthermore, the promotion/transition fees imposed upon Respondent DC37 members were a term and condition of employment and thus were mandatorily negotiable. (R. 50).

Nevertheless, Appellant raises several questions of law on appeal to be decided by this Court. Appellant asks: 1) whether the Third Department incorrectly decided that the uniform schedule of examination application fees were mandatorily negotiable; 2) whether the Third Department incorrectly determined promotional and transitional examination fees are a term and condition of employment that are mandatorily negotiable; and, 3) whether the Third Department's Decision failed to decide this issue of whether PERB's statutory authority to address improper practices also grants it the authority to control and

enjoin the actions of the Department of Civil Service ("DCS"), with the approval of the Director of the Budget ("DOB"). (Appellant Brief, p.6).[3]

Respondent DC37 asserts that Appellant's grounds for appealing the Appellant Division, Third Department's Decision affirming PERB's findings in the proceedings below are without merit and Appellant's questions should be answered in the negative.

[3] Citations to the Appellant Brief are hereinafter cited to "App. Br. p.___".

RELEVANT STATUTES

New York Civil Service Law, § 50 (5):

> (a) Every 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. . . . .
>
> (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 county, as the case may be, or a regional commission or personnel officer, pursuant to governmental 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 . . . .

New York Civil Service Law, § 200:

> The legislature of the state of New York declares that it is the public policy of the state and the purpose of this act to promote harmonious and cooperative relationships between government and its employees and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government. These policies are best effectuated by (a) granting to public employees the right of organization and representation, (b) requiring the state, local governments and other political subdivisions to negotiate with, and enter into written agreements with employee organizations representing public employees which have been certified or recognized, (c) encouraging such public

> employers and such employee organizations to agree upon procedures for resolving disputes, (d) creating a public employment relations board to assist in resolving disputes between public employees and public employers, and (e) continuing the prohibition against strikes by public employees and providing remedies for violations of such prohibition.

New York Civil Service Law, § 201(4):

> The term "terms and conditions of employment" means salaries, wages, hours and other terms and conditions of employment . . . .

New York Civil Service Law, § 201(5):

> The term "employee organization" means an organization of any kind having as its primary purpose the improvement of terms and conditions of employment of public employees . . . .

New York Civil Service Law, 201(6)(a):

> The term "government" or "public employer" means (i) the state of New York, (ii) a county, city, town, village or any other political subdivision or civil division of the state . . . .

New York Civil Service Law, § 204 (3):

> For the purpose of this article, to negotiate collectively is the performance of the mutual obligation of the public employer and a recognized or certified employee organization to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party . . . .

New York Civil Service Law, § 205 (5) (d):

> To establish procedures for the prevention of improper employer and employee organization practices as provided in section two hundred nine-a of this article, and to issue a decision and order directing an offending party to cease and desist from any improper practice, and to take such affirmative action as will effectuate the policies of this article . . . , including but not limited to the reinstatement of employees with or without back pay; provided . . . ; provided further that, without limiting in any way the board's general power to take affirmative action, including the provision to make whole relief, the board's power to address employer violations of cease and desist orders issued pursuant to this section in connection with charges of unfair labor practices under paragraph (d) of subdivision one of section two hundred nine-a of this article shall include, to the extent the board deems appropriate, the authority to make employees whole for the loss of pay and/or benefits resulting from the violation of the cease and desist order and the underlying unfair labor practice by providing that any agreement between the parties be given retroactive effect to the date on which the unfair labor practice was found to have commenced and by providing for appropriate interest from that date . . . .
>
> New York Civil Service Law, § 209-a (1) (d):
>
> It shall be an improper practice for a public employer or its agents deliberately . . . (d) to refuse to negotiate in good faith with the duly recognized or certified representatives of its public employees; . . . .

New York Executive Law, § 653:

> The director shall assist the governor with regard to 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 public employees' fair employment act, as amended, including, without limitation, conducting collective negotiations with recognized or certified employee organizations and executing agreements reached pursuant thereto. The director shall have such other and further powers and duties as may from time to time be conferred upon him by law and as the governor may from time to time request. . . . .

ARGUMENT

POINT I

THE THIRD DEPARTMENT DID NOT ERR WHEN IT AFFIRMED PERB'S DETERMINATION THAT PROMOTION/TRANSITION EXAMINATION FEES FOR INCUMBENT BARGAINING UNIT MEMBERS WERE MANDATORILY NEGOTIABLE

PERB's Authority under the Taylor Law to determine whether a subject is a mandatory subject of bargaining is well established. The Legislature has expressly shrouded PERB with the authority to prevent improper practices, to issue orders to the offending public employer to cease said improper practice and to take affirmative action that will effectuate its policies. *See N.Y. Civ. Serv. Law* § 205 (5)(d). It is further within PERB's authority to determine what constitutes a term and condition of employment as defined under Civil Service Law (*CSL*) § 201(4). *See generally* N.Y. *Civ. Serv. Law* §§ 200*, et seq.*

The Taylor Law further provides that public employers are obligated to negotiate in good faith with certified employee organizations concerning wages, salaries, hours, and other terms and conditions of employment. See *N.Y. Civ. Serv. Law* §§ 204 (3) and 201 (4).

Appellant disagrees that fees for promotion/transition examinations constitute a term and condition of employment, and that they are mandatorily negotiable. *(App.*

Br. p.24). Furthermore, Appellant argues that, even assuming that negotiation over the subject fees was not prohibited by the language of *CSL* §50, it was nevertheless non-mandatory. This is so because PERB did not establish the basis upon which the fees constituted a term and condition of employment such as "salaries, wages, hours and other terms and conditions of employment".

This is an inaccurate representation of the Record below. In the Second Board Decision, PERB expressly established that since the represented State employees did not have to pay promotion/transition fees for a period of at least ten years, these fees constituted an economic benefit. (R. 46-47). Therefore, said benefit constituted a term and condition of employment and, as such, was mandatorily negotiable. (R. 46-47).

The State's past practice of providing promotion/transition examinations to represented employees at no cost constituted a benefit, very much like other recognized benefits and, as such, was a mandatory subject of bargaining. *See e.g., Onondaga-Madison BOCES,* 13 ¶ PERB 3015 (1980); *aff'd,* 82 A.D.2d 691 (N.Y. App. Div. 3d Dep't Oct. 15, 1981); *Cty. Of Schenectady*, 18 PERB ¶ 3038 (1985); *Local 891, Int'l Union of Operating Eng. v. Bd. of Ed. of the City SD of City of N.Y.*, 44 PERB ¶ 3003, *aff'd*, 44 PERB ¶ 7007 (2011), *aff'd*, *City of New York v. PERB*, 103 A.D.3d 145 (NY. App. Div. 3d Dep't Dec. 27, 2012); *Town of Islip v. PERB*, 23 N.Y.3d 482 (2014).

In an opinion issued by New York PERB Counsel, Counsel opined that, as distinguished from open-competitive examination fees, which are open to the general public, "[c]urrent employment is a requirement for participation in a promotional examination and, as such, the fee is related to the employees' employment." Opinion of Counsel, 22 PERB ¶ 5005 (Aug. 30, 1989). Counsel further stated that imposing such a fee "affects the terms and conditions of employment of existing unit members." *Id.* Therefore, said fee would be mandatorily negotiable. *See id.* While Counsel's advisory opinion is not binding law, it is very persuasive with respect to this issue and is consistent with other analogous cases decided by the Board. *See e.g. City of New York v. Sergeants' Benevolent Assoc. of the City of New York,* et al., 9 PERB ¶ 3076 (1976) (finding that the City violated its duty to bargain in good faith when it unilaterally discontinued free transportation for uniformed police officers on its ferries); *County of Westchester*, 27 PERB 4560 (1994) (*stating* that the employer must negotiate decision to impose a fee on employees who participate in its deferred compensation plan).

Appellant additionally states that the "employment" of each individual applicant who applied for the prospective examination at the time was "aspirational" and yet to be attained. (*See App. Br.* p.25). It is undisputed that the affected bargaining unit members were incumbent public employees seeking promotional opportunities within Appellant State employer, who previously were not required to

pay a fee for promotion/transition examinations. (R. 134). Moreover, as PERB found, the fact that Appellant State may also charge non-bargaining unit members a fee for examinations did not relieve it of its obligation to negotiate over the fees for bargaining unit members. (R. 50-51).

Thus, Appellant's unilateral change to this practice violated the law. *See State of New York v. CSEA, Local 1000,* 13 PERB ¶ 3099 (1980) (stating, in a matter concerning an open-competitive exam fee, "if unit employees alone had been exempted from the fee and the government unilaterally eliminated that exemption", the fee would have been mandatorily negotiable). As the Board further explained in *CSEA, Local 1000,* a public employer cannot unilaterally withdraw a special privilege that had been afforded to its employees. *See id.*

Of relevance to the instant appeal, the subject of the waiver of the fees is similar to the tax withholding issue in *Matter of Westchester County Correction Officers Benevolent Assoc. Inc.*, 33 PERB ¶ 3025 (2000). In this case, for a period of seven years the County employer did not withhold income taxes from the bi-weekly wages and salaries of correction officers. Pursuant to a letter from the Internal Revenue Service (IRS), the County had the discretion to withhold income taxes bi-weekly or to issue bi-weekly paychecks without withholding. *See Westchester County Corr. Officers Bene. Assoc.* at 33 PERB at ¶ 3068.

Without negotiating with charging party, the County unilaterally began

withholding income taxes on a bi-weekly basis. *See id.* PERB held that the County's duty to bargain prior to the change in practice was not preempted by the IRS opinion letter, and further "the exercise of discretion is generally subject to a duty to bargain." *See id.* at ¶ 3069.

Appellant's insistence that it had no obligation to bargain over the decision to rescind previously waived application fees for promotion examinations, despite solid case law to the contrary, is concerning. This stance is in direct contravention to the Taylor Law's clear mandate that "a public employer is required to bargain in good faith with its employees regarding all terms and conditions of employment." *Matter of the City of Watertown v. N.Y. State Pub. Empl. Rels. Bd*, 95 N.Y.2d 73, 78 (2000); *Matter of Patrolmen's Benevolent Ass'n. of the City of N.Y., Inc. v. New York State Pub. Empl. Relations Bd.*, 175 A.D.3d 1703, 1704 (2019).

Therefore, PERB rightly found and as affirmed by the Third Department that the at-issue fees constituted a term and condition of employment, and were mandatorily negotiable. Furthermore, as previously stated, the waiver of the fees for a period of ten years was an economic benefit, which the State was not privileged to unilaterally withdraw without bargaining. (R. v-vi).

POINT II

CIVIL SERVICE LAW SECTION 50(5) DOES NOT PROHIBIT COLLECTIVE BARGAINING OVER THE AT-ISSUE FEES

There is no clear legislative intent to exempt the subject of examination fees from collective negotiation. *CSL* § 50(5)(a) provides that "[e]very applicant for examination shall pay a fee to the civil service department or appropriate municipal commission at a time determined by it." It further sets forth a number of criteria on which the fee amount may be determined. However, *CSL* § 50(5)(b) further provides that notwithstanding § 50(5)(a), "the civil service department, subject to the approval of the director of budget . . . 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." *N.Y. Civ. Serv. Law* § 50(5)(b),

Appellant insists that the relevant provisions of *CSL* § 50 prohibit the topic of application fees from collective bargaining, or alternatively render it a non-mandatory subject of negotiations. (*App. Br*. p.26). However, PERB has defined prohibited subjects as those "forbidden by statute or otherwise from being embodied in a collective bargaining agreement." *Matter of Village of Lynbrook v. PERB*, 48 N.Y.2d 398, 402 (1979). It must be "plainly" and "clearly" evident that the Legislature intended to remove a subject that would otherwise be mandatorily

negotiable from bargaining. *See State of New York (Unified Court System)*, 28 PERB ¶ 3044 (1995).

Appellant opines that this issue is a matter of statutory interpretation. (*App. Br.* p.9). However, ignores the clear and plain language of *CSL* § 50, which does not contain any language prohibiting the subject of examination fees from bargaining. *See generally N.Y. Civ. Serv. Law* § 50.

It is true that the language of the statute need not be explicit to remove a subject from bargaining, *Webster Cent. Sch. Dist. v. PERB*, 75 N.Y.2d 619 (1990); however, the implied intent to remove a subject from mandatory negotiation must be "plain and clear" or "inescapably implicit" in the statute. *Syracuse Teachers Assoc. Inc. v. Bd. of Educ.*, 35 N.Y. 2d 743, 744 (1974). This Court reiterated this principle in *City of Watertown*. Here, the Court stated:

> The presumption in favor of bargaining may only be overcome in special circumstances where the legislative intent to remove the issue from mandatory bargaining is plain and clear, or where the specific statutory directive leaves no room for negotiation (internal citations omitted).

95 N.Y.2d 73, 78-79. The statutory language of *CSL* § 50(5) is unambiguous and nothing therein, implicitly or explicitly, evinces an intent by the Legislature to remove the subject of fees from collective bargaining.

Indeed, in the Second Board Decision, PERB noted that *CSL* § 50 does not contain any express prohibition on bargaining. (R. 48). It goes on to explain that

the statute does not provide a "so unequivocal directive to take certain action that it leaves no room for bargaining." (R. 48). Moreover, PERB found that the language of *CSL* § 50 gives DCS "wide discretion" to waive fees, establish a schedule of fees different from that which is required by subsection 5(a), or abolish them based on specific classes of positions or types of exams or candidates. (R. 49) *See also* N.Y. *Civ. Serv. Law* § 50(5)(b). Therefore, the fact that the language of § 50(5)(a) states that every applicant for examination shall pay a fee does not remove the subject from mandatory bargaining where § 50(5)(b) gives the State the authority to abolish them all together. "The existence of the discretion is what gives the State the ability to bargain over the fees." (R. 49)

The Third Department further explained:

> 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 N.Y.2d 660, 668, 670, 555 N.Y.S.2d 659, 554 N.E.2d 1247 [1990]; Matter of State of New York [Div. of Military & Naval Affairs] v. New York Pub. Empl. Relations Bd., 187 A.D.2d at 82, 592 N.Y.S.2d 847). 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 N.Y.2d at 668, 555 N.Y.S.2d 659, 554 N.E.2d 1247). 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 N.Y.3d 876, 880, 948 N.Y.S.2d 842, 972 N.E.2d 83 [2012]. Accordingly, we find no error in PERB's determination that the application fee was a mandatory subject of negotiation. (R. v).

Noting additionally that, "'The 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'" (*quoting Matter of the City of Watertown,* 95 N.Y.2d 73, 78-79) (emphasis added). Appellant has not demonstrated any such special circumstances that would require the parties to remove the subject of promotion examination fees from mandatory bargaining.

Appellant nonetheless cites to *State of New York (Unified Court System)*, 28 PERB ¶ 3044, 3103 (1995), in which PERB found that a Report of the Fiscal Committees of the New York State Legislature on the Executive Budget articulated the Legislature's intent to vest the Chief Administrator with the unfettered discretion to implement the use of mechanical recording equipment, removing this issue from compulsory bargaining; but, still argues simultaneously that such express declaration of intent is not necessary to remove a subject from negotiability as "legislative intent may also be implied". (*App. Br.* p.22, *citing Webster Cent. Sch. Dist. v. PERB,* 75 N.Y.2d 619, 627).

Though, Appellant acknowledges that "Any implied intention prohibiting a subject from bargaining must be 'plain and clear' or 'inescapably implicit' in the statute." (*App. Br.* p.22, *quoting Syracuse Teachers Ass'n., Inc. v. Bd. of Educ.*, 35 N.Y.2d 743, 744 (1974); *Cohoes City Sch. Dist. v. Cohoes Teachers Ass'n*, 40 N.Y.2d 774, 778 (1976)). However, notwithstanding Appellant's acknowledgement that the intent to remove a subject from bargaining must be "plain and clear", Appellant hangs its hope on the legal principle that a statutory language does not need to be "express" to remove a subject from mandatory bargaining. (*App. Br*. pp.22-23.)

As previously noted, the language of Civil Service Law § 50 embodies no such "plain and clear" or "inescapably implicit" intent to remove the subject of the at-issue fees from collective bargaining. As such, the Taylor Law is triggered. *See generally*, *Matter of the City of Watertown*, 95 N.Y.2d 73; *Matter of Patrolmen's Benevolent Assn. of the City of N.Y., Inc.*, 175 A.D.3d 1703. As this Court has previously held, unless a statute is clear a subject is prohibited from or is a permissive subject of bargaining, a public employer is obligated to engage in mandatory bargaining with its represented employees. *See Matter of Bd. of Educ. of City Sch. Dist. of City of N.Y. v. New York State Pub. Empl. Relations Bd.*, 75 N.Y.2d 660, 668, 670, 555 N.Y.S.2d 659, 554 N.E.2d 1247 (1990); *Matter of State*

of New York [Div. of Military & Naval Affairs] v. New York Pub. Empl. Relations Bd., 187 A.D.2d at 82, 592 N.Y.S.2d 847 (1993)).

Alternatively, Appellant argues, even if certain terms and conditions of employment are not mandatory, they may be permissive subjects of negotiation, and an employer cannot be compelled to negotiate over them. (*App. Br*. p.23, *citing Bd. of Educ. of City Sch. Dist. of the City of New York v. PERB*, 75 N.Y.2d 660, 669, *Webster Cent. Sch. Dist.*, 75 N.Y.2d at 627)). Since PERB has already determined below and the Third Department has agreed that the subject fees were a mandatory subject of bargaining (R. v), there is no need to address Appellant's contention that it was not compelled to negotiate over a permissive subject of bargaining.

POINT III

THE THIRD DEPARTMENT CORRECTLY HELD THAT JURISDICTION WAS PROPER AND PERB ACTED WITHIN ITS AUTHORITY TO COMPEL BARGAINING OVER THE PROMOTION/TRANSITION FEES

It appears Appellant takes the position that if some other entity or arm of the State has the authority to, for example, set fees or modify benefits then it is relieved of its own obligation to bargain over said new fees or over a change to benefits previously enjoyed by covered public bargaining unit members. (*App. Br*. p.43). Appellant argues that PERB's acted outside of its jurisdiction "when it

administratively reviewed the actions of DCS, as approved by the DOB . . . ." (*App. Br*. p.43).

This argument misrepresents the basic principle which formed the basis for the improper practice charges brought before PERB. Respondent DC37 and the Co-Respondents brought an improper practice charge in the proceedings below to challenge *GOER's* failure, as the authorized collective bargaining agent for the State, to negotiate over the rescission of an economic benefit. (R. 229).

DCS and DOB's actions regarding the setting of application fees for promotional examinations were not at issue in the proceedings below. Appellant's failure to bargain over the fees prior to imposing them on Respondent DC37 bargaining unit members *was*.

Appellant has concluded that PERB's mandate that the State as the public employer for Respondent Union had an obligation to negotiate the change to a benefit previously enjoyed by its bargaining unit members means that GOER in its capacity as the bargaining agent for the State now has authority to set, waive, or abolish fees in DCS's stead. (*App. Br*. p.39).

Nowhere in PERB's decisions in the proceedings below compels such a conclusion. The Second Board Decision simply stated that *CSL* § 50(5) does not remove the subject fees from collective negotiations. (R. 48). Collective negotiations could result in any likely agreements between negotiating parties; for

example, the uniform schedule of fees could remain unchanged, and the State could offer comparable benefits in other areas, or could agree to subsidize the costs of the fees. This is the nature of collective bargaining.

Thus, by directing Appellant to negotiate through GOER with public employee unions over newly established promotional examination fees does not in any way alter or subvert the authority of DCS to set said fees.

The State further argues that DCS was not acting as the "employer" for the purposes of determining "future promotional" opportunities. (*App. Br.* p.43). In its Second Decision, PERB rejected this argument noting:

> In its exceptions, the State makes the assertion, for the first time, that the charges must be dismissed because the DCS was not acting as the employer when it issued Bulletin 09-01. Having not raised this argument to the ALJ, the State may not raise the issue [ ] for the first time on exceptions.

(R. 52). This Court should similarly reject this argument on appeal. Alternatively, Appellant waived the defense of lack of personal jurisdiction with respect to DCS when it did not raise it in the first instance. *See McGowan v. Hoffmeister,* 15 A.D.3d 297, (1st Dep't 2005).

This Court should find that the Appellate Division, Third Department applied the correct standard of review when it determined there was substantial evidence in the record to support a finding that Appellant engaged in improper practice.

CONCLUSION

For the foregoing reasons, the Appellate Division, Third Department's Decision finding no error in PERB's determination must be affirmed and the instant appeal should be dismissed in its entirety.

Dated: February 8, 2022
New York, New York

Respectfully submitted,

ROBIN ROACH
Attorney for Respondent
District Council 37, AFSCME, AFL-CIO

By: Erica Gray-Nelson
Erica C. Gray-Nelson
EGray-Nelson@dc37.net
125 Barclay Street
New York, New York 10007
Tel: (212) 815-1450
Fax: (212) 815-1497

CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR § 500.13(c) that the foregoing Brief was prepared on a computer using Microsoft Word. 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, and any authorized addendum containing statutes, rules, regulations, etc., is 5166.

Dated: February 8, 2022
New York, New York

Respectfully submitted,

ROBIN ROACH
Attorney for Respondent
District Council 37, AFSCME, AFL-CIO

By: Erica Gray-Nelson
Erica C. Gray-Nelson
EGray-Nelson@dc37.net
125 Barclay Street
New York, New York 10007
Tel: (212) 815-1450
Fax: (212) 815-1497

COURT OF APPEALS OF THE STATE OF NEW YORK

AFFIDAVIT OF SERVICE

159840

APL-2021-00167

Appellant:	**STATE OF NEW YORK**
	-vs-
Respondent:	**NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD, ET AL**

STATE OF NEW YORK
COUNTY OF ALBANY ss.:

Corey Doyle, the undersigned, being duly sworn, deposes and says: that the deponent is not a party to this action, is over 18 years of age and resides in the STATE OF NEW YORK.

On **02/10/2022** at **1:19 PM**, deponent served the within **3 COPIES OF A BRIEF ON BEHALF OF RESPONDENT DISTRICT COUNCIL 37, LOCAL 1359, AFSCME, AFL-CIO, DISCLOSURE STATEMENT, STATUS OF PENDING RELATED LITIGATION, TABLE OF CONTENTS, TABLE OF CASES AND AUTHORITIES, PRELIMINARY STATEMENT, QUESTIONS PRESENTED, STATEMENT OF THE CASE, RELEVANT STATUTES, ARGUMENT AND CERTIFICATE OF COMPLIANCE** on **NEW YORK STATE GOVERNOR'S OFFICE OF EMPLOYEE RELATIONS** at **2 Empire State Plaza, 12th Floor , Albany, NY 12223** in the manner indicated below:

By delivering a true copy of each to and leaving with **KENDALL JOYCE, ASSISTANT COUNSEL** who stated he/she is duly authorized to accept legal documents.

A description of the **Respondent**, or other person served on behalf of the **Respondent** is as follows:

Sex	Color of skin/race	Color of hair	Age(Approx)	Height(Approx)	Weight(Approx)
Female	**White**	**Brown**	**36-43**	**5"6-5"8**	**125-140 lbs**
Other Features:					

Sworn to and subscribed before me on 02/11/2022

Notary Public

[ ] Victoria Nelson
Notary Public, State of NY
No. 01NB6376548
Qualified in Albany County
Commission expires 06/11/2022

[ ]McKayla Wilkinson
Notary Public, State of New York
No. 01WI6406416
Qualified in Schenectady County
Commission expires 3/30/24

[ ] Kerry Gunner
Notary Public, State of NY
No. 01GU5038710
Qualified in Albany County
Commission expires 02/06/2023

KRISTEN SMITH
Notary Public, State of New York
No. 01SM6357988
Qualified in Albany County
Commission Expires May 1, 2025

X

Corey Doyle
Lightning Legal Services, LLC
P. O. Box 9132
Albany, NY 12209
518.463.1049

District Council 37, AFSCME, AFL-CIO
125 Barclay Street
New York, NY 10007

COURT OF APPEALS OF THE STATE OF NEW YORK

AFFIDAVIT OF SERVICE

159841

APL-2021-00167

Appellant:	**STATE OF NEW YORK**
	-vs-
Respondent:	**NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD, ET AL**

STATE OF NEW YORK
COUNTY OF ALBANY ss.:

Corey Doyle, the undersigned, being duly sworn, deposes and says: that the deponent is not a party to this action, is over 18 years of age and resides in the STATE OF NEW YORK.

On **02/10/2022** at **1:26 PM**, deponent served the within **3 COPIES OF A BRIEF ON BEHALF OF RESPONDENT DISTRICT COUNCIL 37, LOCAL 1359, AFSCME, AFL-CIO, DISCLOSURE STATEMENT, STATUS OF PENDING RELATED LITIGATION, TABLE OF CONTENTS, TABLE OF CASES AND AUTHORITIES, PRELIMINARY STATEMENT, QUESTIONS PRESENTED, STATEMENT OF THE CASE, RELEVANT STATUTES, ARGUMENT AND CERTIFICATE OF COMPLIANCE** on **NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD** at **2 Empire State Plaza, 20th Floor , Albany, NY 12220** in the manner indicated below:

By delivering a true copy of each to and leaving with **ELLEN M. MITCHELL, DEPUTY GENERAL COUNSEL** who stated he/she is duly authorized to accept legal documents.

A description of the **Respondent**, or other person served on behalf of the **Respondent** is as follows:

Sex	Color of skin/race	Color of hair	Age(Approx)	Height(Approx)	Weight(Approx)
Female	**White**	**Brown**	**48-56**	**5Ft4In-5Ft5In**	**165-180 lbs**
Other Features:					

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Notary Public

[ ] Victoria Nelson
Notary Public, State of NY
No. 01NE6376548
Qualified in Albany County
Commission expires 06/11/2022

[ ]McKayla Wilkinson
Notary Public, State of New York
No. 01WI6406416
Qualified in Schenectady County
Commission expires 3/30/24

[ ] Kerry Gunner
Notary Public, State of NY
No. 01GU5038710
Qualified in Albany County
Commission expires 02/06/2023

KRISTEN SMITH
Notary Public, State of New York
No. 01SM6357988
Qualified in Albany County
Commission Expires May 1, 2025

X_____
Corey Doyle
Lightning Legal Services, LLC
P. O. Box 9132
Albany, NY 12209
518.463.1049

District Council 37, AFSCME, AFL-CIO
125 Barclay Street
New York, NY 10007

COURT OF APPEALS OF THE STATE OF NEW YORK

AFFIDAVIT OF SERVICE

159842

APL-2021-00167

Appellant:	**STATE OF NEW YORK**
	-vs-
Respondent:	**NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD, ET AL**

STATE OF NEW YORK
COUNTY OF ALBANY ss.:

Corey Doyle, the undersigned, being duly sworn, deposes and says: that the deponent is not a party to this action, is over 18 years of age and resides in the STATE OF NEW YORK.

On **02/10/2022** at **12:03 PM**, deponent served the within **3 COPIES OF A BRIEF ON BEHALF OF RESPONDENT DISTRICT COUNCIL 37, LOCAL 1359, AFSCME, AFL-CIO, DISCLOSURE STATEMENT, STATUS OF PENDING RELATED LITIGATION, TABLE OF CONTENTS, TABLE OF CASES AND AUTHORITIES, PRELIMINARY STATEMENT, QUESTIONS PRESENTED, STATEMENT OF THE CASE, RELEVANT STATUTES, ARGUMENT AND CERTIFICATE OF COMPLIANCE** on **CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.** at **143 Washington Avenue, Albany, NY 12210** in the manner indicated below:

By delivering a true copy of each to and leaving with **SCOTT LIEBERMAN, SENIOR COUNSEL** who stated he/she is duly authorized to accept legal documents.

A description of the **Respondent**, or other person served on behalf of the **Respondent** is as follows:

Sex	Color of skin/race	Color of hair	Age(Approx)	Height(Approx)	Weight(Approx)
Male	**White**	**Brown**	**52-59**	**5Ft6In-5Ft8In**	**155-165 lbs**
Other Features:					

Sworn to and subscribed before me on 02/11/2022

Notary Public

[ ] Victoria Nelson
Notary Public, State of NY
No. 01NE6376548
Qualified in Albany County
Commission expires 06/11/2022

[ ]McKayla Wilkinson
Notary Public, State of New York
No. 01WI6406416
Qualified in Schenectady County
Commission expires 3/30/24

[ ] Kerry Gunner
Notary Public, State of NY
No. 01GU5038710
Qualified in Albany County
Commission expires 02/06/2023

KRISTEN SMITH
Notary Public, State of New York
No. 01SM6357988
Qualified in Albany County
Commission Expires May 1, 2025

X_____
Corey Doyle
Lightning Legal Services, LLC
P. O. Box 9132
Albany, NY 12209
518.463.1049

District Council 37, AFSCME, AFL-CIO
125 Barclay Street
New York, NY 10007

COURT OF APPEALS OF THE STATE OF NEW YORK

AFFIDAVIT OF SERVICE

159843

APL-2021-00167

Appellant:	**STATE OF NEW YORK**
	-vs-
Respondent:	**NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD, ET AL**

STATE OF NEW YORK
COUNTY OF ALBANY ss.:

Corey Doyle, the undersigned, being duly sworn, deposes and says: that the deponent is not a party to this action, is over 18 years of age and resides in the STATE OF NEW YORK.

On **02/10/2022** at **2:36 PM**, deponent served the within **3 COPIES OF A BRIEF ON BEHALF OF RESPONDENT DISTRICT COUNCIL 37, LOCAL 1359, AFSCME, AFL-CIO, DISCLOSURE STATEMENT, STATUS OF PENDING RELATED LITIGATION, TABLE OF CONTENTS, TABLE OF CASES AND AUTHORITIES, PRELIMINARY STATEMENT, QUESTIONS PRESENTED, STATEMENT OF THE CASE, RELEVANT STATUTES, ARGUMENT AND CERTIFICATE OF COMPLIANCE** on **LIPPES MATHIAS LLP** at **54 State Street, Suite 1001, Albany, NY 12207** in the manner indicated below:

By delivering a true copy of each to and leaving with **SHAKKIRA PIPER, LEGAL ASSISTANT** who stated he/she is duly authorized to accept legal documents.

A description of the **Respondent**, or other person served on behalf of the **Respondent** is as follows:

Sex	Color of skin/race	Color of hair	Age(Approx)	Height(Approx)	Weight(Approx)
Female	**Brown**	**Black**	**32-38**	**5Ft3In-5Ft5In**	**110 -120lbs**
Other Features:					

Sworn to and subscribed before me on 02/11/2022

Notary Public

[ ] Victoria Nelson
Notary Public, State of NY
No. 01NE6376548
Qualified in Albany County
Commission expires 06/11/2022

[ ]McKayla Wilkinson
Notary Public, State of New York
No. 01WI6406416
Qualified in Schenectady County
Commission expires 3/30/24

[ ] Kerry Gunner
Notary Public, State of NY
No. 01GU5038710
Qualified in Albany County
Commission expires 02/06/2023

KRISTEN SMITH
Notary Public, State of New York
No. 01SM6357988
Qualified in Albany County
Commission Expires May 1, 2025

X_____

Corey Doyle
Lightning Legal Services, LLC
P. O. Box 9132
Albany, NY 12209
518.463.1049

District Council 37, AFSCME, AFL-CIO
125 Barclay Street
New York, NY 10007