APL-2021-00167
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To Be Argued by Michael T. Fois

STATE OF NEW YORK - COURT OF APPEALS

STATE OF NEW YORK,

Petitioner-Appellant,

- against -

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

Respondents-Respondents.

BRIEF ON BEHALF OF RESPONDENT NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD

Appellate Division, Third Department Docket No. 528783
Albany County Supreme Index No. 07226-18

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PRELIMINARY STATEMENT

Respondents New York State Public Employment Relations Board and John F. Wirenius as its Chairperson (together, "PERB" or "Board") submit this brief in opposition to the appeal by the State of New York of a Decision of the Appellate Division, *Matter of State of New York v NYS Public Employment Relations Board*, 183 AD3d 1061 [3d Dept 2020], R. ii[1] ("Appellate Division Decision"), which confirmed a PERB decision, *State of New York (Dept. of Civ. Serv.)*, 51 PERB ¶ 3027 [2018], R. 40 ("Second Board Decision") (together, "decisions").

The Second Board Decision concerns an improper practice proceeding conducted pursuant the Public Employees' Fair Employment Act, Civil Service Law ("CSL"), Article 14, commonly known as the "Taylor Law."[2] *See* CSL § 200 *et seq.* Four unions representing State employees filed improper practice petitions, which were consolidated. One improper practice petition was dismissed as untimely prior to the issuance of the Second Board Decision.[3] The other three, filed by the other

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[1] Citations to the Record on Appeal are denoted "R."

[2] This matter has resulted in four related decisions being issued by PERB; two by a PERB administrative law judge ("ALJ") and two by the Board. The State has sought to annul only the second decision issued by the Board.

[3] The petition dismissed as untimely was filed by the New York State Public Employees Federation, AFL-CIO ("PEF"). *See State of New York (Dept. of Civ. Serv.)*, 50 PERB ¶ 4584 [2017], R. 177. PEF is not a party in this proceeding, and as to PEF that decision is final and binding. *See e.g. Matter of NYS Pub. Empl. Relations Bd. v City of Kingston*, 49 PERB ¶ 7008 [Sup Ct, New York County 2016] (citing 4 NYCRR § 213.10(b)).

Respondents to this matter ("Respondent Unions"), were decided on the merits.[4]

The Appellate Division Decision and the Second Board Decision apply only to State employees that are members of the three Respondent Unions and to no other individuals, including other State employees such as members of PEF, the union whose improper practice petition was dismissed as untimely. The decisions only concern fees for promotional and transitional exams and do not concern open examinations, which pertain to the public at large. *See* Appellate Division Decision, 183 AD 3d at 1063 n 1, R. v.

The Respondent Unions alleged before PERB that the State violated CSL § 209-a.1(d) when, for the first time in at least ten years, the State unilaterally required State employees represented by them to pay a fee to take State-administered civil service examinations for promotions or transitions to other jobs. CSL § 50(5) grants State's Department of Civil Service ("DCS") the authority to charge fees for civil service exams and the discretion not to charge fees.

PERB found, and before this Court the State does not dispute, that there was a past practice of not charging exam fees. PERB also found that not being charged exam fees was an economic benefit that constituted a mandatorily negotiable term

[4] The Respondent Unions are District Council 37, AFSCME, AFL-CIO, Local 1359; Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO; and New York State Correctional Officers and Police Benevolent Association, Inc.

and condition of employment. PERB held that the State violated CSL § 209-a.1(d) by terminating that past practice.

The Appellate Division correctly affirmed the Second Board Decision in all aspects. It found that the employees at issue received an economic benefit by not having to pay a fee for the exams, and thus such was a term and condition of employment. *See* Appellate Division Decision, 183 AD3d at 1063, R. v (citing *Matter of Town of Islip v NYS Pub. Empl. Relations Bd.*, 23 NY3d 482, 491 [2014]) (other citations omitted).

The Appellate Division also correctly rejected the State's argument that CSL § 50(5) made the creation of a fee schedule a prohibited or permissive subject of bargaining. *See id.* (citing *Matter of Bd. of Educ. of City Sch. Dist. of City of NY v NYS Pub. Empl. Relations Bd.*, 75 NY2d 660, 668, 670 [1990] ("*Bd. of Educ.*") (other citations omitted). CSL § 50(5) contains no express prohibition on the bargaining of application fees. CSL § 50(5) gives the State discretion to charge, waive, or abolish fees. Accordingly, CSL § 50(5) "is not 'so unequivocal a directive to take certain action that it leaves no room for bargaining.'" Appellate Division Decision, 183 AD3d at 1063, R. v (quoting *Bd. of Educ.*, 75 NY2d at 668).

The Appellate Division further correctly held that fee setting is not an inherent or fundamental policy decision related to DCS' primary mission. *See id.* (citing *Matter of NYC Tr. Auth. v NYS Pub. Empl. Relations Bd.*, 19 NY3d 876, 880 [2012]).

Rather than addressing the actual facts and pertinent precedent, the State falsely claims that the decisions in this matter hold that the State's power to change fees "*subject to the approval of each* public employee union." State Br. at 5 (emphasis original). The decisions at issue here do not so hold. Like the Second Board Decision, the Appellate Division Decision applies only to State employees that are members of the Respondent Unions based upon a proven and now undisputed past practice. Another union cannot now timely file an improper practice charge concerning the imposition of fees that gave rise to the instant matter. Notably, neither the Second Board Decision not the Appellate Division Decision applies to members of PEF, the fourth union that was part of the initial proceeding but was dismissed as untimely. *See* note 3, *supra*. The decisions also do not apply to non-State employees, who are thus outside of the bargaining units, whether or not members of the Respondent Unions.

Nor was the "jurisdiction of the DCS [] effectively repealed" by the Second Board Decision or the Appellate Division Decision. State Br. at 1. These decisions did not divest the DSC of any authority or powers granted to it, or to any of the local civil service commissions, by the CSL § 50(5). For at least ten years, the State, through the DSC, chose to exercise its authority not to charge exam fees. It did so pursuant to a statute that did not unequivocally prohibit collective bargaining and thus did not preempt the Taylor Law. Having created the past practice of providing

this economic benefit to members of the Respondent Unions, the State obligated itself, under this State's undisputed strong and sweeping policy in favor of collective bargaining, to negotiate any change in that past practice. The decisions holds only that the State may not compel State employees represented by the Respondent Unions (and only the Respondent Unions) to pay the fees unilaterally imposed.

The Second Board Decision and the Appellate Division Decision are consistent with this Court's clear precedent that where an employer has discretion under a statute that has not unequivocally left no room for bargaining, changes to terms and condition of employment are mandatorily negotiable under the Taylor Law. *See e.g. Bd. of Educ.*, 75 NY2d at 668; *Matter of City of Watertown v State of NY Pub. Empl. Relations Bd.*, 95 NY2d 73, 78-79 [2000], *rearg denied* 95 NY2d 849 [2000] ("*Watertown*"); *Matter of Schenectady Police Benevolent Assn. v NYS Pub. Empl. Relations Bd.*, 85 NY2d 480, 486 [1995]; *Matter of Auburn Police Local 195, Council 82, AFSCME, AFL-CIO v Helsby*, 46 NY2d 1034 [1979] ("*Auburn*").

The Appellate Division also granted PERB's counterclaim for a judicial Order enforcing its remedial order.[5] If the Court annuls the Second PERB Decision or

[5] As a remedy, PERB directed the State to restore the *status quo ante*, to make the affected members of Respondent Unions whole for the cost of paying the fees, to negotiate in good faith with the Respondent Unions, and to sign and post a notice reflecting the order. The Second Board Decision does not require the State to bargain with any other union regarding the exam fees.

PERB's remedial order, PERB respectfully submits that the matter should be remanded to PERB for further proceedings consistent with this Court's opinion.

PERB requests that this Court clarify the standard of review to be applied to PERB determinations. Before the Appellate Division, PERB successfully argued that the Second Board Decision was supported by substantial evidence. In its decision, the Appellate Division stated that if the record supported finding that PERB was not arbitrary and capricious, than there was substantial evidence to support the Second Board Decision. *See* Appellate Division Decision, 183 AD3d at 1062, R. iv. Thus, the Appellate Division effectively found that Second Board Decision satisfied both the substantial evidence and arbitrary and capricious standards and should be confirmed regardless of the standard applied.

In this Court's most recent case addressing the standard of review of a PERB improper practice determination based upon a hearing, this Court applied only the arbitrary and capricious standard. *See Matter of Kent v Lefkowitz*, 27 NY3d 499, 505 [2016]. However, due to PERB's past acquiescence to the substantial evidence standard, there are cases from this Court and lower courts applying both standards to PERB improper practice determinations. Both standards are rationality tests that are often used interchangeably. Procedurally, however, which standard applies determines if the merits of a matter are heard in the first instance by the Supreme

Court (arbitrary and capricious standard) or the Appellate Division (substantial evidence standard).

Subsequent to the Appellate Division Decision, PERB became aware of recent cases holding the substantial evidence standard does not apply to determinations of mini-PERBs because hearings conducted by mini-PERBs are discretionary, not directed by law.[6] These cases caused PERB to reevaluate its position, as PERB hearings are also discretionary. PERB now believes that the substantial evidence standard does not apply to the review of PERB improper practice determinations.

PERB requests this Court to clarify whether the substantial evidence standard can ever be applied where the hearing underlying the determination under review was not directed by law.

QUESTIONS PRESENTED

1. Since PERB improper practice hearings are discretionary, not mandatory, and thus not directed by law, what standard should be applied to the review of a PERB improper practice determination where a hearing was held?

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[6] Mini-PERBs "are the local equivalent of PERB." *Patrolmen's Benevolent Assn. of the City of NY Inc. v City of New York*, 97 NY2d 378, 382-383 [2002]. The Taylor Law "permits local governments to enact their own procedures and to establish their own impartial administrative bodies to replace designated portions of the Taylor Law and their administration by PERB." *Id.*

PERB respectively submits that only the arbitrary and capricious standard of CPLR 7803[3] is applicable to the review of PERB improper practice determinations, and not the substantial evidence standard of CPLR 7803[4].

2. Did the Appellate Division correctly confirm the Second Board Decision?

PERB respectfully submits that it did.

3. Should this Court affirm the Appellate Division's granting of PERB's counterclaim for enforcement of its remedial order?

PERB respectfully submits that it should.

5. If this Court annuls the Second Board Decision or PERB's remedial order, should it remand the matter to PERB for further proceedings?

PERB respectfully submits that it should.

STATEMENT OF THE CASE

Statutory Framework

PERB is an executive agency of the State of New York, established to administer the Taylor Law. *See* CSL §§ 200, 205. The Taylor Law requires public employers and employee organizations to negotiate collectively in good faith to determine the terms and conditions of employment for represented public employees. *See* CSL §§ 200, 203, 204.2.

CSL § 205.5(d) grants PERB exclusive nondelegable authority to prevent certain conduct prohibited by CSL § 209-a, called improper practices, and to issue remedial orders that effectuate the policies of the Taylor Law. *See* CSL § 213(a).

CSL § 209-a.1(d) provides that it is an improper practice for "a public employer or its agents ... to refuse to negotiate in good faith with the duly recognized or certified representatives of its public employees." "Mandatory" subjects of bargaining are those over which employees and employee organizations have an obligation to negotiate in good faith; "Permissive" or non-mandatory subjects are those that either side may, but is not obligated, to bargain; and "Prohibited" subjects are those forbidden by statute or otherwise from being embodied in a collective bargaining agreement because they are unenforceable as a matter of law or public policy. *Bd. of Educ.*, 75 NY2d at 666-667. This Court has held that among mandatorily negotiable terms and conditions of employment are past practices concerning economic benefits. *See e.g. Town of Islip*, 23 NY3d at 492.

The term "public employer" in the Taylor Law is not limited to the subdivision of the State directly employing the individuals impacted by an alleged improper practice. *See* CSL § 201(6) ("The term ... "public employer" means (i) the state of New York, ... [or] (vi) any other unit of government which exercises governmental powers under the laws of the state ....").

As with any other public employer, the State must abide by the duty to negotiate under the Taylor Law. *See e.g. Matter of State of New York v NYS Pub. Empl. Relations Bd.,* 176 AD3d 1460 [3d Dept 2019]. The governor, as the State's chief executive officer, is charged with the duty to negotiate on its behalf. *See* CSL § 201.12. Under Executive Law § 650–654, the Governor's Office of Employee Relations ("GOER") acts as the governor's agent in collective negotiations, contract administration, and administrative proceedings before PERB.

The Taylor Law does not direct PERB to conduct hearings; it explicitly grants PERB discretion "to hold such hearings and make such inquiries *as it deems necessary* for it properly to carry out its functions and powers." CSL § 205.5(j) (emphasis added).

The Taylor Law authorizes PERB to establish procedures for the prevention of improper employer and employee organization practices and to make and amend such rules. *See* CSL § 205.5(d) & (l). PERB Rules are found at 4 NYCRR § 200 *et seq.* Pursuant to PERB Rules, PERB's conduct of a hearing is discretionary and not required by law. *See e.g.* PERB Rules § 212.4(a) ("A formal hearing for the purpose of taking evidence relevant to the case before the agency shall be conducted *as necessary*"); § 204.4(a) ("The board *may* also direct … that a hearing be held ...."; § 204.4(b) (same as PERB Rule § 204.4(a)); § 204.4(c) ("*If* a hearing is held …") (emphasis added).

CSL § 50(5) is entitled "Application Fees." CSL § 50(5)(a) provides in pertinent part that "[e]very applicant for examination for a position in the competitive or non-competitive class, or in the labor class when examination for appointment is required, shall pay a fee to the civil service department or appropriate municipal commission at a time determined by it."

CSL § 50(5)(b) states, in relevant part:

> Notwithstanding the provisions [CSL § 50(5)(a)], the state civil service department, subject to the approval of the director of the budget ..., may elect to waive application fees, or to abolish fees for specific classes or positions or types of examinations or candidates, or to establish a uniform schedule of reasonable fees different from those prescribed in [CSL § 50(5)(a)] ...; provided, however, that fees shall be waived for candidates who certify to the state civil service department, a municipal commission or a regional commission that they are unemployed and primarily responsible for the support of a household, or are receiving public assistance.

Facts and Procedural History

The material facts are stipulated (*see* R. 113–117) or are undisputed. The State stipulated that it is public employer and that DCS is a department of the State. *See* R. 114 (Stipulations 5, 7). The State also stipulated that it (not the DCS), as respondent in the improper practice proceedings "did not require State employees ... to pay application fees" for the at-issue exams for at least ten years prior to the unilateral change that gave rise to the improper practice petition. R. 115 (Stipulation 10).

On March 16, 2009, DCS issued General Information Bulletin Number 09-01 ("Bulletin 09-01"), stating that DCS would begin assessing exam fees. *See* R. 114 (Stipulation ¶ 9). Bulletin 09-01 declares that its purpose is to "defray the cost of processing applications." R. 55. Bulletin 09-01 applies only to current State employees who wish to obtain promotions or transitions to other State jobs. *See id.*

Following issuance of Bulletin 09-01, the State began assessing exam fees. *See* R. 115 (Stipulation ¶ 12). The State stipulated that "[f]or at least ten years prior to the issuance of Bulletin 09-01, Respondent [State] did not require State employees ... to pay application fees for promotion/transition examinations ...." *Id.* (Stipulation ¶ 10). The State did not seek to negotiate with the Respondent Unions before requiring its members to pay the new fee. *See id.* (Stipulation ¶ 11).

In May 2009, the Respondent Unions filed improper practice charges with PERB alleging that the State violated CSL § 209-a.1(d) by unilaterally requiring its members to pay exam fees after ten years of permitting them to take the exams for free. *See* R. 57, 72, 92. PEF filed a similar improper practice petition in August 2009. The State filed answers to the charges. *See* R. 60, 78, 103. The matters were consolidated, the parties filed a joint stipulation of facts, and a discretionary hearing was conducted by an ALJ. *See* Stipulation, R. 113-117; Transcript, R. 257 *et seq.*

On December 11, 2012, the ALJ dismissed the charges. *See State of New York (Dept. of Civ. Serv.)*, 45 PERB ¶ 4620 [2012], R. 130. The Respondent Unions filed

administrative appeals with the Board (*See* R. 148; 151; 157) and the State filed responses and cross-exceptions. *See* R. 161.

On October 15, 2013, the Board issued its first decision in this matter. It reversed the ALJ, finding that the State's undisputed ten year practice of permitting the represented employees to take the exams for free constituted a past practice. *See State of New York (Dept. of Civ. Serv.)*, 46 PERB ¶ 3032 [2013], R. 32. The Board then remanded the matter to the ALJ to determine whether the State had a bargaining obligation concerning its decision to terminate the past practice.

On November 22, 2017, the second ALJ decision was issued, holding that the ten year practice of permitting the employees to take the exams for free was a mandatorily negotiable economic benefit that the State could not unilaterally terminate. *See State of New York (Dept. of Civ. Serv.)*, 50 PERB ¶ 4584 [2017], R. 169.[7] The State filed exceptions to the ALJ's decision, and the Respondent Unions filed responses. *See* R. 186; 192; 196; 208.

On October 23, 2018, the Second Board Decision was issued. *See* R. 40. The Board held that permitting members of the Respondent Unions that were State employees to take the exams without having to pay a fee constituted a mandatorily negotiable economic benefit for those employees. *See* Second Board Decision, R.

[7] The ALJ dismissed as untimely the improper practice petition of PEF. *See* note 3, *supra*; R. 177.

46-47. It further held that the State's ten year practice of not requiring the employees to pay the fee constituted a past practice that the State could not unilaterally terminate. *See id.*, R. 52.

The Board rejected the State's argument that CSL § 50(5) removed the fees from the scope of mandatory negotiations. *See* Second Board Decision, R. 47-50. Although CSL § 50(5)(a) directs DCS to charge specifically enumerated fees, CSL § 50(5)(b) permits DCS to charge different fees, to waive fees, or abolish them altogether. *See id.*, R. 49.[8] The Board reasoned that CSL § 50(5) gives the State the discretion whether to charge a fee, leaving room for negotiations concerning the subject. *Id.* (citing *Bd. of Educ.*, 75 NY2d at 668) (other citations omitted).

The Board concluded that the State's unilateral action violated CSL § 209-a.1(d). As a remedy, the Board directed the State to: cease and desist from requiring unit employees represented by Respondent Unions to pay a fee for promotion and transition examinations; make unit employees represented by Respondent Unions whole; to negotiate in good faith with Respondent Unions; and to post a PERB-issued notice reflecting the order. *See* Second Board Decision, R. 53.

On November 30, 2018, the State filed an Article 78 action. *See* R. 5. PERB counterclaimed for the enforcement of its order. On February 13, 2019, the parties

[8] The Second Board Decision cites to "Paragraph 6 of CSL § 50." R. 49. This has been consistently referred to by all parties to this proceeding as citation to CSL § 50(5)(b).

stipulated to the transfer to the Appellate Division, Third Department, under CPLR 7804(g). *See* R. 629 (Transfer Stipulation); R. 631 (Transfer Order).

The Appellate Division Decision was issued May 20, 2020, affirming the Second Board Decision in all aspects and granting PERB's counterclaim for enforcement. *See* Appellate Division Decision, 183 AD3d 1061, R. ii. The State first moved for reargument before the Appellate Division, which was denied, and then requested leave to appeal from this Court. On October 14, 2021, this Court granted the State's request for leave to appeal. *See* R. i.

ARGUMENT

POINT I

STANDARD OF REVIEW

CPLR 7803[3] provides what is commonly known as the arbitrary and capricious standard: "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion ...." CPLR 7803[4] provides what is commonly known as the substantial evidence standard: "whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence."

The Appellate Division conflated these two standards and described the standard of review it applied as follows: "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." Appellate Division Decision, 183 AD3d at 1062, R. iv (quoting *Matter of DeOliveira v NYS Pub. Empl. Relations Bd.*, 133 AD3d 1010, 1011 [3d Dept 2015]). Thus, the Appellate Division effectively found that Second Board Decision satisfied both the substantial evidence and the arbitrary and capricious standards.

This Court has referenced both standards in its opinions. *See e.g. Kent*, 27 NY3d at 505 (applying arbitrary and capricious standard); *Matter of Inc. Vil. of Lynbrook v NYS Pub. Empl. Relations Bd.*, 48 NY2d 398, 404 [1979] ("*Lynbrook*") (same); *Matter of W. Irondequoit Teachers Assn. v Helsby*, 35 NY2d 46, 50-51 [1989] ("*W. Irondequoit*") (same). *Compare Matter of Chenango Forks Cent. Sch. Dist. v NYS Pub. Empl. Relations Bd.*, 21 NY3d 255, 265 [2013] ("*Chenango*") (referencing substantial evidence standard); *Town of Islip*, 23 NY3d at 486 (same).[9]

The arbitrary and capricious standard and the substantial evidence standard have frequently been conflated. *See e.g. DeOliveira*, 133 AD3d at 1011. They are both, in their own way, rationality tests. *See e.g. Matter of Pell v Bd. of Educ. of*

[9] PERB acknowledges that the Courts do not apply either standard to issues of pure statutory interpretation outside of an agency's area of expertise. *See e.g. Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451, 459 [1980]. For the reasons stated in Point I (B)(ii), PERB argues that the instant matter is not such a case.

Union Free Sch. Dist. No. 1 of the Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222, 231 [1974] ("Rationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard."). As a former Associate Justice of this Court has recently noted: "At bottom, the standards are similar, as is evident from the fact that courts routinely reference both standards interchangeably in Article 78 proceedings." Hon. Graffeo and LeCours, CPLR Article 78 Challenges to Administrative Determinations, 4F NY Prac., Commercial Litig. in NYS Courts § 143:15 (5th ed.) (October 2021 update) (citations omitted).

While the phrasing of rationality standard applied was not outcome determinative in this matter, there is a significant procedural difference between the two standards that will impact future Article 78 actions challenging PERB determinations. Where the substantial evidence standard applies, the matter is transferred to the Appellate Division pursuant to CPLR 7804(g); where the arbitrary and capricious standard applies, the merits of matter are reviewed in the first instance by the Supreme Court. For the reason detailed below, PERB argues that the appropriate standard is the arbitrary and capricious standard.

Point I (A): This Court Should Clarify that Only the Arbitrary and Capricious Standard Applies to the Review of PERB Determinations

For years, PERB believed that it could consent to the application of the substantial evidence standard and thereby have the matter transferred to the

Appellate Division. That is what occurred in this case. This has resulted in several cases applying the substantial evidence standard to PERB determination, including the cases cited by the Appellate Division. PERB is unaware of any case in the last 25 years to apply the substantial evidence standard to the review of a PERB improper practice determination where PERB opposed the transfer of the matter to the Appellate Division. *See e.g Matter of Civ. Serv. Empls. Assn., Local 1000, AFSCME, AFL–CIO, Ichabod Crane Cent. Sch. Dist. CSEA Unit v NYS Pub. Empl. Relations Bd.*, 300 AD2d 929, 930 [3d Dept 2002] (In response to challenge by PERB to the transfer of an Article 78 action, Appellate Division held that the arbitrary and capricious standard, not the substantial evidence standard, applied); *Matter of County of Rockland v NYS Pub. Empl. Relations Bd.*, 54 PERB ¶ 7002, NYSCEF Doc No. 60: Index No. 907537/2020 [Sup Ct, Albany County Jan. 13, 2022, McDonough, J.] (denying petitioner's request for transfer under CPLR 7804(g) where opposed by PERB).

Subsequent to the Appellate Division Decision, PERB revaluated its position in response to recent cases on the application of the substantial evidence standard involving a mini-PERB, the New York City Office of Collective Bargaining ("OCB"), and its constituent boards, the Board of Collective Bargaining ("BCB") and Board of Certification ("BOC"). Mini-PERBs are required under Taylor Law § 212 to operate under rules substantially equivalent to PERB. *See Patrolmen's*

Benevolent Assn. of the City of NY Inc., 97 NY2d at 383. This Court has long held that BCB improper practice "determination[s] should not be upset unless 'arbitrary and capricious or an abuse of discretion.'" *Matter of Levitt v Bd. of Collective Bargaining of the City of NY*, 79 NY2d 120 [1992] (quoting CPLR 7803[3]) (relying upon *Lynbrook*, 48 NY2d at 404; *W. Irondequoit*, 35 NY2d at 50-51).

In 2019, 2020, and 2021, courts explicitly rejected petitioners' requests to apply the substantial evidence standard to BCB and BOC determinations because OCB hearings are "discretionary, not mandatory" and thus "the standard of judicial review is whether the determination is arbitrary and capricious." *Matter of Corr. Officers' Benevolent Assn. v NYC Bd. of Collective Bargaining*, 182 AD3d 522, 522 [1st Dept 2020] (hearing discretionary in improper practice proceedings) (citing *Matter of United Fedn. of Teachers v City of New York*, 154 AD3d 548, 551 [1st Dept 2017]). *See also Matter of NYC Health & Hosp. Corp. v Org. of Staff Analysts*, 2019 NY Slip Op 30466(U), 2019 WL 954764, at *5 (NY Sup) [Sup Ct, New York County 2019], *affd* 179 AD3d 573 [1st Dept 2020], *lv denied* 35 NY3d 906 [2020]; *Matter of NYC Health and Hosp. Corp. v Communication Workers of America, Local 1180*, 2021 NY Slip Op. 32333(U), 2021 WL 5359333, * 2 (NY Sup) [Sup Ct, New York County 2021].

In the wake of these cases, PERB re-evaluated this Court's and Appellate Division precedent. Because, like OCB hearings, PERB's improper practice

hearings are discretionary and not directed by law, the substantial evidence standard should not be applied to PERB determinations even if PERB so consents. *See e.g. Kent*, 27 NY3d at 505; *Matter of Lippman v Pub. Empl. Relations Bd.*, 263 AD2d 891, 894-895 [3d Dept 1999] (holding PERB hearings are discretionary and thus substantial evidence standard does not apply even if PERB consents to the transfer and the application of substantial evidence standard).[10] *See also Matter of City of Rome v NYS Health Dept.*, 65 AD2d 220, 224 [4th Dept 1978], *lv denied* 46 NY2d 713 [1979] (transfer under CPLR 7804(g) inappropriate even where agency consented to the transfer and to substantial evidence review where the hearing underlying the determination was not directed by law).

Kent is this Court's most recent pronouncement as to the standard of review of PERB improper practice determinations. In *Kent*, a PERB Assistant Director conducted a hearing and found that the employer violated the Taylor Law. The employer appealed to PERB, which overturned the Assistant Director, and the union commenced an Article 78 action. The Supreme Court affirmed PERB but the Appellate Division reversed. This Court applied the arbitrary and capricious standard and reversed the Appellate Division. *See id.*, 27 NY3d at 502.

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[10] *Lippman* concerned a representation matter, not an improper practice petition. The Taylor Law and PERB Rules for holding a hearing do not distinguish between representation and improper practices. The First Department relied upon *Lippman* when it held that the transfer of Article 78 petition seeking to annul a BCB improper practice determination issued after a hearing was improper. *See Corr. Officers' Benevolent Assn.*, 182 AD3d at 522.

PERB acknowledges that prior to *Kent*, this Court and other courts, without any analysis, have sometimes applied the substantial evidence standard to PERB determinations. *See Chenango*, 21 NY3d at 265; *Town of Islip*, 23 NY3d at 486. In both *Chenango* and *Town of Islip*, PERB acquiesced to the transfer of the matters to the Appellate Division and thus the application of the substantial evidence standard. Thus, this Court presumed without any analysis that hearings held by PERB are required by law. As demonstrated below, PERB improper practice hearings are discretionary. The instant matter provides this Court the opportunity to resolve the confusion as to the applicable standard to the review of PERB determinations.

Point I (A)(i): *PERB Hearings are Discretionary, not Mandatory, and Not Directed By Law*

This Court has long held that "the substantial evidence test applies *only* where a hearing has been held and evidence taken pursuant to direction by law." *Matter of Colton v Berman*, 21 NY2d 322, 329 [1967] (emphasis added). *See also Matter of Scherbyn v Wayne–Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 757-758 [1991]; *Pell*, 34 NY2d at 231.

The substantial evidence standard does not apply even where a "full evidentiary hearing [was] conducted" if the hearing was not mandatory. *City of Rome*, 65 AD2d at 224. *See also Matter of City of New York v NYS Pub. Serv.*

Comm., 105 AD3d 1200, 1201-1203 [3d Dept 2013][11]; *Matter of Niagara Mohawk Power Corp. v Pub. Serv. Commn.*, 164 AD2d 502, 505 [3d Dept 1990], *lv denied* 77 NY2d 808 [1991]; *Matter of Christopher v Phillips*, 160 AD2d 1165, 1167 [3d Dept 1990], *lv denied* 76 NY2d 706 [1990].

Hearings held by PERB are discretionary. The Taylor Law does not direct that PERB conduct hearings but expressly preserves PERB's discretion in that regard, empowering PERB "[t]o hold such hearings and make such inquiries *as it deems necessary* for its properly to carry out its functions and powers." CSL § 205.5(j) (emphasis added).

The discretionary nature of PERB hearings is reflected in PERB Rules. *See* 4 NYCRR 200 *et seq.* Since 1999, PERB Rules have clearly tracked the language of the Taylor Law, providing that "[a] formal hearing for the purpose of taking evidence relevant to the case before the agency shall be conducted *as necessary* ...." PERB Rules § 212.4(a) (emphasis added). All of the references in the current PERB Rules regarding whether hearings in improper practice petitions are to be conducted is

[11] In *City of New York*, the NYS Public Service Commission held "extensive hearings" and created an "evidentiary record" as to cost allocation by Con Edison between steam and electric customers regarding a specific power project. 105 AD3d at 1201. The Commission also held joint hearings on the cost allocation issue and a request by Con Edison to set rates for the steam generation. Con Edison challenged both the Commission's cost allocation determination and its rate determination. The court found the challenge to the rate determination was not ripe. The court rejected Con Edison's argument that the substantial evidence standard should apply to the review of the cost allocation determination because, while the law required hearings when adjudicating rates, there was no such legal requirement for hearings to determine cost allocation. The court held that the arbitrary and capricious standard of CPLR 7803[3] applied. *See id.* at 1203.

permissive. *See e.g.* PERB Rules § 204.4(a) ("The board *may* also direct ... that a hearing be held ...." (emphasis added); § 204.4(b) (same as PERB Rule § 204.4(a)); § 204.4(c) ("*If* a hearing is held ...") (emphasis added). PERB Rules are issued pursuant to the New York State Administrative Procedures Act and thus have the force and effect of law.[12]

Indeed, PERB has often issued determinations in improper practice charges without holding a hearing, something that would not be possible if PERB hearings were mandatory. *See e.g. Lynbrook*, 48 NY2d 398. *Lynbrook* concerned an improper practice petition alleging that the Village violated CSL § 209-a.1(d) by unilaterally altering the termination pay provision of the parties' expired collective bargaining agreement. The matter was decided upon stipulated facts submitted to a PERB ALJ by the parties. The matter was transferred by the Supreme Court to the Appellate Division, whose decision was appealed to this Court. *See id.*, 48 NY2d at 398. In affirming PERB's determination, this Court "emphasize[d] ... the narrowness of our inquiry." *Id.* at 404. Quoting from CPLR 7803[3], this Court held that "unless the board's determination was 'affected by an error of law' or was 'arbitrary and capricious or an abuse of discretion', we will not interfere." *Id.*

[12] *See e.g.* 1984 NY Op Atty Gen 31 (NYAG), 1984 WL 186636 (citing *Brunner v Allstate Ins. Co.*, 79 AD2d 491, 494 [4th Dept 1981], *appeal dismissed* 54 NY2d 641 [1981]; *People Ex Rel. Jordan v Martin*, 152 NY 311, 316–317 [1897]).

This Court has never analyzed whether PERB hearings are discretionary or directed by law. Lower courts that have addressed this issue have concluded that PERB hearings are discretionary and that the substantial evidence standard does not apply. In *Lippman*, 263 AD2d 891, although both the petitioner and PERB supported the transfer of the matter to the Appellate Division for substantial evidence review, the court rejected the parties' position because "the hearing that [PERP] afforded to the [petitioner] ... was discretionary and was clearly not required by law ... the standard to be applied upon a CPLR article 78 review of [PERB's] determination interpreting and applying the Taylor Law is whether it was arbitrary and capricious." *Id.*, 263 AD2d at 894-895 (internal citations omitted). The *Lippman* Court cited to the use of the permissive "may" language in PERB Rules when holding that substantial evidence standard did not apply PERB determinations. *See id.*, 263 AD2d at 894. *See also Matter of Civ. Serv. Empl. Assn., Inc., Local 1000, AFSCME, AFL–CIO v NYS Pub. Empl. Relations Bd.*, 34 AD3d 884, 885 n 2 [3d Dept 2006] (transfer to the Appellate Division on "the ground that PERB's decision was not supported by substantial evidence ... was not warranted ... [i]inasmuch as it is within PERB's discretion to grant a hearing ..."); *Civ. Serv. Empls. Assn.*, 300 AD2d at 930 ("PERB's determination was not made following 'a hearing held ... pursuant to direction by law'") (internal citations omitted) (quoting CPLR 7803[3]); *County of Rockland*, 54 PERB ¶ 7002, NYSCEF Doc No. 60: Index

No. 907537/2020 (relying on the permissive language of the Taylor Law and PERB Rules, court found PERB hearings not required by law).[13] Accordingly, the arbitrary and capricious standard alone is the correct standard to apply.

Point I (A)(ii): *The Appellate Division Decision Should be Affirmed Even Under the Substantial Standard*

The Second Board Decision is clearly supported by substantial evidence. The "substantial evidence standard is a minimal standard" which "demands only that a given inference is reasonable and plausible, not necessarily the most probable." *Matter of Haug v State Univ. of NY at Potsdam*, 32 NY3d 1044, 1045-1046 [2018] (quotation marks omitted) (quoting *Matter of FMC Corp. v Unmack*, 92 NY2d 179, 188 [1998]; *Matter of Ridge Rd. Fire Dist. v Schiano,* 16 NY3d 494, 499 [2011]). "Where substantial evidence exists, the reviewing court may not substitute its judgment for that of the agency, even if the court would have decided the matter differently." *Id.* at 1046 (citations omitted).

[13] *Compare Matter of Margolin v Newman*, 130 AD2d 312 [3d Dept 1987], *lv denied* 71 NY2d 844 [1988]. *Margolin* is the only case to analyze PERB Rules and then conclude that PERB hearings are required by law. However, *Margolin* was decided under the pre-1999 PERB Rules which did not include the permissive "as requested" language. Subsequent to the amendment of the PERB Rules, no court has followed *Margolin* on this point. Copies of the pertinent section of the PERB Rules for 1984 (version in effect when *Margolin* decided) and 1999 (version with "as requested" added) can be found as NYSCEF Doc No. 35: Exhibit A to PERB's Memorandum of Law in Reply in *Local 32, Intl. Assn. of Firefighters, AFL-CIO, Utica Professional Firefighters Assn. v NYS Pub. Empl. Relations Bd.*, Sup Ct, Albany County, index No. 908413-21.

The pertinent facts were stipulated to or are undisputed. Even where "the evidence is conflicting and room for choice exists," which is not the case in the instant matter, the substantial evidence standard is met where the agency "could" reach the challenged finding as the "question, thus, is not whether [a court] find[s] the proof ... convincing, but whether the [agency] could do so." *Matter of State Div. of Human Rights (Granelle),* 70 NY2d 100, 106 [1987]. *See also Matter of Marine Holdings, LLC v NYC Commn. on Human Rights,* 31 NY3d 1045, 1047 [2018], *rearg denied* 32 NY3d 903 [2018]. The State disagrees with PERB's legal conclusions. That, however, does not "diminish or negate the fact that there is also substantial evidence in the record as whole to support PERB's determination." *See Matter of Romaine v Cuevas,* 305 AD2d 968, 970 [2003].

Point I (B): The Appellate Division Should Have Granted PERB Deference

The State erroneously claims that the "Third Department erred when it gave deference to PERB's statutory interpretation ...." State Br. at 12. The word deference, nor any synonym thereof, does not appear in Appellate Division Decision. PERB, for reasons stated below, believes that the Third Department should have given deference to PERB but no such deference was actually granted to PERB. The Third Department clearly agreed with, and found no error in, PERB's holdings, but concluding that PERB was correct is not the same as deferring to PERB's judgement.

The Third Department explicitly "reject[ed] petitioner's assertion that the application fee was not a term and condition of employment." Appellate Division Decision, 183 AD3d at 1062-1063, R. v. The Third Department further was "unpersuaded by petitioner's contention that, under [CSL] § 50(5), the creation of a fee schedule was a prohibited or permissive subject of bargaining." *Id.* The Third Department based its holding on three factors: that CSL § 50(5) "contains no express prohibition on the bargaining of application fees"; that CSL § 50(5) "also gives petitioner discretion to charge or abolish fees and, therefore, is not 'so unequivocal a directive to take certain action that it leaves no room for bargaining'"; and that "the decision to impose an application fee for the at-issue exams is not an inherent or fundamental policy decision related to petitioner's primary mission." *Id.* (quoting *Bd. of Educ.*, 75 NY2d at 668) (other citations omitted). None of these findings, nor the Third Division's legal conclusions, are reliant upon deference to PERB.

The issues raised by this matter were either pure application of the Taylor Law to the facts (*i.e.* whether there was a past practice, whether not paying a fee is an economic benefit and a term and condition of employment, what is mandatorily bargainable), addressed in Point I (B)(i) below, or concerned the intersection of the Taylor Law and CSL § 50(5) (*i.e.* whether CSL § 50(5) unequivocally prohibited bargaining), addressed in Point I (B)(ii) below.

Point I (B)(i): *Deference Should Have Been Granted PERB's Interpretation of the Taylor Law*

When an administrative agency is charged with implementing and enforcing the provisions of a particular statute, courts presume that the agency has developed an expertise with regard to that statute and defer to the judgment of the agency. *See Kent*, 27 NY3d at 504. This deference "includes 'the resolution of improper practice charges'" by PERB. *Id.* (quoting *Matter of Poughkeepsie Professional Firefighters' Assn., Local 596, IAFF, AFL–CIO–CLC v NYS Pub. Empl. Relations Bd.*, 6 NY3d 514, 522 [2006]). *See also Matter of Professional Staff Congress-City Univ. of NY v NYS Pub. Empl. Relations Bd.*, 7 NY3d 458, 465 [2006].

A court "may not disturb PERB's determination unless the agency's ruling is irrational." *Watertown*, 95 NY2d at 73. *See also Matter of Med. Malpractice Ins. Assn. v Supt. of Ins. of the State of NY*, 72 NY2d 753, 763 [1988], *cert denied* 490 US 1080 [1989]. An "agency's determination need not be the only rational conclusion to be drawn from the record" and "the existence of other, alternative rational conclusions does not warrant annulment of the agency's conclusion." *Matter of Jennings v NYS Off. of Mental Health*, 90 NY2d 227, 239 [1997].

In reviewing a PERB determination, a court does not weigh the facts and merits *de novo,* rather, "as long as PERB's interpretation is legally permissible and so long as there is no breach of constitutional rights and protections, the courts have no power to substitute another interpretation." *Bd. of Educ.*, 75 NY2d at 666

(quoting *W. Irondequoit*, 35 NY2d at 50). *See also Medical Mal. Ins. Assn.*, 72 NY2d at 763; *Matter of Clancy-Cullen Storage Co. v Bd. of Elections of the City of NY*, 98 AD2d 635, 636 [1st Dept 1983].

Thus, if PERB's "determination has a rational basis, [the Court] must affirm, even if this Court would have interpreted the provision differently." *Matter of Uniformed Firefighters Assn. of Greater NY v City of New York*, 114 AD3d 510, 514 [1st Dept 2014], *lv denied* 23 NY3d 904 [2014] (citing *Matter of Peckham v Calogero*, 12 NY3d 424, 430-31 [2009]).

Point I (B)(ii): *This Matter Does Not Concern Pure Statutory Interpretation Not Reliant Upon PERB's Expertise*

PERB acknowledges that it is not owed deference on matters of pure statutory interpretation outside of its area of expertise "dependent only on accurate apprehension of legislative intent." *Kurcsics*, 49 NY2d at 459.

This instant matter is not a case of pure statutory interpretation. PERB's expertise in collective bargaining and the Taylor Law are directly relevant to whether CSL § 50(5) prohibits a specific subject from collective bargaining. Deference should be accorded PERB on whether another statute unequivocally excludes itself from the Taylor Law especially where, as in the instant matter, the statutes are not

in conflict and can harmonized.[14] *See e.g. NYC Health + Hospitals*, 179 AD3d at 573; *Matter of NYC Health + Hosps. v Org. of Staff Analysts*, 171 AD3d 529, 530 [1st Dept 2019], *lv denied* 34 NY3d 909 [2020].

In the decisions involving the NYC Health and Hospitals Corporation ("HHC") and the statute that created it (Unconsolidated Laws of NY § 7385 *et seq.*), the Appellate Division addressed deference accorded to the BOC, one of the NYC mini-PERBs, as to its statutory construction. The issue in those cases was whether status of HHC employees as managerial under the statute creating the HHC also controls whether these employees are excluded from collective bargaining as managerial as provided for by the Taylor Law. To resolve this, the BOC had to interpret not just the Taylor Law, but also HHC's enabling statute. HHC made, and Appellate Division rejected, the same arguments that the State makes here, and "accord[ed] deference to the Board's rational interpretation of the governing statutes." *NYC Health + Hospitals*, 179 AD3d at 573. *See also NYC Health + Hospitals*, 171 AD3d at 530; *NYC Health and Hosp. Corp. v Communication Workers of America, Local 1180*, 2021 NY Slip Op. 32333(U), 2021 WL 5359333, * 2-3.

[14] The State, while recognizing PERB's independence from DCS, notes that "PERB is a board within DCS established under the Taylor Law." State Br. at 8 & n 4 (citing CSL § 205.6). This clearly shows that the provisions of the CSL at issue in this case (CSL § 50(5) *et seq.*, and CSL § 200 *et seq.*) were drafted to be harmonized and are not in conflict, and courts should defer to PERB's expertise in doing so.

Similarly, in *Matter of Levitt v Board of Certification of the Office of Collective Bargaining*, 273 AD2d 104 [1st Dept 2000], the First Department granted deference to the BOC's interpretation of the Vehicle and Traffic Law that certain City employees were not eligible to collectively bargain.[15]

POINT II

THE STATE'S QUESTIONS PRESENTED ARE MISLEADING

The State's first Question Presented asks if the Appellate Division erred "when it held that the uniform schedule of examination application fees established by DCS, and approved by DOB, pursuant to [CSL] § 50(b)(5) *must be negotiated between the State, as employer, and each individual bargaining unit/union*?" State Br. at 6 (emphasis added).

This question reflects neither the record nor the holdings, since neither the Appellate Division nor PERB so held. Neither decision compels the DCS to ab initio negotiate with "each individual bargaining unit/union." State Br. at 6. The decisions apply only to the three Respondent Unions, which the State itself acknowledges "represent only a portion of the several bargaining units" with employees subject to

[15] The underlying Supreme Court decision was explicit that its review was "limited to determining whether [the Board's] decision was arbitrary and capricious." *Matter of Levitt v Bd. of Certification of the Off. of Collective Bargaining*, Index No. 104693/98 [Sup Ct, New York County, Apr. 7, 1999, Chen, J.], *affd* 273 AD2d 104 [1st Dept 2000]. This decision is available through NYSCEF, Doc No. 93, Exhibit A to Motion 004, in *Matter of NYC Health + Hosps. v Org. of Staff Analysts*, index no. 450553/18.

Bulletin 09-01. *Id.* at 3. The State introduced into evidence a "document listing the multiple public employers and multiple public employee unions, *most of which are not parties to this proceeding*, with employees that applied for promotion examinations administered by DCS and paid fees subject to [Bulletin] 09-01." State Br. at 9 (emphasis added). This chart lists over 20 such bargaining units. *See* R. 491

As demonstrated by the dismissal of PEF's improper practice petition as untimely, it is too late for any of the other unions that had similarly situated members to challenge the new fees and seek to compel negotiations based upon the events that gave rise to this matter. Further, the decisions only concern promotional and transitional exams, not open compete examinations. The decisions' holdings are narrow, based upon a past practice regarding three specific unions and only the State employees they represent.

The State's second Question Presented is similarly misleading. The State asks if the Appellate Division erred "when it determined that an application *fee* established pursuant to [CSL] § 50(b)(5) *paid* by a candidate for examination for a promotional position is a term and condition of employment under the Taylor Law that is mandatorily negotiable?" State Br. at 6 (emphasis added).

What the Appellate Division actually held was that *not requiring a fee* was an economic benefit and thus a term and condition of employment for a small sub-group of civil service candidates (current State employees of three unions) for a sub-group

of exams (promotional and transitional) because the DCS choose not to charge such fees for at least ten years, creating a past practice under the Taylor Law. *See* Appellate Division Decision, 183 AD3d at 1063 & n 1, R. v. As discussed in Point III (A) below, the State does not now dispute that such a past practice exists. As discussed in Point III (B) below, the State does not address the cases relied upon by the Appellate Division, including precedent from this Court, for its holding that an economic benefit is a term and condition of employment.

The State's third and final Question Presented again misstates the scope of the decisions at issue before this Court, asking if the Third Department erred "when it *did not address the question of whether PERB's statutory authority*, set forth at [CSL] § 209-a, to address improper employer and employee organization practice charges *grants it the authority to control and enjoin the actions of DCS*, with approval of DOB, that were made based upon a specific statutory grant of authority to DCS and DOB?" State Br. at 6 (emphasis added).

The Appellate Division explicitly addressed PERB's authority under the Taylor Law. *See* Appellate Division Decision, 183 AD3d at 1063, R. iv. The Appellate Division did not grant PERB "authority to control and enjoin the actions of DCS." State Br. at 6. The Appellate Division correctly found that CSL § 50(5) did not remove changing a past practice of not charging fees from this State's strong

and sweeping policy of collective bargaining because the Legislature has not explicitly or implicitly unequivocally indicated an intent to do so.

POINT III

THE TEN YEAR PAST PRACTICE MADE NEW EXAM FEES A MANDATORY SUBJECT OF BARGAINING FOR STATE EMPLOYEES THAT ARE MEMBERS OF RESPONDENT UNIONS

PERB held, and the Third Department confirmed, that (a) a past practice existed of the DCS not charging State employees represented by the Respondent Unions exam fees; (b) not charging fees constituted an economic benefit and therefore a term and condition of employment that is mandatorily bargainable; and (c) under CSL § 50(5), fees are not a prohibited or permissive subject of bargaining.

Point III (A): A Past Practice of Not Charging Exam is Undisputed

It is undisputed that for at least ten years, the State did not charge exam fees to State employees who were members of the Respondent Unions. *See* R. 115 (Stipulation ¶ 10). Before this Court, the State has abandoned its argument that no past practice exists. Indeed, the term "past practice" does not even appear in the State's Brief. Accordingly, this Court should affirm the part of the Appellate Division Decision finding that a past practice existed. *See* 183 AD3d at 1063-1064, R. v. Once "such a past practice is shown to exist, the employer is not free to

discontinue it without prior negotiation." *Matter of Inc. Vil. of Hempstead v Pub. Empl. Relations Bd.*, 137 AD2d 378 [3d Dept 1988], *lv denied* 72 NY2d 808 [1988] (citation omitted).

Point III (B): Not Charging Exams Fees Constituted an Economic Benefit and a Mandatorily Bargainable Term and Condition of Employment

The State does not dispute the Appellate Division holding that the Taylor Law requires public employers, such as the State, "to bargain in good faith with its employees regarding all terms and conditions of employment." Appellate Division Decision, 183 AD3d at 1062, R. iv (citing *Watertown*, 95 NY2d at 78) (other citation omitted); *see also* CSL §§ 203, 204.2. Terms and conditions of employment are broadly defined as "salaries, wages, hours and other terms and conditions of employment." CSL § 201.4.

As the Appellate Division citations demonstrate, this Court recognizes that economic benefits for represented public employees are terms and conditions of employment because they are forms of compensation. *See* Appellate Division Decision, 183 AD3d at 1063, R. v (citing *Town of Islip*, 23 NY3d at 491; *Matter of Bd. of Coop. Educ. Servs. Sole Supervisory Dist., Onondaga & Madison Counties v NYS Pub. Empl. Relations Bd.*, 82 AD2d 691 [3d Dept 1981]).

Town of Islip concerned the personal use of employer-owned vehicles. Citing PERB decisions confirmed by the lower courts, this Court endorsed what PERB has

long held, that "an economic benefit [is] a mandatorily negotiable term and condition of employment; therefore, a public employer may not unilaterally discontinue a past practice of providing its employees with this benefit." *Id.*, 23 NY3d at 491 (citing *County of Nassau*, 13 PERB ¶ 3095 [1980], *confd sub nom. Matter of County of Nassau v Pub. Empl. Relations Bd. of State of NY*, 14 PERB ¶ 7017 [Sup Ct, Nassau County 1981], *affd* 87 AD2d 1006 [2d Dept 1982], *lv denied* 57 NY2d 601 [1982]; *County of Onondaga*, 12 PERB ¶ 3035 [1979], *confd sub nom. Matter of County of Onondaga v NYS Pub. Empl. Relations Bd.*, 77 AD2d 783, 783-784 [4th Dept 1980]).

The Appellate Division also cited *Board of Cooperative Education Services Sole Supervisory District.* That case confirmed that "PERB's decision that a free physical examination provided or reimbursed by the employer was an economic benefit and a term or condition of employment that could not be unilaterally withdrawn without negotiation is reasonable." *Id.*, 82 AD2d at 693-694. Once again, the State fails to even address precedent relied on in the Appellate Division Decision it seeks this Court to reverse.

Instead of addressing the cases relied upon by the Appellate Division, the State argues that it was "arbitrary and contrary to law" for PERB to find the economic benefit to be mandatorily bargainable. State Br. at 25. PERB respectively submits to this Court that it cannot be found to be arbitrary and capricious for

following its own and this Court's precedent that an economic benefit is a term and condition of employment.

The State irrationally expands the holdings of the decisions, misleadingly claiming that "[u]nder this broad and all-encompassing measure, *any change to a fee paid, or not paid*, by a public employee to a governmental entity would be a term and condition of employment." State Br. at 25 (emphasis added). The decisions do not hold that "any change to a fee paid" is a term and condition of employment. *Id.* PERB found, and the Appellate Division confirmed, based upon a ten year past practice, that not charging a fee was an economic benefit and term and condition of employment. Each future case must be, and will be, decided upon its facts. Contrary to the State's arguments, nothing in the decisions repeals or enjoins the DCS general authority to set, waive, or abolish exams fees. Indeed, as noted above, the State may compel PEF-represented State employees to pay the new fees even though the PEF sought to negotiate such fees as its improper practice charge was untimely. *See* note 3, *supra*. No other union has made a similar demand, and would be time-barred from demanding negotiations based upon Bulletin 09-01.

The State argues that the fees are not a term and condition of employment because they are "tied" to the qualifications for employment. State Br. at 25. No explanation is provided by the State as to how the ability to pay is relevant to the qualifications for a position under the merit and fitness system administered by the

DCS. The State's position directly contradicts the provision of CSL § 50(5)(b) which mandates waiving exam fees for those who "are unemployed and primarily responsible for the support of a household" or "are on public assistance." More importantly, the decisions under review by this Court applies only to current State employees, not those seeking "future, not yet realized, employment." State Br. at 25. *See* Second Board Decision, R. 51 ("The fees here apply only to current employees."); Appellate Division Decision, 183 AD3d at 1063 n 1, R. v.

Point III (C): Under CSL § 50(5), the Creation of a Fee Schedule was not a Prohibited or Permissive Subject of Bargaining

The State argues that CSL § 50(5) prohibits negotiations over exams fees or makes them a permissive subject of bargaining.

This Court's precedent regarding when a matter is exempt from mandatory collective bargaining is clear and consistent. The "public policy of this State in favor of collective bargaining is strong and sweeping." *Watertown*, 95 NY2d at 78 (quoting *Bd. of Educ.*, 75 NY2d at 667; *Matter of Cohoes City Sch. Dist. v Cohoes Teachers Assn.*, 40 NY2d 774, 778 [1976]).

Thus, "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." *Watertown*, 95 NY2d at 79 (editing and quoting marks omitted) (quoting Lefkowitz, Osterman, and Townley,

Public Sector Labor and Employment Law, at 498 [2d ed 1998]; *City of Rochester (Rochester Police Locust Club)*, 12 PERB ¶ 3010 [1979]). Accordingly, "[a]bsent 'clear evidence' that the Legislature intended otherwise, the presumption is that all terms and conditions of employment are subject to mandatory bargaining." *Id.* (quoting *Bd. of Educ.*, 75 NY2d at 670). Such evidence must be "so unequivocal a directive to take certain action that it leaves no room for bargaining." *Bd. of Educ.*, 75 NY2d at 668.

If the State seeks to exempt itself in whole or part from the Taylor Law, it must do so consistent with this Court's precedent. To escape the strong and sweeping policy in favor of collective bargaining, the State must show either that CSL § 50(5) shows a clear intent by the Legislature to exempt a subject from collective bargaining, addressed in Point III (C)(i) below, or that public policy so requires, addressed in Point III (C)(ii) below. That fees are not a permissive subject of bargaining is addressed in Point III (C)(iii) below.

Point III (C)(i): There is No Clear Evidence of Legislative Intent to Remove the Past Practice of Not Paying Fees From Collective Bargaining

The State's claim that "there is the *express legislative intent that mandates* that '[e]very applicant for examination for a position ... shall pay a fee to the civil service department'" is demonstrably false. State Br. at 26 (quoting CSL § 50(5)(a)). In CSL § 50(5)(b), the Legislature expressly and unequivocally provides that fees

are not mandated. Notably, while CSL § 50(5)(b) provides DCS discretion to waive or abolish fees for anyone, stating that DCS "*may* elect to waive application fees, or to abolish fees," it explicitly mandates that DCS not charge fees to certain classes, providing that "fees *shall be waived* for candidates who certify ... that they are unemployed and primarily responsible for the support of a household, or are receiving public assistance." (emphasis added). Accordingly, the Appellate Division correctly found that CSL § 50(5) "contains no express prohibition on the bargaining of application fees." Appellate Division Decision, 183 AD3d at 1063, R. v (citing *Bd. of Educ.*, 75 NY2d at 668) (other citation omitted).

There is also no clear implicit evidence that the Legislature intended to remove fees from mandatory bargaining where there is an undisputed past practice of not charging fees.

The State's reliance on *Matter of City of Schenectady v NYS Public Employment Relations Board*, 30 NY3d 109 [2017], as supporting its analysis of Legislative intent is clearly misplaced. That case turned not on Legislative intent but on balancing competing public policies. This Court defined the issue before it in that case as "'[i]s there a public policy strong enough to justify excluding police discipline from collective bargaining?'" *Id.* at 115 (quoting *Matter of Patrolmen's Benevolent Assn. of City of N.Y., Inc. v NYS Pub. Empl. Relations Bd.*, 6 NY3d 563,

573 [2006]). The correctness of the Appellate Division holding that public policy does not prohibit bargaining in this matter is addressed in Point III (C)(ii) below.

The Legislative intent that fees are not always mandated and the intent to provide the DCS discretion not to charge fees is clear on the face of CSL § 50(5). This Court's precedent consistently holds that where a statute provides an agency with discretion regarding a subject, such discretion indicates that the Legislature did not intend to remove the subject from mandatory bargaining. *See e.g. Bd. of Educ.*, 75 NY2d at 667; *Auburn*, 46 NY2d 1034.

In *Bd. of Educ.*, this Court held that the express grant of statutory discretion permitting the New York City Board of Education to require employees to file financial disclosure statements to ferret out official corruption did not relieve the school district of its duty to negotiate concerning the exercise of that statutory discretion. *See id.*, 75 NY2d at 667. In *Auburn*, 46 NY2d 1034, by adoption of the Third Department opinion on appeal, this Court held that where the statutory scheme provides employers a discretionary right to terminate employees, the pre-termination and post-termination procedures are mandatorily negotiable under the Taylor Law, even where such procedures are expressly provided under the statutory scheme.[16]

[16] In *Matter of Auburn Police Local 195, Council 82, AFSCME, AFL-CIO v Helsby*, 62 AD2d 12 [3d Dept 1978], *affd on opinion below* 46 NY2d 1034 [1979], the Third Department held that alternatives to the disciplinary procedures specified in CSL §§ 75 and 76 are mandatorily negotiable. *See id.*, 62 AD2d at 16-18.

The State argues that since CSL § 50(5) only references the DCS and the DOB, "there is no ambiguity on the fact that the Legislature only contemplated two entities ... to be involved in the setting of a uniform fee schedule." State Br. at 30. DCS or DOB are subdivisions of the State. The decisions before this Court do not remove either from the process. The underlying improper practice was based upon the State's, acting through DCS, now undisputed ten year past practice.

The State also argues that CSL § 50(5) implicitly prohibits bargaining over fees because CSL § 50(5)(b) requires DCS to "establish a uniform schedule of reasonable fees." The State conveniently omits that the word "or" immediately preceding the clause of CSL § 50(5)(b) it quotes. *See* State Br. at 31. This Court should not be misled by the State's selective quotation. By preceding the clause with "or," the Legislature indicated that a uniform fee schedule was not mandatory, or even preferred, but one option. CSL § 50(5)(b) also provides DCS the discretion "to waive application fees, or to abolish fees for specific classes or positions or types of examinations or candidates." For at least a decade, the DCS choose to exercise that option and not charge fees. Clearly the CSL § 50(5) does not imply that the Legislature intended to foreclose bargaining. Accordingly, the States reliance on *Schenectady*, 30 NY3d 109, for the position that fees are not a mandatory subject of bargaining because CSL § 50(5(b) "specifically commits" the setting of exam fees to DCS is misplaced. State Br. at 15 (citing *Schenectady*, 30 NY3d at 115).

The statutory schemes are fully compatible. Indeed, the State acknowledges that "CSL § 50(5)(b) and the Taylor Law should not be deemed irreconcilable." State Br. at 39.

The State, however, turns the statutory analysis on its head. Rather than presuming thar all terms and conditions of employment are mandatorily bargainable, the State disregards this Court's precedent and reverses the inquiry. The State demands that the Taylor Law "specifically require" that "fees be a mandatory subject of bargaining." State Br. at 39. The State cites no precedent for this approach to statutory construction. This Court's precedent is clear that terms and conditions of employment are presumed bargainable. *Watertown*, 95 NY2d at 78; *Bd. of Educ.*, 75 NY2d at 667; *Cohoes City Sch. Dist.*, 40 NY2d at 778. There is no requirement that the Taylor Law separately identify each and every statute that may impact employment and explicitly address to what extent, if at all, it removes a subject from collective bargaining.

The State argues that since CSL § 50(5) pre-dates the Taylor Law, it is exempt from the "the Taylor Law written a decade later." State Br. at 35. No citation is provided in support of the State's premise that the analysis created by this Court's precedent is to be jettisoned whenever a State statute older than the Taylor Law is cited. That argument directly conflicts with this Court precedent. For example, in both *Watertown* and *Schenectady Police Benevolent Assn.*, 85 NY2d 480, this Court

analyzed whether General Municipal Law ("GML") § 207-c, which pre-dates the Taylor Law, prohibited a subject from collective bargaining.[17] In neither case was the dates of the enactment of the Taylor Law and GML § 207-c a factor. These precedents show "that if the Taylor Law's obligation to bargain is compatible with a statute, bargaining must take place, regardless of when the legislation was passed." Second Board Decision, R. 50 (discussing *Schenectady Police Benevolent Assn.*).

Everything the State identifies regarding fees in the statutory scheme underscores the discretion of DCS to set or not set fees. *See e. g.* State Br. at 28 (describing numerous statutory grants of discretion to DCS). *See also Matter of Barclay v Bahou*, 55 NY2d 338, 341 [1982] (noting DCS's discretion to set or waive fees). Nothing in the statutory scheme implies an intent to remove the economic benefit created by a past practice of not charging fees from mandatory bargaining.

Point III (C)(ii): Public Policy Does Not Support Removing the Past Practice of Not Paying Fees From Mandatory Collective Bargaining

The Appellate Division correctly held "that the decision to impose an application fee for promotional and transitional examinations is not an inherent or

[17] *Watertown* concerned the provision of GML § 207-c which directs employers to pay police officers who are injured in the line of duty their full wages during the period of their disability. Because GML § 207-c is silent with respect to the procedures to be used to implement it, this Court concluded that such procedures are mandatorily negotiable. *See id.*, 95 NY2d at 81. In *Schenectady*, this Court held that the employer did not have to negotiate concerning the requirement of GML § 207-c that employees execute a limited medical confidentiality waiver form that was necessary for the employer to fulfill the statutory mandate. *See id.*, 85 NY2d at 487.

fundamental policy decision related to petitioner's primary mission." Appellate Division Decision, 183 AD3d at 1063, R. v (citing *NYC Tr. Auth.*, 19 NY3d at 880).

The State spends a considerable amount of its brief on DCS's role in the merit and fitness system, with over 30 references thereto. The State did not raise before PERB the argument that a duty to negotiate concerning fees that members of three unions must pay impairs DCS' ability to fulfill its obligation under the New York State Constitution to ensure the merit and fitness of State employees. It therefore should not be considered by this court. *See Matter of Corrigan v NYS Off. of Children & Family Servs.*, 28 NY3d 636, 643 [2017] (constitutional claims that were not raised during the administrative proceeding are not properly before court as "[j]udicial review of administrative determinations pursuant to CPLR Article 78 is limited to questions of law, and unpreserved issues are not issues of law.") (internal quotation marks omitted) (quoting *Matter of Khan v NYS Dept. of Health*, 96 NY2d 879, 880 [2001]). *See also Peckham*, 12 NY3d at 430; *Matter of Civ. Serv. Empl. Assn., Inc. v Pub. Empl. Relations Bd.*, 73 NY2d 796, 798 [1988]; *Matter of NYS Corr. Officers and Police Benevolent Assn. v NYS Pub. Empl. Relations Bd.*, 309 AD2d 1118, 1120 [3d Dept 2003].

It is also meritless. Neither the Appellate Division Decision nor the Second Board Decision impacts the State's merit and fitness system. The State has not demonstrated how an applicant's ability to pay is pertinent to their qualification for

a position, nor that the charging of fees is connected to the DCS' ability to carry out its responsibilities of administrating the merit and fitness system.[18] The State's position directly contradicts the provision of CSL § 50(5)(b) mandating the waiving exam fees for those who "are unemployed and primarily responsible for the support of a household" or "are on public assistance." Notably, the subjects found negotiable in *Bd. of Educ.* (disclosure statements to prevent corruption), *Auburn* (termination procedures), and *Watertown* (wages for injured police) are all far closer to the responsibilities of the employers involved in those cases than the payment of exam fees is to the operation of the merit and fitness system.

Contrary to the State's assertion, the Taylor Law did not repeal CSL § 50(5) by implication. The statutory schemes are fully compatible. The decisions did not divest the DSC of any authority or powers granted to it, or to any of the local civil service commissions, by CSL § 50(5). For at least ten years, the State, through the DSC, chose to exercise its authority not to charge exam fees. It did so pursuant to a statute that did not unequivocally prohibit collective bargaining and thus did not preempt the Taylor Law. Having created the past practice of providing this economic benefit to members of the Respondent Unions, the State obligated itself,

[18] Bulletin 09-01 notes the fees were instituted as "to defray the cost of processing applications." R. 55. Such fiscal concerns are immaterial to the duty to negotiate. *See e.g. Matter of City of Poughkeepsie v Newman*, 95 AD2d 101, 103 [3d Dept 1983], *app dismissed* 60 NY2d 859 [1983], *lv denied* 62 NY2d 608 [1984] (fiscal advantages that an employer may obtain by unilaterally altering terms and conditions of employment for employees go to the merits of its position at the bargaining table, but do not affect its duty to negotiate).

under this State's undisputed strong and sweeping policy in favor of collective bargaining, to negotiate any change in that past practice. The Second Board Decision holds only that the State may not unilaterally compel State employees represented by the Respondent Unions (and only the Respondent Unions) to pay the fees unilaterally imposed. Thus, contrary to the State's assertion, the decisions did not repeal CSL § 50(5) by implication.

The State puts forth the straw man of the "unwieldly and inescapable" result of GOER having to separately negotiate over fees individually with 17 separate bargaining units. State Br. at 30; *see also* State Br. at 30-31 (State falsely listing units GOER must negotiate over to include those represented by PEF); at 32 (State falsely claiming DCS must request "GOER negotiate with PEF"). The decisions created no such dilemma. The State must only negotiate with the three Respondent Unions, and only regarding State employees. The decisions explicitly do not require DCS to negotiate with PEF or any other union. *See* note 3, ***supra.*** Nor do the decisions impact other public employers. The time to file an improper practice petition regarding Bulletin 09-01 has long passed. The scope of the decisions is narrow. Notably, while the State spends several pages of its brief on nightmare hypotheticals, it has not named any other public employer impacted by the decisions, and PERB is unaware of any other employer or union engaged in a dispute regarding exam fees.

The unworkable scenario described by the State is a mirage. The concerns the State details in its brief do not differ from those faced by every public employer against whom PERB has ordered make whole relief. To accept the State's argument that administrative difficulties in affording make whole relief or complying with the Taylor Law after it created a past practice—the only context in which the State's discretion is impacted by the Taylor Law—is to hold the State above the law as a public employer, absent any ground to do so.

Point III (C)(iii): Exam Fees are not a Permissive Subject of Bargaining

The State cites *Bd. of Educ.* for the premise that a subject may be a permissive subject of bargaining but makes no attempt to demonstrate that the facts of this case are analogous to any case finding a permissive subject of bargaining. The statute at issue in *Bd. of Educ.* explicitly authorized the employer to require financial disclosures to weed out corruption. In the instant matter, CSL § 50(5) explicitly authorizes setting fees. The statute at issue in *Bd. of Educ.* provided the employer with discretion as to its implementation of the financial disclosure requirement. In the instant matter, CSL § 50(5) explicitly provides DCS discretion to set fees and to abolish or waive them. This Court in *Bd. of Educ.* found the procedures regarding financial disclosures to be a mandatory, not a permissive, subject of bargaining. This Court rejected the argument that it should find disclosure requirements to be permissive because if found "no evidence--let alone clear evidence--that the

Legislature intended to withdraw the subject of disclosure requirements from the mandatory negotiating process despite their evident impact upon the employees." *Id.*, 75 NY2d at 670.

The employer in *Bd. of Educ.* argued, and this Court rejected, that matter should be deemed permissive because it was "so closely tied to" its goals. *Id.*, 75 NY2d at 670. The State similarly argues here that fees are "tied" to the merit and fitness system that DCS administers. State Br. at 25. This Court should reject that argument here. The procedures for a disclosure statement at issue in *Bd. of Educ.* were far closely tied to the goal of addressing corruption than the payment of fees is to qualification for employment, yet that tie was insufficient to move the subject from mandatory to permissive.

That some statutes reference the Taylor Law underscores that the Legislature knows how to make its intent to remove a subject form collective bargaining clear. The frequent amendments referenced by the State support the implication that the Legislature had no intention of foreclosing bargaining over fees, as it has ample opportunity to do so.[19]

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[19] To the extent the State's arguments here go beyond CSL § 50(5), such arguments should be disregarded as they are not appropriately before this Court. The State does not dispute that they were only raised before PERB in vague and conclusory allegations. *See* Second Board Decision, R. 48 n 16 ("In the absence of precise citations to such other provisions of the CSL, [PERB found] it impossible to opine on the meaning of such alleged language in other provisions."). PERB had no occasion to address these arguments. Review of a PERB decision "is limited to matters included in the original charge or developed at the formal hearing." *Civ. Serv. Empl. Assn., Inc.*,

POINT IV

PERB DID NOT ACT OUTSIDE OF ITS JURISDICTION

The State phrases as jurisdictional its argument that the DCS was not acting in the capacity of a public employer when setting the new fees and therefore the State had no duty to negotiate with the Respondent Unions over them. The State acknowledges that it did not raise this argument before the ALJ. *See* State Br. at 44. The argument was raised for the first time in the State's exceptions to the Board. Thus, this argument was never properly before PERB, PERB had no opportunity to address it, and is not properly before this Court. *See Civ. Serv. Empl. Assn.*, 73 NY2d at 798 (review of a PERB decision "is limited to matters included in the original charge or developed at the formal hearing."); *Corrigan*, 28 NY3d at 643 (even constitutional claims that were not raised during the administrative proceeding are not properly before court); *Khan*, 96 NY2d at 880; *Peckham*, 12 NY3d at 430; *NYS Corr. Officers and Police Benevolent Assn.*, 309 AD2d at 1120.

Should this Court nevertheless address the State's jurisdictional argument, it is meritless. In the stipulation it signed, the State clearly stipulated that, for the purposes of the instant matter, the State was responsible for setting fees and that the State is a public employer. *See* R. 114 (Stipulations 5, 7, 10). The State, who was

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73 NY2d at 798. *See also NYS Corr. Officers and Police Benevolent Assn.*, 309 AD2d at 1120. *See generally Peckham*, 12 NY3d at 430; *Corrigan*, 28 NY3d at 643; *Khan*, 96 NY2d at 880.

the named Respondent in the improper practice proceedings, explicitly stipulated that "Respondent did not require State employees ... to pay application fees" for exams. R. 115 (Stipulation 10).

Even without these clear stipulations, a public employer (the State) cannot be allowed to circumvent the Taylor Law by using sub-divisions to divide and conquer its workforce. "The State is specifically identified and listed [in the Taylor Law] as a single unit." *Matter of Hudson Val. Dist. Council of Carpenters v State of New York (Dept of Corr. Servs.)*, 152 AD2d 105, 108 [3d Dept 1989]. Accordingly, "[t]he whole and unified nature of the State as a public employer" is recognized by the courts. *Id.* (citing *Matter of Civ. Serv. Empl. Assn. v Helsby*, 32 AD2d 131 [3d Dept 1969], *affd on opinion below* 25 NY2d 842 [1969]).

The State cites no cases in support of its claim that PERB lacked jurisdiction to hear the instant matter. Instead, it cites a single case in which an individual terminated for lying on her application filed an Article 78 action against the local equivalent of the DCS. *See* State Br. at 44 (citing *Matter of Crossfield v Schuyler County*, 151 AD3d 1448 [3rd Dept 2017], *lv denied* 30 NY3d 905 [2017]). *Crossfield* does not address any jurisdictional issues, let alone opine as to PERB's jurisdiction.

Notably, the definition of "public employer" in the Taylor Law is not limited to the subdivision of the State directly employing the individuals impacted by an

alleged improper practice. *See* CSL § 201(6) ("The term ... "public employer" means (i) the state of New York, ... [or] (vi) any other unit of government which exercises governmental powers under the laws of the state ...."). Improper employer practices are also not defined based upon the direct employer but are action by "a public employer or its agents." CSL § 209-a(1). The DCS operates as an agent of the State in administration of the State's merit and fitness system, including setting fees related thereto. Jurisdiction is conferred by virtue of the undisputed status of the State as public employer and the clear status of DCS as the State's agent.

POINT V

THE COURT SHOULD AFFIRM THE GRANTING OF PERB'S COUNTERCLAIM FOR ENFORCEMENT OF ITS REMEDIAL ORDER

Under CSL § 205.5(d), PERB is authorized to issue remedial orders directing offending parties to cease and desist from engaging in an improper practice and to take such affirmative action, including, but not limited to, make whole relief, as will effectuate the policies of the Taylor Law. *See e.g. Matter of NYS Pub. Empl. Relations Bd. v Bd. of Educ. of City of Buffalo*, 39 NY2d 86, 90 [1976]. Remedies imposed by PERB are reviewed by this Court with deference to PERB's expertise as such "remedies for improper employer practices are peculiarly matters within [PERB's] administrative competence." *Matter of City of Albany v Helsby*, 29 NY2d

433, 439 [1972]; *Town of Islip*, 23 NY3d at 494. Such orders are enforceable by the courts under CSL § 213(a)(ii). *See e.g. City of Poughkeepsie*, 95 AD2d at 105; *Matter of Monroe County v NYS Pub. Empl. Relations Bd.*, 85 AD3d 1439, 1442 [3d Dept 2011]. "An order devised by PERB to remedy an improper practice should be upheld if it can be reasonably applied." *Matter of City of New York v NYS Pub. Empl. Relations Bd.*, 103 AD3d 145 [3d Dept 2012], *lv denied* 21 NY3d 855 [2013].

The Appellate Division correctly held that PERB's remedial order here falls well within its exclusive, nondelegable authority to fashion a remedy for the State's violation of CSL § 209-a.1(d) and that its order is properly enforced. *See* 183 AD3d at 1064, R. vi. (citing *State of New York,* 176 AD3d at 1465).

POINT VI

IF THE COURT ANNULS PERB'S DECISION OR REMEDIAL ORDER, IT SHOULD REMAND THE MATTER

If the Court annuls any part of PERB's decision or remedial order, the Court should remand the matter to PERB for further proceedings consistent with the Court's opinion. *See e.g. Town of Islip*, 23 NY3d at 494; *Burk's Auto Body v Ameruso*, 113 AD2d 198, 201 [1st Dept 1985] ("The appropriate procedure, upon a finding that the agency acted arbitrarily, is to remand the matter to the administrative agency for further proceedings in accordance with the opinion."); *Matter of Albany*

Police Officers Union v NY Pub. Empl. Relations Bd., 170 AD3d 1312, 1314 [3d Dept 2019], *lv denied* 33 NY3d 911 [2019].

In *Town of Islip*, PERB sought to have the employer return vehicles to its employees that no longer existed because no injunction had been sought earlier in the proceedings. *Id.* at 494. This Court annulled that relief as it would require the employer to purchase a new fleet of vehicles. This Court remitted the matter to PERB to "so that PERB may fashion a remedy that grants commensurate, practical relief to the employees subject to the improper practice." *Id.*

CONCLUSION

PERB respectfully submits that the Court should affirm the Appellate Division Decision in all aspects. Alternatively, the Court should remand the matter to PERB for further proceedings consistent with the Court's determination.

Respectfully submitted,

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February 10, 2022 MICHAEL T. FOIS

CERTIFICATE OF COMPLIANCE

IT IS hereby certified pursuant to 22 NYCRR § 500.13 (c)(1) that the foregoing brief was prepared on a computer using Microsoft Word. A serifed, proportionally spaced typeface was used, as follows:

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Dated: February 10, 2022
Albany, New York

STATE OF NEW YORK
COURT OF APPEALS

STATE OF NEW YORK,

Petitioner-Appellant,

- against -

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

Respondents-Respondents.

AFFIDAVIT OF SERVICE

Court of Appeals APL-2021-00167

STATE OF NEW YORK)
)
COUNTY OF ALBANY)

Lisa Robert, being duly sworn, deposes and says that deponent is over the age of 18 years and an employee of the New York State Public Employment Relations Board ("PERB").

That on February 10, 2022, deponent served PERB's BRIEF **via first-class mail,** at the address(es) designated by depositing a true copy thereof enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York, upon:

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Lisa M. Robert

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

SHEILA L. KENNEDY
Notary Public, State of New York
No. 01KE6231328
Qualified in Saratoga County
Commission Expires 11/22/2022