To be argued by:
Kevin P. Hickey, Esq.
(Time requested: 30 minutes)

APL No. APL-2021-00167
Appellate Division, Third Department Docket No. 528783
Albany County Clerk's Index No. 07226-18

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 RESPONDENT NEW YORK STATE CORRECTIONAL OFFICERS AND POLICE BENEVOLENT ASSOCIATION, INC.

Lippes Mathia LLP
Kevin P. Hickey, Esq.
Attorneys for Respondent
New York State Correctional Officers and
Police Benevolent Association, Inc.
54 State Street, Suite 1001
Albany, New York 12207
Tel: (518) 462-0110
khickey@lippes.com

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 New York State Correctional Officers and Police Benevolent Association, Inc. ("NYSCOPBA"), a Respondent herein, states that it is a labor organization organized as a not-for-profit corporation under the laws of New York State. NYSCOPBA has no parents, subsidiaries, or affiliates. There is no publicly held corporation that owns any stock in NYSCOPBA.

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PRELIMINARY STATEMENT

The Respondent, New York State Correctional Officers and Police Benevolent Association, Inc. ("NYSCOPBA"), represents members of the Security Services Unit ("SSU") employed by the State of New York (State) (R. 114, 133). This Brief is respectfully submitted on behalf of Respondent NYSCOPBA.

The issue in this appeal is whether the Legislature intended to prohibit the State of New York and its employees from bargaining over the issue of promotional and transitional examination fees when it gave discretionary authority to decide such fees to the Department of Civil Service (DCS) and the Division of Budget (DOB) in Civil Service Law §50(5)(b). Respondent NYSCOPBA contends that it did not, and the Appellate Division, Third Department unanimously agreed.

For at least ten years[1] prior to March 16, 2009, State employees, including the represented members of the Respondents, were not charged a fee in connection with promotional/transitional examinations (R.115, 134). On March 16, 2009, DCS issued General Information Bulletin No. 09-01 (R. 55-56), announcing that fees would be charged for all promotional/transitional exams announced on or after March 13, 2009 and administered after May 30, 2009. The imposition of this new

[1] Remarkably, the record contains no proof as to whether DCS *ever* imposed a fee for promotional/transitional examinations on State employees since the authority to waive examination fees for State employees existed even before enactment of CSL § 50(5) in 1958. L. 1958, c. 790.

examination fee changed the State's long-established policy and practice of allowing State employees the right to sit for such promotional/transitional examinations free of charge.

As a result, each of the named Respondents commenced an improper practice charge against the "State of New York" [through its representative, the Governor's Office of Employee Relations (GOER)] for unilaterally taking such action without negotiating the matter as required by the Public Employees' Fair Employment Act (Civil Service Law § 200 *et seq.* known as the "Taylor Law") and specifically, Civil Service Law § 209-a.1(d).

The New York State Public Employment Relations Board ("PERB" or the "Board") consolidated the separate charges for hearing and issued a final administrative Decision and Order of PERB on October 23, 2018 (R. 40). In its October 23, 2018 Decision and Order, PERB cited directly to this Court's decision in the *Matter of City of Watertown v. State of New York Public Employment Relations Board*, 95 NY2d 73, 78 (2000) in explaining the standard of review to be applied in this situation:

> "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, or where a specific statutory directive leaves no room for negotiation.
>
> To be sure, where a statute clearly forecloses negotiation of a particular subject, that subject may be deemed a prohibited subject of bargaining. Alternatively, if the Legislature has manifested an intention to commit

> a matter to the discretion of the public employer, negotiation is permissive but not mandatory. Generally, however, bargaining is mandatory even for a subject treated by statute unless the statute clearly preempts the entire subject matter or the demand to bargain diminishes or merely restates the statutory benefits. Absent clear evidence that the Legislature intended otherwise, the presumption is that all terms and conditions of employment are subject to mandatory bargaining."

(R. 47-48 internal citations and quotations omitted in original).

After properly applying the *City of Watertown* standard to the pending issues, PERB found "that the subject of examination fees [in CSL § 50] is neither a prohibited nor a nonmandatory subject of bargaining (R.47)." PERB continued:

> "CSL § 50 contains no express prohibition on bargaining. Nor is the statute 'so unequivocal a directive to take certain action that it leaves no room for bargaining.' Nor does the statutory language expressly vest the employer with such unilateral discretion to act with respect to the subject of fees as to preempt or foreclose negotiation."

(R. 48 internal footnotes and citations omitted).

Dissatisfied with PERB's ruling, the State commenced an Article 78 proceeding on November 30, 2018 challenging the Board's decision (R.5, 8) which was then transferred on March 5, 2019, by a stipulated Order of Transfer, to the Appellate Division, Third Department, pursuant to CPLR § 7804(g) (R. 629-632).

In its Memorandum and Judgment decided and entered on May 14, 2020, the Appellate Division recited the Taylor Law requirement that a public employer bargain in good faith with its employees regarding all terms and conditions of employment and recited the same *City of Watertown* standard for overcoming this

presumption, *supra* ("[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"). *State v. New York State Public Relations Board*, 183 A.D.3d 1061 (3d Dept 2020) (R. at pages ii through vi). The Appellate Division then reviewed the applicable statute and confirmed PERB's determination:

> "As PERB noted, [CSL § 50] 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)

The State claims that both PERB and the Appellate Division erred in their respective rulings by not adopting the State's belief that the discretionary power to charge examination fees to DCS and DOB under CSL § 50 strictly prohibits the State from bargaining on the issue. As a result, the primary question on this appeal is whether the discretion given to DCS and DOB in CSL § 50(5)(B) establishes a

legislative intent "*to remove the issue from mandatory bargaining*" such that it leaves "*no room for negotiation*." *Watertown*, 95 NY2d 73, 78.

Attempting to meet its burden, the State contends that the true purpose of CSL § 50(5)(b) was to grant to DCS and DOB the exclusive authority to determine examination fees such that the State was prospectively excluded from Taylor Law obligations to negotiate the issue. The State then relies on statutory language that merely establishes that DCS and DOB became the designated executive agencies to discretionarily determine whether to collect fees, or to waive/abolish them completely.

The Legislature did not mandate that DCS impose any promotional examination fees under CSL § 50(5)(b). In fact, there is no evidence that DCS imposed a fee on promotional examinations at any time- dating possibly as far back as prior to 1958 (R.115, 134). Instead, the authority to determine whether to impose a fee is equivocal and discretionary in nature- as DCS may elect to waive examination fees, abolish them for specific positions or types of examinations or candidates, or create a different fee structure than that prescribed in subsection 50(5)(a), subject to the approval of the director of budget within DOB. More importantly, the statute contains no requirement that DCS/DOB exercise their discretion exclusively or without any outside negotiation or discussion. Nor does the statute contain express language prohibiting the State, as a public employer, or

GOER as the State's bargaining agent, from bargaining with public sector unions prior to imposing such fees. Therefore, the State cannot rely on this legislative silence as proof of the Legislature's intent "to remove the issue from mandatory bargaining" such that it leaves "no room for negotiation."

The same holds true with respect to any subsequent legislative intent. When compared to ensuing legislative action, the Legislature's goals regarding bargaining rights are evident. The clear progression and inter-relationship among the relevant statutes that followed the enactment of CSL § 50(5), as explained in more detail in the Statement of the Case, *infra*, compels a completely different understanding than that suggested by the State regarding the impact of the Appellate Division's decision.

While the Civil Service Law was silent with respect to bargaining rights when § 50 was passed in 1958, the Legislature added the Taylor Law negotiation obligations to the Civil Service Law less than ten years later as Article 14 (L. 1967, 392). By doing so, the Legislature expressed its strong support for bargaining rights for public employees vis-à-vis their public employers – thereby leaving no doubt that the Legislature wanted public employees to have an important voice with respect to matters affecting all terms and conditions of their employment.

The Legislature didn't stop there. Within just two years of enacting the Taylor Law, the Legislature decided that it was important to not only reaffirm the policy considerations previously codified, but also felt compelled to protect the product of

such negotiations. Executive § 650 *et seq.* As a result, the Legislature created the Governor's Office of Employee Relations (L. 1969, c. 491) empowering its director to "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 [the Taylor Law], as amended, including, without limitation, conducting collective negotiations with recognized or certified employee organizations and executing agreements reached pursuant thereto..." Executive Law 653. Once an agreement is reached between GOER and the public employees' representatives, it becomes binding against the State and, under Executive Law § 654, GOER has the power over the actions of other officers, departments, boards, commissions or agencies to enforce the terms of the agreement. L. 1969, c. 491 and Executive Law § 654.

In his Memorandum to Governor Nelson A. Rockefeller commenting on this legislation, the Hon. Louis J. Lefkowitz, former Attorney General of New York, stated that he found "no legal objection" to the legislation that "details the power and jurisdiction of the Director of Employee Relations, including, among others, supervisory power over the *Budget Director* and the *Civil Service Commission* as to certain stated areas of control over civil service employees…(emphasis added)" (L. 1969, c. 491).

What resulted from this incremental legislation was a clearly developed policy favoring mandatory negotiations over the terms and conditions of employment for public employers and public employees. In accordance with this longstanding policy, PERB then ruled, and the Appellate Division affirmed, "that the exemption from the [application] fee is an economic benefit that is a term and condition of employment for the State's employees" and was a mandatory subject of negotiation (R. 52 and v.).

The State claims, *ipse dixit*, that the practical effect of the Appellate Division's decision is that GOER will now replace DCS and DOB as the operative legal entity for establishing, waiving, or otherwise abolishing promotional examination fees for State employees. This argument completely misunderstands the respective rulings and the improper practice charges in this matter.

The Respondents brought an improper practice charge on the grounds that prior to 2009, State employees were given the benefit of taking a promotional examination, without charge. It was an improper practice of the State, as a public employer, and specifically, GOER, as the negotiating arm of the State, to not negotiate prior to the State rescinding this prior benefit. The requirement that GOER engage in negotiations prior to the implementation of a fee does not undermine the authority of DCS and DOB under CSL §50. To the extent the discretionary authority given to DCS and DOB is arguably "vitiated" by GOER's separate obligation to

bargain on behalf of the State- as the State claims would be the "new" result- such minimal impact was the intention and natural consequence of the important policy goals of both the Taylor Law and Executive Law §§ 650 *et. seq*.

Accordingly, the respective decisions from PERB and the Appellate Division should be affirmed.

QUESTIONS PRESENTED

Q: Did the Appellate Division, Third Department, err by deciding that the State violated Civil Service Law § 209–a (1)(d) when it imposed promotional examination fees on public employees without first negotiating with their representatives?

A: No.

STATEMENT OF THE CASE

A. Civil Service Law § 50 (5)(b)

Enacted in 1958, subdivision (5) of Civil Service Law § 50 was a small part of a comprehensive amendment and recodification of the former Civil Service Law of 1909. *See* L. 1958, c. 790. The relevant language of CSL § 50(5) is as follows:

> (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 ...

Prior to 1958, the Civil Service Commission was permitted to waive examination fees in promotional examinations, only. *Id.* By adding CSL § 50(5), the Legislature broadened the discretionary authority even further. Subject to the approval of DOB, DCS could either receive the examination fee as set forth under CSL 50(5)(a)- or in the alternative, DCS had the general authority to waive, abolish, or establish a different fee schedule under CSL 50(5)(b). The statutory language contains no express prohibition on collective bargaining with respect to any of these broad discretionary powers.

At that time, the Public Employees' Fair Employment Act (known as the "Taylor Law") and the Governor's Office of Employee Relations (GOER) did not yet exist. Compare, L. 1967, c. 392 and L. 1969, c. 491. As a result, the general

discretion to determine whether to impose examination fees defaulted to DCS, subject to approval from DOB.

B. The Evolution of Bargaining Rights

Within a decade after enacting CSL § 50, the Legislature added the Taylor Law, as Article 14 to the Civil Service Law, thereby formally recognizing collective bargaining rights in New York State. See L. 1967, c. 392 and Civil Service Law § 200 *et seq*. Effective September 1, 1967, the Taylor Law was the consequence of recommendations put forward by Governor Nelson A. Rockefeller's Committee on Public Employee Relations, headed by Professor George W. Taylor ("Taylor Committee"). See *Association of Surrogates and Supreme Court Reporters Within the City of New York*, 78 N.Y.2d 143 (1991).

Governor Rockefeller requested that the Taylor Committee 'make legislative proposals for protecting the public against the disruption of vital public services by illegal strikes, while at the same time protecting the rights of public employees.' *Id* at 152. The Governor noted during approval of the legislation that "he had been prompted to appoint the committee because the need for a change in the law had been 'unquestionably demonstrated over the years by the utter inadequacy of the Condon–Wadlin law [L.1947, ch. 391] to resolve paralyzing strikes and threats of strikes by public employees." *Id*.

This Court further recognized the Taylor Committee's conclusion that it:

> " 'is elementary justice to assure public employees, who are estopped from using the strike, that they have the right to negotiate collectively' (Taylor Committee Report, at 20.) The Committee found that public employee strikes "have often been caused by a feeling of futility on the part of public employees because of the absence of other means by which they could participate in the determination of the terms and conditions of their employment," and that in "some instances their inability to form or join organizations which are assured of standing as recognized representatives has contributed to this sense of futility and has led them into strike action." (Taylor Committee Report, at 42.) To solve this problem, the Committee recommended that public employees be permitted to organize and negotiate with public employers."

Id. At 153.

Through the Taylor Law, the Legislature specifically "declare[d] 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." *See* Civil Service Law § 200 *et seq*. The Legislature further elaborated that "[t]hese policies are best effectuated by (a) granting to public employees the right of organization and representation, (b) requiring the state…to negotiate with, and enter into written agreements with employee organizations representing public employees… (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… and (e)

continuing the prohibition against strikes by public employees and providing remedies for violations of such prohibition. *Id.* § 200.

Further addressing the concerns of the Taylor Committee, the Taylor Law also made it an improper practice for a public employer to refuse to negotiate in good faith with the duly recognized or certified representatives of its public employees with respect to the terms and conditions of their employment. *Id.* § 204(2) and 209-a(1)(d).

In 1969, the Legislature then clarified the division of duties resulting from the Taylor Law by adding the Governor's Office of Employee Relations (GOER) as the bargaining agent for the State executive agencies. L. 1969, c. 491 and Executive Law § 650 *et seq.* The Legislature "reaffirm[ed] its policy to promote harmonious and cooperative relationships between the state and its employees to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of state government; and recognizes that furtherance of such policy requires creation in the executive department of an office of employee relations with staff and skills requisite to act as the governor's agent in conducting collective negotiations, to assure the proper implementation and administration of agreements reached pursuant to such negotiations, and to assist the governor and direct and coordinate the state's efforts with regard to the state's powers and duties under the public employees' fair employment act." Executive Law § 650.

The 1969 legislation also empowered GOER's director to "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 [the Taylor Law], as amended, including, without limitation, conducting collective negotiations with recognized or certified employee organizations and executing agreements reached pursuant thereto..." Executive Law § 653.

Once an agreement is reached between GOER and the public employees' representatives, it becomes binding against the State and under Executive Law § 654, GOER obtained the power to direct other officers, departments, boards, commissions or agencies to take certain action as follows:

> a. Notwithstanding any inconsistent provision of law, any state officer, department, board, commission or agency, shall, upon written request from the director, take such administrative or other action as is necessary to implement and administer the provisions of any binding agreement between the state and one or more employee organizations representing state employees pursuant to the public employees' fair employment act, as amended. Such action may include, without limitation, the adoption, repeal or amendment of rules, regulations or other procedures. Without prejudice to the rights of an employee organization under such agreement, the opinion of the attorney general shall be conclusive in resolving any disagreement between the director and any such officer, department, board, commission or agency regarding any legal question arising out of such a request, including, without limitation, whether the agreement is binding, whether compliance with the request is necessary to implement or administer the agreement and whether compliance with the request is legally possible.

> b. All state officers, departments, boards, commissions and agencies are authorized and directed to provide such other and further assistance, services and data as may be necessary to allow the director properly to carry out his functions, powers and duties.

In his Memorandum to Governor Nelson A. Rockefeller commenting on this legislation, the Hon. Louis J. Lefkowitz, former Attorney General of New York, stated that he found "no legal objection" to the legislation that "details the power and jurisdiction of the Director of Employee Relations, including, among others, *supervisory power over the Budget Director and the Civil Service Commission* as to certain stated areas of control over civil service employees…(emphasis added)" (L. 1969, c. 491).

When compared to the limited bargaining rights and prior draconian treatment of public employees under the Condon-Wadlin Act (L.1947, ch. 391), the Taylor Law's passage resulted in a deeply established policy favoring bargaining rights for public employees regarding terms and conditions of employment. These bargaining rights led to the creation of GOER and its respective duties- including, the power over DCS and DOB with respect to matters relating to negotiated terms and conditions of employment.

In essence, the legislatively created Taylor Law introduced detailed bargaining practices that apply as an important check and balance against one-sided employment actions. This appeal attempts to unravel these well-crafted procedures

and return to the unilaterally imposed employment practices of the Condon-Wadlin era.

C. The Taylor Law and CSL § 50(5) can harmoniously coexist

The State, more specifically, GOER, argues that the imposition of Taylor Law bargaining rights with respect to promotional examination fees under CSL 50(5) would in some manner invade DCS's responsibilities with respect to the merit and fitness system in New York.

Notwithstanding the State's quest to exaggerate the rulings in this matter, the Appellate Division and PERB did not "vitiate the plainly worded legal authority of" CSL § 50(5)(b) and newly designate GOER as the only operative entity that stands in DCS's stead to establish, waive, or otherwise abolish application fees. To be clear, through the Taylor Law, the Legislature did impose bargaining rights that did not exist at the time CSL 50(5)(b) was enacted as explained, *supra*. With these bargaining rights came GOER's duties under Executive Law § 650 *et. seq* to negotiate in good faith with employees' representatives regarding terms and conditions of employment. It is this legislative structure that created the obligation, not an overstep by PERB. But the State's claim that GOER is now required to stand in DCS's stead is founded on the mistaken belief that the Taylor Law bargaining rights cannot coexist with DCS's general discretionary authority to implement fees.

The Appellate Division and PERB have not encroached on DCS's powers with respect to the merit and fitness system as the State wants to believe. This attempted distraction is a mixture of hyperbole and subterfuge. The goals of the merit and fitness system are clearly defined under the New York State Constitution. "Appointments and promotions in the civil service of the state and all of the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as practicable, by *examination* which, as far as practicable, *shall be competitive*." New York State Const. Art V, § 6 [emphasis added].

The relevant decisions in this matter focused solely on whether the discretionary authority to collect an *administrative fee* for promotional and transitional exams under CSL § 50 (5) is subject to bargaining. The Appellate Division and PERB opinions dictate and imply nothing with respect to the *competitive* aspects of examination and the merit and fitness system. Those portions of the Civil Service Law remain completely undisturbed by the rulings in this case. The ability to pay a monetary fee has no relationship to the qualifications of the candidate for the position sought, nor does it have any bearing on the subject matter of the examination for which the fee is charged. The State surely does not mean to imply that the payment of an administrative processing fee somehow relates to the "merit and fitness" of a potential applicant. The Appellate Division and PERB

simply followed longstanding precedent and ruled that since the State is a public employer, when one arm of that public employer decides to unilaterally impose fees that directly alter the terms and conditions of employment for public employees, the negotiation arm of the State, GOER, must first bargain with represented employees on that issue.

CSL § 50(5)(b) does not prohibit bargaining and there is nothing unique about the broad and general discretionary power to impose examination fees that should entitle it to some exemption from the requirements of the Taylor Law. Accordingly, the impact the Taylor Law has on CSL§ 50(5) is no different or more arduous than any other situation where bargaining rights have been determined to be present. Nor is the relationship between and among DCS, DOB, and GOER, any different than that contemplated when GOER was created. See, L. 1969, c. 491 and Executive Law § 654. The attempt to place these different branches of the same public employer into separate silos is just a veiled effort to deny public employees their bargaining rights.

Stated differently, when public employers seek to unilaterally impose new terms and conditions of employment on their employees, the Taylor Law clearly and unequivocally requires that such matters be negotiated. This bargaining obligation is not inherently at odds with the CSL § 50 discretionary powers to waive or abolish examination fees. Through bargaining, the general purpose of both statutes is

maintained, the potential for arbitrary imposition of fees on current employees is removed, and the process becomes more fair, just, and efficient. Simultaneously, the State's discretionary powers are unharmed and the "harmonious and cooperative relationship" of public employers and public employees is accomplished. Indeed, many of the policy concerns that would have been previously considered by DCS would be necessarily assisted through the bargaining process with GOER (e.g. balancing the State's interest in collecting revenue against the economic loss and the potential disincentive a fee might have to public employees who might seek a promotion).

Appellants argue as if the options are binary- either DCS (subject to DOB approval) has the power to unilaterally impose fees, or the power is completely transferred to GOER and the bargaining process. This misconception completely ignores the powers and duties of GOER as the bargaining agent of the governor [L. 1969, c. 491 and Executive Law § 650 *et seq.*], as well as the bargaining agreements that would likely result from negotiations. Among the many options DCS/DOB can continue to waive the fee for State employees, seek to impose the fee while GOER negotiates a comparable benefit or subsidy, or abolish the fee altogether.

ARGUMENT

POINT I

THE STATE VIOLATED THE TAYLOR LAW BY FAILING TO BARGAIN WITH ITS EMPLOYEES REGARDING PROMOTIONAL EXAMINATION FEES

The State's appeal acknowledges that the Taylor Law expresses the "strong and sweeping policy of the state" favoring negotiation of terms and conditions of employment. *City of Watertown v. New York State Public Employment Relations Board*, 95 NY2d 73 (2000), quoting *Matter of Cohoes City School District v. Cohoes Teachers Association*, 40 NY2d 774 (1976); *State of New York (Department of Civil Service),* 51 PERB ¶ 3027 (2018).

The State also concedes that this presumption in support of bargaining can only be overcome where there is a "specific statutory provision" indicating a clear and unmistakable legislative or public policy prohibiting negotiations. *Board of Education of Union Free School District No. 3 of Town of Huntington v. Associated Teachers of Huntington, Inc*., 30 NY2d 122, 130 (1972); *Matter of Board of Education of Catskill Central School District*, 130 AD3d 1287 (3d Dept 2015), *lv to app den* 26 NY3d 912 (2015).

CSL 50(5)(b) contains no express prohibition on bargaining. Although it is correct that an "express declaration" of legislative intent regarding negotiability is not required, Court of Appeals precedent is clear that any implied intention

prohibiting a subject from bargaining must be "plain and clear" or "inescapably implicit" in the statute. *Matter of Webster Cent. School Dist. v Public Empl. Relations Bd. of State of NY*, 75 NY2d 619 (1990) ("Webster"), citing, *Syracuse Teachers Assn. v Board of Educ.*, 35 NY2d 743, 744; *Matter of Cohoes City School Dist. v Cohoes Teachers Assn.*, 40 NY2d 774, 778; see also, *Matter of City School Dist. v New York State Pub. Employment Relations Bd.*, 74 NY2d 395. Civil Service Law § 50(5)

A review of Civil Service Law 50(5) reveals that while this statute does generally authorize DCS the discretion to collect a fee for examinations, it does not establish a plain and clear intent to forbid, prohibit, or otherwise remove promotional examination fees as a topic for negotiation. Absent clear evidence that the Legislature intended otherwise in drafting a statute, the presumption is that all terms and conditions of employment are subject to mandatory bargaining. *See generally, In the Matter of the Application of Poughkeepsie Professional Fire Fighters' Association, Local 596, I.A.F.F., AFL-CIO-CLC,* 36 PERB 7016 (Sup Ct. Alb Co. 2003), and cited cases *(Matter of Board of Educ. v. New York State Pub. Empl. Relations Bd.,* 75 NY2d 660 (1990), *City of Watertown, supra).*

A. Civil Service Law §50 does not prohibit collective bargaining for promotional examination fees

The State's appeal relies heavily on its belief that Civil Service Law § 50(5) strictly prohibits its bargaining agent, GOER, from bargaining on the issue of examination fees.

The applicable language of Civil Service Law § 50(5) is as follows:

> (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 ...

In order for the State to prevail, it must overcome the very difficult burden clearly stated in *City of Watertown*, *supra* at 78-79, and properly cited by PERB in its decision:

> "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, or where a specific statutory directive leaves no room for negotiation.

> To be sure, where a statute clearly forecloses negotiation of a particular subject, that subject may be deemed a prohibited subject of bargaining. Alternatively, if the Legislature has manifested an intention to commit a matter to the discretion of the public employer, negotiation is permissive but not mandatory. Generally, however, bargaining is mandatory even for a subject treated by statute unless the statute clearly preempts the entire subject matter or the demand to bargain diminishes or merely restates the statutory benefits. Absent clear evidence that the Legislature intended otherwise, the presumption is that all terms and conditions of employment are subject to mandatory bargaining."

(R. 47-48 internal citations and quotations omitted in original).

The Appellate Division, Third Department reviewed the statute and rejected the State's argument:

> "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]

CSL §50(5) makes no mention, whatsoever, regarding bargaining rights. Since the statute is silent on bargaining rights, the State must instead claim that the Legislature impliedly intended to prohibit such rights by giving exclusive authority to determine examination fees to DCS and DOB. CSL §50(5)(b) merely says that DCS (subject to DOB approval) "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." At most, DCS (with DOB's consent) was given the general discretionary authority to waive or abolish fees. But the issue here is whether the Legislature intended to forever exclude or prohibit any external persuasion in that decision- including legislatively required bargaining rights under the Taylor Law. The very fact that DCS and DOB are not mandated to take any action at all, but may exercise discretion, implies just the opposite- that the Legislature expected DCS and DOB to be persuaded to waive or abolish fees for any number of reasons. The fact that the Taylor Law requires bargaining on the issue prior to imposing a fee does not remove that authority. Therefore, assuming any intent can be gleaned from CSL § 50(5)(b), such intent does not clearly preempt the entire subject matter so as to prohibit bargaining as would be required under *City of Watertown*.

1. The Appellate Division applied the proper standard of review

The State claims that the Third Department erred by giving deference to PERB's statutory interpretation with respect to CSL § 50(5). No such deference occurred.

Instead, the Appellate Division properly set forth the standard to be applied when it recited the same requirements for overcoming the strong presumption in favor of bargaining as cited, *supra*. It was only after first determining that the statute does not prohibit bargaining that the Third Department then cited the substantial evidence standard (R. iv).[2] Therefore, while PERB and the Appellate Division both

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[2] The Appellate Division did, however, properly defer to PERB on the issue of whether the State violated the Taylor Law when it altered a past practice without negotiating:

> "Furthermore, a public employer violates the Taylor Law when it alters a past practice that impacts a mandatory subject of negotiation (see *Matter of Aeneas McDonald Police Benevolent Assn. v. City of Geneva*, 92 N.Y.2d 326, 331, 680 N.Y.S.2d 887, 703 N.E.2d 745 [1998]; *Matter of State of New York [Div. of Military & Naval Affairs] v. New York Pub. Empl. Relations Bd.*, 187 A.D.2d 78, 82, 592 N.Y.S.2d 847 [1993]). "Whether a past practice exists depends on whether it was unequivocal and was continued uninterrupted for a period of time under the circumstances to create a reasonable expectation among the affected unit employees that the practice would continue" (*Matter of Spence v. New York State Dept. of Transp.*, 167 A.D.3d 1188, 1189–1190, 90 N.Y.S.3d 337 [2018] [internal quotation marks and citation omitted]). "Our review of a PERB determination is limited to whether it is supported by substantial evidence, that is, whether there is a basis in the record allowing for the conclusion that PERB's decision was legally permissible, rational and thus not arbitrary and capricious" (*Matter of DeOliveira v. New York State*

separately considered and disagreed with the State's belief that the statute prohibits bargaining, this does not mean that the Appellate Division specifically "deferred to" PERB on this topic as the State argues. In fact, the Appellate Division specifically decided that it was "unpersuaded by [the State's] contention that, under Civil Service Law § 50 (5), the creation of a fee schedule was a prohibited or permissive subject of bargaining." Clearly the Appellate Division reviewed the statute and made its own finding as to whether a legislative intent to remove the issue from mandatory bargaining was plain and clear. Although the Appellate Division then notes that it *agreed* with PERB that the "statute contains no express prohibition on the bargaining of application fees," there is no basis, whatsoever, for claiming that the Appellate Division merely *deferred* to PERB on this issue and did not conduct its own review.

Second, contrary to the State's belief, nowhere in its decision did the Third Department rule, explicitly or implicitly, that the Taylor Law constituted a legislative rescission of the authority given DCS in CSL § 50(5). As explained herein, the Taylor Law did impose bargaining obligations on public employers with

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Pub. Empl. Relations Bd., 133 A.D.3d 1010, 1011, 19 N.Y.S.3d 627 [2015] [internal quotation marks and citations omitted]; see *Matter of State of New York v. New York State Pub. Empl. Relations Bd*., 176 A.D.3d 1460, 1463, 112 N.Y.S.3d 300 [2019]; *Matter of Albany Police Officers Union, Local 2841, Law Enforcement Officers Union Dist. Council 82, AFSCME, AFL–CIO v. New York Pub. Empl. Relations Bd.*, 149 A.D.3d 1236, 1238, 52 N.Y.S.3d 132 [2017])." *Id.*

respect to terms and conditions of employment that did not exist prior to 1967, but such obligations do not operate to rescind DCS's authority.

Regardless of the standard applied, no error occurred as the Appellate Division and the Board properly held that the statute is not "so unequivocal a directive to take certain action that it leaves no room for bargaining (R. 48 and v)."

2. The State cannot meet its burden of proof with respect to the remaining issues

The remaining "parade of horribles" that the State believes resulted from the respective decisions in this case are similarly flawed.

i. The right to negotiate does not infringe on DCS/DOB authority

The Respondent does not dispute the general authority given DCS and DOB under CSL § 50(5). When applied to State employees sitting for promotional examinations, however, that authority is not without limitation and must be subject to the bargaining requirements under the Taylor Law.

Contrary to the State's contention, the statute does not mandate that a fee be charged, subject to only a few limited exceptions. Instead, the practice of not charging a fee for promotional examinations has shown that the exceptions have largely subsumed the rule. While the State is correct that a default fee is statutorily established for all applicants, the statute then indicates that the fee can be waived, abolished, or a different fee established. History shows that with respect to

promotional fees for State employees, the State has consistently defaulted to waive these fees- dating back to before the addition of CSL (50)(5) in 1958.

In fact, subdivision (5) was added in 1958 to permit the State Civil Service Department, with the approval of the Budget Director, to waive application fees or abolish fees for specific classes of positions or types of examinations or candidates, or to establish a uniform schedule of fees different from those prescribed in the law. L.1958, c. 790 and Civil Service Law § 50(5)(b). Before 1958, the law permitted the waiver of fees in promotional examinations, only. Id. Therefore, in addition to the historical authority to waive fees for promotional exams since before 1958, subdivision (5) broadened and expanded the reasons DCS could waive such fees under the Civil Service Law beyond those previously enjoyed by State employees, only. L. 1958, c. 790.

Simply put, the requirement that "every applicant for examination for a position…shall pay a fee" is not a mandate, but instead is the right to collect a fee subject to the amorphously defined and, for long periods of time, generally ignored discretion of DCS. It is precisely in this non-preempting discretion where there is room for bargaining to live.[3] Accordingly, the statutory language does not foreclose

[3] Even if we assume that the statute evidences the Legislature's general "intention to commit" the issue of fees "to the discretion of the public employer," bargaining would still be mandatory for that subject "treated by statute" unless the statute "'clearly preempt[s] the entire subject matter'" or the demand to bargain "'diminish[es] or merely restate[s] the statutory benefits'." *City of Watertown,* 95

the subject and is "not so unequivocal" of a directive that it "leaves no room for bargaining." *Matter of Board of Educ. v. New York State Public Employment Relations Bd.*, 75 NY2d 660 (1990).

The ability to bargain regarding the broad discretion to impose an examination fee is completely unlike the Court's narrow holding in *Webster*, which dealt with a statute regarding a school district's decision to participate in cooperative education programs. *Matter of Webster Cent. School Dist. v. Public Empl. Relations Bd. of State of NY*, 75 NY2d 619 (1990). In *Webster*, the Court of Appeals focused on the "finely calibrated legislative scheme" with its detailed procedures, layers of approvals, required deadlines, cooperation between multiple school districts, and particularly the incorporation of specific rights and job protections for teachers into Education Law § 1950 via Education Law § 3014-a. *Id.* "Given *this* statutory scheme" the Court narrowly found an implicit intent to render the subject of participation in summer school programs a prohibited subject of bargaining (italics in original). *Id*.

Civil Service Law § 50(5) does not have a similar statutory scheme that would rise to the level of an implied intent to remove the subject from negotiations, nor does it safeguard employees' rights such that it might warrant the exclusion of the

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NY2d 73, 79 (2000) citing Lefkowitz, Osterman and Townley, Public Sector Labor and Employment Law, at 498 [2d ed. 1998], quoting Matter of City of Rochester [Rochester Police Locust Club], 12 PERB ¶ 3010).

Taylor Law protections. The language in Civil Service Law § 50(5) is broad and generally provides for discretion on the issue of fees and their waiver. The statute does not include any deadlines, procedures for analyzing waivers, procedures for addressing the circumstances for abolishing the fees for certain classes of positions or types of exams or types of candidates, required collaboration or discussion between parties/entities, or any protections for employees' rights as were present in *Webster*. CSL §50(5) is a broad, non-detailed statute, which provides latitude and discretion without any prohibition against negotiation.

Certainly, this is not the same type of "finely calibrated legislative scheme" that might establish intent to remove the subject of promotional exam fees from negotiations as found in the limited holding in *Webster*.

ii. The Taylor Law

While true that CSL § 50 was enacted almost a decade before the Taylor Law, and is therefore unsurprisingly silent on the issue of collective bargaining, it is this silence that forms the primary reason why the Appellant cannot sustain its burden in this matter. However, the State appears to adopt the Legislature's silence with respect to bargaining rights in CSL § 50 as proof that the discretion given to DCS was to be forever unaffected by outside negotiation. Even if the Legislature's failure to speak with respect to bargaining rights in 1958 exhibited some non-specific understanding with respect to bargaining rights at the time of enactment, after 1967

it could no longer be argued that the Legislature wished to deny employees the right to negotiate on matters relating to the terms and conditions of their employment.

The claim that the Legislature has amended other provisions of the Civil Service Law to "give way and account for collective bargaining rights established under the Taylor Law" but has not done so for CSL § 50 (5) is specious[4]. The fact that the Legislature hasn't specifically amended CSL § 50(5) to insert bargaining rights is entirely consistent with the general sweeping requirements of the Taylor Law and not surprising for several reasons.

First, as PERB agrees, "[t]he strong and sweeping policy in favor of bargaining would make such an explicit grant of the right to negotiate an unnecessary redundancy (R. 48)." The Taylor mandate itself is the legislative "amendment" to the Civil Service that requires negotiation- so no further legislative action was necessary. Besides, the standard in *Watertown* is not whether the Legislature took further action to incorporate the Taylor Law into an already existing statute, the standard is whether there is plain and clear legislative intent to "remove the issue from mandatory bargaining" such that it leaves "no room for negotiation." See

[4] Clearly this argument attempts to shift the burden of proof. The State concedes that public policy requires that a public employer must bargain in good faith with its employees regarding all terms and conditions of employment. It is the *State's* burden to prove the exception- i.e. that the Legislature intended to *remove* this issue from mandatory bargaining- not the Respondent's burden to explain why no subsequent action was taken to specifically incorporate the Taylor Law beyond its own mandate.

Watertown, 95 NY2d 73, 78. Given the legislatively created presumption in favor of bargaining under the Taylor Law, the fact that the Legislature made no subsequent attempt to amend CSL 50 § (5) to further *strengthen* those rights lends no assistance to the inquiry as to legislative intent.[5]

Second, considering there has been no proof that DCS ever charged a fee for promotional examinations possibly dating back further than 1958, there would be no compelling need to amend CSL § 50 (5) to clarify that such benefit was a term and condition of employment that was subject to bargaining.

Finally, the amendments to the Civil Service Law cited by the State via footnote (App. Br. at p. 18 FN 9) were not specifically made to redundantly insert general bargaining rights covered by the Taylor Law, they were made to various technical provisions of the Civil Service Law to address other narrow or unique reasons unrelated to the specific issues in this litigation.

Accordingly, the Appellate Division correctly determined that the statute contains no express prohibition on the bargaining of examination fees, nor is the discretionary power in CSL 50(5)(b) "so unequivocal a directive to take certain

[5] In fact, in order for an amendment to be necessary, we would first need to agree that CSL§ 50(5) prohibits bargaining. If the statute does not prohibit bargaining, the Taylor Law presumes those rights exist. Since CSL§ 50(5) does not prohibit bargaining, the Taylor Law applies and the Legislature would need to amend CSL 50(5) only if it wished to *clarify*, *reduce*, or *limit* the presumed Taylor Law bargaining rights- as it arguably did in the amendments cited by the State. See, App. Br. at p. 18 FN 9.

action that it leaves no room for bargaining." As such, the Appellate Division found "no error in PERB's determination that the application fee was a mandatory subject of negotiation (R. v)." The State therefore violated the Taylor Law when it unilaterally changed its practice with respect to a mandatory subject of negotiation.

B. The longstanding waiver or exemption from paying a promotional examination fee is a term and condition of employment

The Appellate Division properly ruled that substantial evidence supported the determination by PERB that the State engaged in an improper employment practice by failing to engage in mandatory negotiations prior to requiring that employees pay promotional and transitional examination fees (citations omitted)(R. v). Deference was appropriately accorded to PERB's determination concerning the obligations of employers and employees under the Taylor Law. *Matter of Chenango Forks Cent. School District v. PERB*, 21 NY3d 255 (2013).[6]

1. Not charging a fee is an economic benefit for current employees.

The State contends that PERB arbitrarily concluded, and the Appellate Division confirmed, that the waiver of an examination fee is an economic benefit

[6] In this decision, the Court of Appeals held, "[a]s the agency charged with implementing the fundamental policies of the Taylor Law, [PERB] is presumed to have developed an expertise and judgment that requires us to accept its decisions with respect to matters within its competence." *Id. at 266.*

that is a term and condition of employment.

PERB has a long precedential history of holding that economic benefits are mandatorily negotiable terms and conditions of employment. *Town of Islip*, 44 PERB 3014, 3051 (2011), *confirmed and remanded as to remedy,* 23 NY3d 482 (2014). The ability to take a promotional/transitional examination without charge is a mandatory subject of bargaining because it is an economic benefit enjoyed by current State employees seeking to advance their careers within the State workforce. While their fitness for the specific position might be aspirational, their current status as public employees and their enjoyment of the benefit that comes from being employees- i.e. taking such exam free of charge- is not. Accordingly, the longstanding ability to sit for these examinations without paying a fee added a benefit to those employees' terms and conditions of employment. *See, Buffalo Sewer Authority,* 27 PERB 3002 (1994).

In this case, the authority to waive fees for promotional/transitional examinations predates the enactment of CSL § 50(5). See L. 1958, c. 790. The record is clear that there had been no fees charged for promotional/transitional exams for at least ten (10) years- likely much longer as the record lacks competent evidence that a fee was *ever* charged (R.115, 134). During that period, employees enjoyed the economic benefit of not paying examination fees. The

imposition of an examination fee for promotion/transition examinations where none previously existed implicates a past economic benefit and is therefore properly deemed a term and condition of employment according to prior PERB decisions. *See, e.g., State of New York (Dep't of Transportation),* 50 PERB 3004 (2017); *Board of Educ. of the City Sch. Dist. of the City of New York,* 44 PERB 3003 (2011); *State of New York (Dep't of Correctional Serv.),* 20 PERB 3003 (1987); *Town of Henrietta,* 20 PERB 3013 (1987); and *Board of Educ. of Union Free Sch. Dist. No. 3 of the Town of Huntington* v. *Assoc. Teachers of Huntington,* 30 N.Y.2d 122, 5 PERB 7507 (1972).

Moreover, the Board previously signaled that promotional examination fees are a mandatorily negotiable term and condition of employment. In *State of New York* v. *CSEA,* PERB distinguished between open-competitive examinations applicable to the general public and promotional examinations applicable to existing employees. *See State of New York v. CSEA,* 13 PERB 3099 (1980). In that case, PERB found that the exemption from such examination fees is a monetary benefit and would be a term and condition of employment. *Id.* The Board found that open-competitive examination fees did not require negotiation prior to imposition. *Id.* The Board further opined on this specific fact pattern: "A different conclusion would be reached if the union sought to negotiate an

exemption for unit employees or if unit employees alone had been exempted from the fee and the government unilaterally eliminated that exemption." *Id.*

This latter hypothetical raised by the Board mirrors the facts in the present case. Accordingly, the Board's position that the examination fees are a mandatory subject of negotiation as an economic benefit is in no way arbitrary, but rather has been consistent since this hypothetical was raised in 1980.

2. Past Practice.

A unilateral change in practice occurs when "[the] practice was unequivocal and was continued uninterrupted for a period of time sufficient under the circumstances to create a reasonable expectation among the affected unit employees" that it would continue. *County of Nassau,* 24 PERB 3029 (1991). *See Chenango Forks Cent. Sch. Dist.,* 40 PERB 3012 (2007), *remanded,* 42 PERB 4527 (2009), *aff'd,* 43 PERB 3017 (2010), *conf'd sub nom, Chenango Forks Cent. Sch. Dist. v. New York State Pub. Emp't Rel. Bd.,* 95 A.D.3d 1479, 45 PERB 7006 (3d Dep't 2012), *aff'd,* 21 N.Y.3d 255, 46 PERB 7008 (2013), *Spence v. NYS Dept. of Transportation*, 167 A.D.3d 1188, 1190 (3d Dept. 2018).

The practice at issue was the act of waiving promotional examination fees for State employees which continuously occurred for at least ten years prior to the commencement of the improper practice, and possibly as far back as prior to

1958 (R. 115, 134). Furthermore, to the extent that the State argues that the "practice" is actually the determination each year of whether or not to waive the fees, this is not supported by the facts. There is no evidence that any internal discussions about possibly implementing a fee were ever made public (R. 322-323). Regardless, even if a determination was made to charge such fees at any prior time, such proposals were rejected by the State and no fee was imposed. Under these facts, it is impossible for any unit member to know anything other than the fee had been waived- thereby providing an economic benefit, consistently, for many years.

Substantial evidence shows that the State had an unbroken practice of not charging fees. These facts create a reasonable expectation that the practice of not charging exam fees for promotional exams would continue.

C. The respective decisions in this case do not repeal, by implication, Civil Service Law 50(5)(b)

The State cites to the Court's ruling in *City of Schenectady v. NYS Pub. Empl. Rel. Bd.*, 30 NY3d 109, 115 (2017) ("City of Schenectady") that "the Taylor Law's general command regarding collective bargaining is not sufficient to displace the more specific authority granted by the Second Class Cities Law" as support for the

claim that the Taylor Law does not displace the authority given DCS and DOB in CSL § 50(5) (App. Br. at p. 38).

However, the Court in City of Schenectady acknowledged that the "Taylor Law prevails where 'no legislation *specifically commits* police discipline to the discretion of local officials' (citing *Matter of Patrolmen's Benevolent Assn. of City of N.Y., Inc. v. New York State Pub. Empl. Relations Bd.*, 6 N.Y.3d 563, 571-572 (2006)(Emphasis added). It was only after setting forth that general rule that it then cited an exception where a previously enacted statute has been specifically "grandfathered" in a manner that allows the statute to remain "in force." *City of Schenectady* v. NYS Pub. Empl. Rel. Bd., 30 NY3d 109, 115 citing *Matter of Patrolmen's Benevolent Assn.* at 571–572. In that limited situation, the "policy favoring control over the police prevails, and collective bargaining over disciplinary matters is prohibited." *Id*.

None of those factors are present in this case. First, this case is not about an employer's right to discipline its employees, it's about whether an employer can unilaterally impose a fee on aspiring employees seeking promotions without first negotiating the subject of fees. Further, unlike the *Matter of Patrolmen's Benevolent Assn.* where local police disciplinary rules were "grandfathered" in and protected by Civil Service Law 76(4) [which states that "[n]othing contained in section seventy-five or seventy-six of this chapter shall be construed to repeal or modify any general,

special or local law or charter provision relating to the removal or suspension of officers or employees in the competitive class of the civil service of the state or any civil division"], the Legislature has taken no action to protect the general discretion given to DCS or DOB in 1958 from the bargaining requirements of the Taylor Law in 1967.

In addition, a review of the statutory scheme in *City of Schenectady* evidences a clear distinction to the statutory language contained in Civil Service Law § 50(5). Where the Second Class Cities Law specifically commits detailed authority over police discipline to local officials, Civil Service Law generally gives a non-specific power to collect the default examination fees, or to waive/abolish them completely without any specific mandate as to how that authority should be used. The Court of Appeals in *City of Schenectady* found it important to take note of the very detailed authority that was statutorily granted:

> "The Second Class Cities Law contains detailed provisions governing the procedures for police discipline. For example, '[t]he commissioner of public safety shall have cognizance, jurisdiction, supervision and control of the government, administration, disposition and discipline of the police department' (Second Class Cities Law § 131). In addition, the commissioner: 'is authorized and empowered to make, adopt, promulgate and enforce reasonable rules, orders and regulations for the ... discipline ... of [police] officers . . . , and for the hearing, examination, investigation, trial and determination of charges made or prepared against any officer ...and may, in his discretion, punish any such officer or member found guilty thereof ... ; but no officer ... shall be removed or otherwise punished for any other cause, nor until specific charges in writing have been preferred against and served upon him, and he shall have been found guilty thereof, after reasonable notice and upon due

> trial before said commissioner." *City of Schenectady*, 30 NY3d 109, 113-114 [internal citations omitted].

The language at issue in *City of Schenectady* is distinctly more specific and detailed than Civil Service Law. First, it contains language directly placing the issue of control over police discipline to the commissioner. Then, it goes on to further state what that control entails. This statute is not a broad designation of oversight with respect to a simple subject, but rather a very detailed and specific designation of control over an entire process- including procedures, hearings, examination, investigation, trial, and punishment. It also addresses procedural elements such as notice of charges in writing, service, and reasonable notice of trial.

This finely calibrated legislative scheme is in clear contrast to the broad discretionary language found in CSL § 50(5). The language in Civil Service Law § 50(5) does not include any policy considerations favoring the denial of bargaining rights for employees- nor does it set deadlines, procedures for analyzing waivers, procedures for addressing the circumstances for abolishing the fees for certain classes of positions or types of exams or types of candidates, required collaboration or discussion between affected parties/entities, or any remedies for determinations. Unlike the Second Cities Law at issue in *City of Schenectady* where bargaining on the issue of police discipline would be at complete odds with the specifically tailored procedures for discipline, the CSL §50(5) is a broad, non-detailed statute, which

provides considerable flexibility on an otherwise routine administrative matter[7]. As stated, *supra*, it is precisely in this discretion where there is room for bargaining to live.

Since the exception to the general rule relied upon in *City of Schenectady* does not apply to this situation, the Taylor Law should prevail. This is not to say that CSL 50(5) was effectively repealed, but rather that the statute must yield to the bargaining requirements under the Taylor Law. "Generally, a statute is deemed impliedly repealed by another statute only if the two are in such conflict that it is impossible to give some effect to both. If a reasonable field of operation can be found for each statute, that construction should be adopted." *Alweis v. Evans*, 69 N.Y.2d at 204 (1987). Since CSL § 50(5)(b) does not prohibit bargaining, and the discretionary powers given to DCS lack the specificity that might put it at odds with the Taylor Law, a "reasonable field of operation can be found for each statute" by requiring that the State bargain with its employees prior to implementing a promotional examination fee.

[7] When compared to the issue of control over police disciplinary procedures, the issue of whether to collect an administrative fee or to otherwise waive or abolish the same for current State employees, while very important to the Respondents, is a seldom utilized power for the State- as is evidenced further by the long history of taking no action to implement a fee for promotional examinations for many years as discussed, *passim*.

POINT II

PERB DID NOT LACK JURISDICTION TO HEAR THIS DISPUTE

Where a public employee alleges that a public employer has failed to negotiate the terms and conditions of employment, otherwise known as an improper practice under Civil Service Law § 209–a [1][d], PERB has exclusive jurisdiction to resolve the dispute. See Civil Service Law § 205[5][d]; see also *Matter of Zuckerman v. Board of Educ. of City School Dist. of City of N.Y.*, 44 N.Y.2d 336, 342 (1978).

The State of New York is the employer for all NYSCOPBA-represented employees impacted by this matter. The charge filed by NYSCOPBA specifically cites "The State of New York" as the Public Employer (noting c/o the Governor's Office of Employee Relations) (R. 92). GOER is the statutory bargaining agent for the State of New York (R. 9, *Executive Law* § 653).

The Department of Civil Service is the central personnel agency for the Executive Branch of New York State government, serving approximately 150,000 employees (internet).[8] DCS administers the examination fees on behalf of all affected agencies and subdivisions.

DCS was acting on behalf of the State and all the executive agencies with respect to issuing exams to those agencies' employees, and there should be no

[8] https://www.cs.ny.gov/home/agency.overview.cfm

distinction drawn between the employing agencies and DCS. To dismiss the underlying Improper Practice charge on the basis that DCS was not acting as the employer under these circumstances would allow the State to circumvent its Taylor Law obligations to negotiate terms and conditions of employment with the appropriate employee organizations.

Furthermore, the issue in this case is limited to DCS's authority to charge a fee for promotional or transitional examinations without the State first negotiating with the affected employees' representatives. When we separate out those individuals who are seeking a promotion from those who are not currently employees, the absurdity of the argument that DCS was not acting as an employer becomes even more apparent. It is axiomatic that a person cannot sit for a promotional or transitional examination unless they are currently an employee of the State. One does not seek to get "promoted" by any entity other than their employer. Therefore, when they apply for a promotion, they are doing so with their *employer*, and the decision whether to charge or waive an application fee for promotional exams directly relates to that person's employment. The mere fact that certain administrative aspects of the State's role as employer were delegated to the self-described "central personnel" branch of that same employer is of no consequence.

Moreover, the Board has previously decided cases related to civil service examination fees and to other analogous fees, and in so doing exercised jurisdiction.

See, e.g., State of New York v. CSEA, 13 PERB 3099; *State of New York (SUNY Binghamton),* 19 PERB 3029 (1986). Based on the existing precedent, it is completely proper for PERB to continue to exercise jurisdiction over allegations that the State as an employer failed to negotiate in good faith with its employees, including the unilateral imposition of Civil Service examination fees and other similar practices.

POINT III

BASED ON THE RULINGS BY PERB AND THE APPELLATE DIVISION, THE ISSUE OF WHETHER UNIONS MAY DEMAND TO BARGAIN THE IMPACT OF APPLICATION FEES SET BY DCS AND DOB IS IRRELEVANT

The State takes exception to the fact that neither the Appellate Division nor PERB acknowledged that if application fees for promotional examinations are deemed a nonmandatory (prohibited or permissive) subject of negotiation, unions are permitted to demand negotiation as to the impact application fees might have upon its members.

However, PERB specifically found "that the subject of examination fees [in CSL § 50 (5)] is *neither a prohibited nor a nonmandatory subject of bargaining* [Emphasis added] (R.47)." PERB then ruled that "the exemption from the fee is an economic benefit that is a term and condition of employment for the State's

employees. As such, it is *mandatorily negotiable*, and the past practice found in our earlier decision therefore is enforceable [Emphasis added] (R. 52)." Similarly, the Appellate Division specifically stated that it was "unpersuaded by [the State's] contention that, under Civil Service Law § 50 (5), the creation of a fee schedule was a prohibited or permissive subject of bargaining (R. v)." Accordingly, the Appellate Division "[found] no error in PERB's determination that the application fee was a mandatory subject of negotiation." *Id.*

Since both PERB and the Appellate Division specifically declined to accept that the issue of examination fees was nonmandatory or permissible, and instead ruled that the imposition of such fees on State employees is a mandatory subject of bargaining, there was no need for either to discuss or address the consequences of an undecided and alternative ruling. Had the Appellate Division and PERB commented on this issue, it would have had no value or importance to this case and been nothing more than *obiter dicta*.

CONCLUSION

Based on the foregoing, the Court must uphold the at-issue Decisions and Orders of the Appellate Division, Third Department and the Public Employment Relations Board and dismiss Petitioner's claims challenging these decisions. The legal and factual determinations made by the Board are consistent with the law and supported by substantial evidence.

Dated: February 9, 2022

Respectfully submitted,

LIPPES MATHIAS LLP

By:_____
Kevin P. Hickey
Attorneys for Respondent
NYSCOPBA
54 State St., Suite 1001
Albany, NY 12207
Telephone: (518) 462-0110

CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR 500.13(c)(1) that the foregoing brief was prepared on a computer using Microsoft Word.

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Dated: February 9, 2022