COURT OF APPEALS
OF THE STATE OF NEW YORK

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, 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-Respondents.

MOTION FOR LEAVE TO APPEAL

Michael N. Volforte
Acting General Counsel
Governor's Office of Employee Relations
Attorney for Petitioner-Appellant
Agency Building #2, 12th Floor
Albany, New York 12223
(518) 473-1416

Clay J. Lodovice,
Assistant Counsel

Dated: May 20, 2021

TABLE OF CONTENTS

TABLE OF CONTENTS (con't)

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Albany County
Index No. 07226-18

Date Filed:
May 20, 2021

Respondents-Respondents.

PLEASE TAKE NOTICE, that upon the annexed papers, and the Record on Appeal and briefs submitted to the Appellate Division, Third Department, as well as all of the pleadings and proceedings had and held herein, Petitioner-Appellant, STATE OF NEW YORK, will move this Court pursuant to Civil Practice Law and Rules 5602(a)(1)(i) and 22 NYCRR § 500.22, at Court of Appeals Hall, 20 Eagle Street, Albany, New York, on June 21, 2021, for an Order granting leave to appeal

to this Court from the Memorandum and Judgment of the Appellate Division, Third Department, entered on May 14, 2020.

Dated: May 20, 2021

MICHAEL N. VOLFORTE, ESQ.
Acting General Counsel
Governor's Office of Employee Relations
Attorneys for Petitioner
Agency Building #2, 12th Floor
Albany, New York 12223
(518) 473-1416

By: _____
CLAY J. LODOVICE, ESQ.
Of Counsel

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO APPEAL

PRELIMINARY STATEMENT

This appeal arises from a dispute about whether the Public Employees' Fair Employment Act's (Taylor Law)[1] general command that public employers collectively negotiate terms and conditions of employment with the employee organizations representing their employees has replaced and rendered null the statutory authority of Civil Service Law § 50(5)(b) which vests the authority to set application fees to sit for promotional examinations for State jobs with the New York State Department of Civil Service (DCS), subject only to approval by the New York State Director of the Budget (DOB).

This appeal seeks to overturn a 2018 decision of the New York State Public Employment Relations Board ("PERB") that held the Taylor Law's general command that public employers collectively bargain terms and conditions of employment with public employee unions renders null and meaningless the specific, pre-existing, language of Civil Service Law § 50(5)(b) which expressly vests with DCS, subject only to approval by DOB[2], the authority to establish,

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[1] The Public Employees' Fair Employment Act, i.e. Taylor Law, is codified at Civil Service Law Article 14.

[2] The Director of the Budget is the "head of the division of the budget … who shall be appointed by the governor." Executive Law Article 8, at § 180.

waive or otherwise abolish application fees for promotional examinations conducted by DCS to assess the merit and fitness of applicants for State employment. (R.41-53). In this case, PERB's determination has the practical effect to vitiate the plainly worded legal authority of Civil Service Law § 50(5)(b) by newly requiring a different State agency not named therein, *i.e.* the Office of Employee Relations (GOER), to now become the operative legal entity in the process of establishing, waiving or otherwise abolishing application fees for promotional examinations.[3] As PERB has newly determined that application fees for promotional examinations conducted by DCS are subject to collective negotiations, GOER, as the Governor's agent in conducting collective negotiations, must now stand in the stead of DCS and DOB to alter examination application fees contravening the procedure which was legislatively limited to DCS and DOB. (*See* Executive Law §§ 650, 653; *compare* Civil Service Law § 50(5)(b)). Furthermore, PERB's determination contradicts the express language of Civil Service Law § 50(5)(b) by newly mandating that any change to such fees be, for the first time, *subject to the approval* of each public employee union.

The Third Department's decision warrants this Court's review for three reasons.

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[3] The Office of Employee Relations, created by New York State Executive Law Article 24, is commonly referred to as the Governor's Office of Employee Relations (GOER).

First, the decision wrongly holds that the Taylor Law's "general command" regarding collective bargaining acts to displace the "more specific authority" granted to DCS, with approval by DOB, by Civil Service Law § 50(5)(b). (*See* City of Schenectady v. New York State Public Employment Relations Board, 30 N.Y.3d 109, 115 [2017]).

Second, respectfully, the decision applied an incorrect standard of review to PERB's determination that the Taylor Law displaces the preexisting express statutory grant of authority vested in DCS and DOB. The Third Department, at pages 3-4, incorrectly gave deference to PERB's 'factual' determination that the Taylor Law outweighs Civil Service Law § 50(5)(b). In doing so, the Third Department failed to adhere to the principal that "statutory construction is a function of the courts, not PERB." (Bd. of Educ. of the City of N.Y. v. New York State Pub. Employment Relations Bd., 75 N.Y.2d 660, 666 [1990] *citing* Matter of Rosen v. New York State Pub. Employment Relations Bd., 72 N.Y.2d 42, 47-48 [1988]). On this point, the Third Department wholly failed to acknowledge or address the statutory structure that balances the role of DCS and DOB – *i.e.* administration of the merit and fitness system and formulation of the State budget, respectively – versus the role of GOER – the Governor's agent to conduct collective bargaining with public employee unions. As the union respondents and

PERB are aware, GOER is the Governor's statutorily designated agent to conduct collective negotiations, not DCS or DOB. (*Compare* Civil Service Law § 6, Executive Law § 180, and Executive Law, Article 24). Even PERB acknowledged within its brief to the Third Department, at page 18, that "DCS is not even a party to this case." The Third Department did not conduct any legal analysis with regard to the distinct statutory roles and limitations of PERB, DCS, DOB, and GOER, as those roles and limitations intersect with the express grant of authority set forth in Civil Service Law § 50(5)(b). Here, this Court should grant leave to determine whether the decision properly interpreted, under the correct standard of review, whether the general command of the Taylor Law overwrites the specific provisions of the Civil Service Law § 50(5)(b) and Executive Law Article 24.

Third, the decision failed to dismiss the several improper practice charges due to PERB's lack of jurisdiction to review DCS's statutorily empowered act, with DOB approval, to set a uniform schedule of examination application fees as it administered the merit and fitness requirements in the hiring of future employees for the State. The Taylor Law does not grant PERB authority to intervene in DCS's administration of the merit and fitness system. As PERB acted beyond its statutorily defined jurisdiction, the Third Department failed to issue a decision appropriately rendering PERB's two determinations null. Petitioner-Appellant submits that the proper forum to address the actions made by DCS and DOB

pursuant to Civil Service Law § 50(a)(5) would be to file a petition pursuant to C.P.L.R. Article 78 – not by filing improper practice charges pursuant to the Taylor Law against the State of New York as employer. The Third Department failed to vacate PERB's decision due to PERB's lack of subject matter jurisdiction. PERB's determination to modify the law by acting as a *de facto* court over DCS and DOB's action was improper because: (1) PERB does not have jurisdiction under the Taylor Law to render void the authority of DCS to set examination fees, subject only to DOB approval; and (2) because the DCS was not a party to the improper practice charge proceeding. Accordingly, the Third Department's decision wrongly permitted a determination on the merits rather than dismissing each improper practice charge based upon the fact each pleading was filed in the wrong forum.

PROCEDURAL HISTORY AND TIMELINESS

This appeal is taken from successive PERB Board Decision and Order determinations issued by PERB on October 15, 2013, and October 23, 2018, respectively. Hereinafter referred to as the First Board Decision and Second Board Decision, respectively, and are attached hereto as **Exhibits A** and **B** (*See* R.32, R.41). On November 28, 2018, Petitioner-Appellant filed an Article 78 petition challenging PERB's determinations. (R.5-31). The Article 78 petition was

transferred directly to the Appellate Division with no determination being issued by the Supreme Court, Albany County, on the merits of the proceeding. (R.631).

By Memorandum and Judgment, the Third Department confirmed the PERB determinations, dismissed the petition, and granted PERB's counterclaim for a judgment of enforcement of the remedial order. (*See* **Exhibit C**).

This motion for leave is timely. The Third Department's Memorandum and Judgment was served by mail with notice of entry on November 25, 2020. (**Exhibit C**). By motion served and filed on December 16, 2020, in the Third Department, Petitioner-Appellant GOER timely sought leave to appeal to this Court or, alternatively, reargument. (**Exhibit D**). The Third Department denied the motion in a Decision and Order on Motion entered on April 4, 2016. (**Exhibit E**, Notice of Entry with Decision and Order on Motion). The Decision and Order on Motion with Notice of Entry, was personally served on GOER on April 21, 2021. This motion is made within 30 days of that service, and thus is timely. *See* C.P.L.R. §§ 2103(b)(2), 5513(b).

JURISDICTION

This Court has jurisdiction over this appeal because the action originated in an administrative agency, the Third Department's Memorandum and Judgment finally determined the action, and that order is not appealable as of right. *See* CPLR § 5602(a)(1)(i).

For the reasons set forth herein, this Court should grant the Petitioner-Appellant's motion for leave to appeal.

STATEMENT OF THE CASE

GOER is an office within the executive department of the State of New York and is the entity filing the at-issue petition. Such office is established under Article 24 of the Executive Law and is charged with assisting the Governor regarding labor 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 Taylor Law, as amended, including, without limitation, conducting collective negotiations with recognized or certified employee organizations (hereinafter referred to as the "public employee unions") and executing agreements reached pursuant thereto. (Executive Law § 653). This assistance includes, among other things, acting as the State's representative, as an employer, in matters before PERB.

GOER does not administer or implement rules for examinations, appointments, or promotions for employees in the civil service of the State. That responsibility is Legislatively vested with the State Civil Service Commission. (Civil Service Law § 6).

At all relevant times, DCS is a department of the State of New York established under Article 2 of the Civil Service Law. The president of the Civil

Service Commission is the head of DCS. (Civil Service Law § 7). The Civil Service Commission is tasked with the responsibility to "proscribe and amend suitable rules and regulations for carrying into effect the provisions [of the Civil Service Law] and section six of article five of the constitution of the state of New York, including … rules for examinations, promotions, … of employees in the classified service of the state." (Civil Service Law § 6; *see also* New York State Constitution, Article 5, Section 6).

DCS does not conduct collective negotiations with public employee unions with respect to terms and conditions of employment for employees of the State. That responsibility is Legislatively vested with GOER. (Executive Law § 653)

Respondent PERB is a board established under the Taylor Law. Pertinent to this proceeding, PERB's authority is limited to establish procedures "for the prevention of improper employer … practices." (Civil Service Law §§ 205, 209-a).

The factual genesis of this proceeding occurred in March 2009 when DCS, after receiving approval from DOB, published *General Information Bulletin No. 09-01* that established a uniform schedule of fees (different than those prescribed by the statute) for the processing of applications for promotion examinations administered by DCS. (R.55, a copy is attached as **Exhibit F**). For convenience, a document listing the **multiple public employers** and **multiple public employee unions** with employees that applied for promotion examinations administered by

DCS and paid fees subject to *General Information Bulletin No. 09-01* is attached hereto as **Exhibit G**. (*See* R.491).

This appeal, at its core, presents to the Court an issue of statutory interpretation with respect to the Legislatively defined authority and roles for these three separate and distinct offices and department of the State of New York – GOER, DCS and PERB – in the context of setting application fees for promotion examinations taken by State employees seeking new employment positions, a subject Legislatively codified at Civil Service Law § 50(5).

Namely, the appeal challenges PERB's holding that the Taylor Law takes legal precedence over Civil Service Law § 50(5)(b) which, in turn, has the effect of removing the Legislatively-prescribed authority to determine and set application fees from the DCS and newly transferring that responsibility to GOER, subject to the Taylor Law's general command to collectively bargain terms and conditions of employment with public employee unions.

Civil Service Law § 50(5)(b) provides, in pertinent part, that:

> (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 count, as the case may be, or a regional commission or personnel officer, pursuant to government agreement, **may elect to waive application fees, or to abolish fees for specific classes of positions or types of examinations or candidates, or to establish a uniform schedule of reasonable fees**

> **different from those prescribed in paragraph (a)** of this subdivision, specifying in such schedule the classes of positions or types of examinations or candidates to which such fees shall apply; 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.

(emphasis supplied).[4]

The plain language of Civil Service Law § 50(5)(b) directs that DCS and DOB are specifically tasked with a role in the establishment of application fees. In this case, the record established that after obtaining approval from DOB, DCS established "a uniform schedule of reasonable fees different from those prescribed in paragraph (a) of this subdivision, specifying in such schedule the classes of positions or types of examinations or candidates to which such fees shall apply." (R.55, 85-86; Civil Service Law § 50(5)(b)). And consistent with Civil Service Law § 50(5)(b), which does not contemplate GOER or the public employee

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[4] PERB's determination, if upheld, will similarly mean that the authority vested in **municipal or regional civil service commissions** will lose their statutory authority to "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 proscribed in [§ 50(5)(a)]". (Civil Service Law § 50(5)(b)). Rather, each of the public employers whose merit system is administered by a municipal or regional commission must newly negotiate and reach agreement with each of its public employee unions prior to any change being made to the established schedule of examination application fees.

unions' involvement/approval in the setting of application fees, the record established that neither GOER nor the public employee unions interfered in the statutory process. (*See e.g.* R.114-115).[5]

Despite the record evidence establishing that the DCS and DOB annually engaged in an application fee review process consistent with the Civil Service Law § 50(5)(b), PERB determined that DCS and DOB actions were improper because the Taylor Law's general command to negotiate terms and conditions of employment required that the subject of application fees for promotion examinations be mandatorily negotiated. (R.137-142, 146). To reach its determination, PERB necessarily held that PERB's authority under the Taylor Law supersedes DCS's authority under the Civil Service Law § 50(5)(b) and, therefore, PERB held that it was administratively permitted to insert GOER and several public employee unions into the merit and fitness statutory scheme.

The Third Department erred when it gave deference to PERB's statutory interpretation that the Legislature's enactment of the Taylor Law constituted a legislative rescission of the pre-existing express authority granted to DCS, with only DOB's necessary consent, within Civil Service Law § 50(5)(b) to establish a reasonable schedule of application fees for promotion/transition examinations

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[5] Similarly, the other multiple public employers and their multiple respective bargaining units of employees did not participate in DCS's and DOB's deliberation process prior to issuance of *General Information Bulletin No. 09-01*.

different than the fee structure mandated to be paid by applicants in CSL § 50(5)(a).

REASONS FOR GRANTING LEAVE

A. The Third Department's decision incorrectly held that examination application fees were mandatorily negotiable pursuant to the Taylor Law despite the plain language of Civil Service Law § 50(5) that vests the subject of waiving, abolishing or establishing a uniform schedule of examination application fees in the sole discretion of DCS, with approval by DOB

The Third Department wrongly upheld PERB's determinations when it failed to apply the Legislature's plain language which designated only DCS and DOB with the authority to set examination application fees. Despite the Legislature's exclusion of GOER from the responsibility or requirement to play a *mandatory role* in the setting of application fees for examinations administered by the DCS, the decision will prevent any change to application fees charged to State employees seeking potential future employment opportunities unless GOER seeks and obtains agreement from each public employee union who may have members that may potentially apply for a promotional job opportunity examination.

Contrary to the express terms of Civil Service Law § 50(5)(b), the decision newly mandates GOER to act as the necessary party, along with multiple public employee unions, to the process of waiving, abolishing or otherwise establishing a uniform schedule of application fees to take promotion examinations different than the fee structure mandated by Civil Service Law § 50(5)(a). The outcome of the

decision is inconsistent with, and renders null, the statutory scheme enacted by the Legislature within Civil Service Law § 50.

PERB's determination effectively removes DCS's participation, subject only to DOB approval, in the determination to waive, abolish or otherwise establish a reasonable schedule of fees to apply for a promotional examination. Rather, PERB has transferred that function to GOER, subject to the approval in the collective bargaining process by the multiple public employee unions representing State employees.

Although not parties to this proceeding, with respect to the several other public employers whose employees may choose to apply for potential promotional employment opportunities that are administered by the DCS,[6] the outcome of PERB's determination newly mandates those employers to act as a necessary party, along with multiple public employee organizations, to the process of

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[6] Looking specifically to the public employers with employees who applied for examinations subject to *General Information Bulletin No. 09-01*, the group of additional public employers that will be newly required to be parties to the process of setting application fees for examinations administered by the DCS for potential promotional employment opportunities includes the **New York State Thruway Authority, New York State Canal Corporation, New York State Teachers Retirement System and the New York State Bridge and Tunnel Authority**. (*See* R.491, 492-567; *see also* Verified Petition, ¶ 20). The Taylor Law specifically defines these employers as separate and distinct from the State of New York, as employer. (*See* Civil Service Law § 201(6)(a)). If PERB's determination is upheld, these several employers will be, by administrative fiat, inserted into Civil Service Law § 50(5)(b) in the place of DCS and DOB.

establishing a reasonable and uniform schedule of application fees for promotion/transition examinations different than the fee structure mandated to be paid by applicants in CSL § 50(5)(a). (R.491). In this vein, PERB's determination has a Statewide implication for any public employer whose employees may seek to apply for a promotional job opportunity that require merit and fitness examination.

Furthermore, PERB's determination has the practical outcome of transferring the final determination of the schedule of examination fees to be paid by individuals applying for promotional examination opportunities from DCS, subject to DOB approval, to the multiple public employee unions that have members who apply for a potential promotional job opportunity, even if that potential promotional job opportunity is outside of the member's current employee bargaining unit. (R.492-567). This PERB driven outcome will prevent DCS from meeting the statute's express requirement that the schedule of reasonable examination fees be "uniform." (Civil Service Law § 50(5)(b)). PERB's determination will inevitably result in numerous different fee schedules across employers and their several bargaining units since uniformity will be impossible to obtain. This means that employees for the same employer will be paying different application fees to take the same promotional examination. In this vein, PERB's statutory interpretation is not valid.

As detailed in the Verified Petition, Respondent challenges PERB's statutory interpretation that holds the provisions of Civil Service Law § 50(5) to have been superseded and rendered null by the Taylor Law.

B. The Third Department applied the incorrect standard of review when it granted deference to PERB's interpretation of a statute outside of PERB's

Contrary to the established standard of review applicable to conflicts between statutes, the Third Department limited its review to whether PERB's statutory interpretation was "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. (Exhibit C, at p.3, *citing* Matter of DeOliveira v PERB, 133 A.D.3d 1010, 1011 [2015] [internal quotation marks and citations omitted]; *see* Matter of State of New York v PERB, 176 A.D.3d 1460, 1463 [2019]; Matter of Albany Police Officers Union, Local 2841, Law Enforcement Officers Union Dist. Council 82, AFSCME, AFL-CIO v. PERB, 149 A.D.3d 1236, 1238 [2017]).

Unlike the issue of law raised in the current case, each case cited by the Third Department presented review of PERB's *findings of facts* as interpreted through the terms of the Taylor Law. The cases cited by the Third Department did not address PERB's administrative interpretation of a statutory provision outside of the Taylor Law that specifically vests the authority to act with other distinct State

offices and/or departments. By citing to these cases, the Third Department appears to have improperly granted deference to PERB's determination on questions founded solely upon statutory interpretation.

The core question presented in this proceeding is one of statutory interpretation, *i.e.* the question of whether the Taylor Law enactment superseded the specific grant of authority to DCS and DOB in Civil Service Law § 50(5)(b). Accordingly, the Petitioner respectfully submits that a Court must review the issue presented *de novo*, without deferring to PERB's interpretation of the statute, because "the question is one of pure statutory construction 'dependent only on apprehension of legislative intent [with] little basis to rely on any special competence'" of PERB. (*See* Matter of Rosen v. PERB, 72 N.Y.2d 42, 47-48, 560 N.Y.S.2d 534 [1998] *quoting* Kurcsics v. Merchants Mut. Ins. Co., 49 N.Y.2d 451, 459, 426 N.Y.S.2d 454 [1980]; *see also* New York City Transit Authority v. PERB, 8 N.Y.3d 226, 231, 832 N.Y.S.3d 132 [2007]).

Rather than review PERB's interpretation of Civil Service Law § 50(5) *de novo*, the Third Department relied on PERB's assessment of whether the record contained 'substantial evidence' to support a finding of law, rather than fact. Petitioner respectfully submits that the Taylor Law's general command regarding collective bargaining is not sufficient to displace the more specific authority granted to DCS and DOB by Civil Service Law § 50(5)(b). (*See e.g.* Matter of City

of Schenectady v. PERB, 30 N.Y.3d 109, 116, 64 N.Y.S.3d 644 [2017]; *see also* City of Long Beach v. PERB, 187 A.D.3d 745, 133 N.Y.S.3d 32, [2nd Dept., 2020] *lv.app. granted* April 29, 2021, 2021 WL 1686078).

By placing the authority to set application fees for promotion examinations specifically with DCS and DOB, to the exclusion of GOER, the Legislature manifested the intent that the subject of application fees is excluded from collective bargaining as it relates to State employees.[7]

If the Legislature intended for the subject matter of merit and fitness examination application fees to be mandatorily bargained, it had the opportunity to place GOER in the stead of DCS contemporaneously with the five times Civil Service Law § 50(5) was amended by the Legislature subsequent to the enactment of the Taylor Law. (*See* L.1985, c.845, § 1; L.1989, c. 61, § 195; L.2006, c.449, § 1; L.2017, c.404, § 1; and L.2018, c.35 § 1).[8]

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[7] In contrast, the Legislature has accounted for the application of the Taylor Law, *i.e.* "Article Fourteen," within several areas of the Civil Service Law. *See e.g.* Civil Service Law § 65, 75, 76, *etc*. If the Legislature intended for the setting of application fees to be mandatorily negotiable under the Taylor Law as surmised by PERB, it could have done so similar to the several other provisions contained in the Civil Service Law. Despite amending Civil Service Law § 50(5) on five occasions, the Legislature did not expressly do so.

[8] A detailed legislative timeline covering the Civil Service Law § 50(5), the enactment of the Taylor Law, creation of PERB, and the creation of GOER, is set forth in the Petitioner-Appellant's Brief submitted to the Appellate Division, at pages 6-10.

Furthermore, the Third Department did not address the implication of PERB's determination upon the statutorily defined functions across GOER and DCS as those functions pertain to the distinctly defined roles of collectively bargaining with public employee unions and the administration of the Constitutionally required merit and fitness system applicable to civil employees, respectively. In fact, neither the existence of GOER nor GOER's statutorily defined role in the collective bargaining process, *i.e.* Executive Law Article 24, were mentioned within the Third Department's decision.

The decision's result which necessarily and improperly transfers responsibility to set fees from DCS to GOER was based upon the Third Department's error in giving deference to PERB's statutory analysis. The decision wrongly focused upon PERB's analysis which rested upon whether DCS possessed discretion to set the application fees administered by it rather than whether the Legislature determined that such fees are to be set by DCS or, in the alternative, negotiated by GOER for State employee examinations.

C. The Third Department's decision failed to address the question of whether PERB's statutory authority to address improper practices grants it authority to control and enjoin the actions of DCS, with approval of DOB, that were made based upon a plain and clear grant of statutory authority.

The Third Department failed to dismiss the proceeding due to PERB's improper assumption of jurisdiction when it proceeded to hear the public employee

unions' challenge against the setting of application fees by DCS, and approved by DOB, in accordance with Civil Service Law § 50(5)(b). Accordingly, PERB's determination should be vacated and rendered null.

The record established that DCS and DOB acted in accordance with the terms of Civil Service Law § 50(5)(b) for several years prior to the implementation of fees challenged by the public employee unions herein. The initially assigned Administrative Law Judge relied upon the credible record evidence that demonstrated a detailed history of DCS and DOB acting in accordance with the terms of Civil Service Law § 50(5)(b) for several years and opined as follows:

> The [public employee unions] did not rebut the State's evidence establishing that DCS has, in the past, submitted, or considered submitting, promotion exam fee proposals to the Division of Budget as part of its yearly budget process; nor did the [public employee unions] rebut the State's evidence that the Division of Budget has applied various objective criteria in its yearly determination as to whether or not such proposals should be approved and applied. Rather, the [public employee unions] assert that the State's deliberations were inconsistent and not communicated to the unions. I reject both of these arguments.

(R. 130, 146).

Although the Third Department noted that "in 2004 and 2005, proposals were submitted to establish a fee schedule for promotional and transitional examinations, but they were ultimately rejected," it is unclear whether the Third Department (1) weighed this fact within the context of the procedure required by

Civil Service Law § 50(5)(b), or (2) contemplated that the proposals were submitted by DCS to DOB or, alternatively, incorrectly contemplated that the proposals were submitted by GOER to the public employee unions in the context of collective bargaining. (Exhibit C, p.5).

In the Second Board Decision, PERB did not set forth a statutory basis to establish that it possessed jurisdiction to review DCS's statutorily based action of setting of application fees that had been approved by DOB. PERB failed to explain the basis upon which its limited statutory mandate to "establish procedures for the prevention of improper … practices" extended over actions Legislatively delegated to DCS. (*See* Civil Service Law § 5050(5)(d)). Rather, PERB asserted that the question of whether it acted in excess of its jurisdiction was not raised to the administrative law judge and, therefore, cannot be raised to the PERB Board. (R.13).

By statute, although the PERB Board is created within the DCS, the DCS and Civil Service Commission are prohibited from supervising, directing or controlling the PERB Board in the performance of its functions under the Taylor Law. (Civil Service Law § 205(6)). Conversely, the PERB Board is not empowered to control or enjoin the functions of DCS.

The Third Department did not specifically address whether PERB possessed jurisdiction to review and enjoin DCS and DOB from setting of application fees.

(Exhibit C, p.5). Petitioner-Appellant respectfully submits that PERB's lack of jurisdiction over DCS's actions justifies a grant of leave.

D. The holding that the Taylor Law removes DCS's statutory authority, subject to DOB approval, to establish uniform application fees for promotion examination administered by DCS with the outcome that GOER (and other employers and public employee unions) must collectively bargain any change to a uniform application fee schedule with each union that may have members that apply to sit for a promotional examination is a novel ruling warranting this Court's review.

The plain language of Civil Service Law § 50(5)(b) vests to DCS, and DOB, the authority to determine appropriate examination application fees for promotional job opportunities examinations administered by DCS. This statutory grant of authority is consistent with the vesting of the responsibility to meet the merit and fitness requirements for the State's public employees upon DCS through both the New York State Constitution and Civil Service Law. Implementation of the uniform fee schedule set forth in *General Information Bulletin 09-01* was consistent with DCS's responsibility and statutorily granted authority. Despite the fact that implementation of the uniform fee schedule set forth in *General Information Bulletin 09-01* readily fits within the Civil Service Law's statutory scheme for DCS, PERB's determination presents the novel issue of whether the Taylor Law was enacted with the effect of inserting other departments/offices into the administration of the merit and fitness system. Here, the question for appeal is

whether PERB's statutory interpretation of competing statutes, i.e. Civil Service Law § 50(5)(b) and Taylor law, is appropriate and entitled to deference. PERB's statutory interpretation, that contravenes the plain language of the Civil Service Law, presents the novel issue of whether GOER, a distinct office of the State, must become a necessary party to Civil Service Law § 50(5)(b)'s structure to waive, abolish or otherwise establish a uniform schedule of promotion examination application fees.

This appeal further presents a novel ruling in that the outcome of PERB's determination and the Third Department's decision necessarily means that the statutory requirement that the schedule of promotion examination application fees be **uniform** will be impossible to obtain. DCS will be practically prevented from ever meeting Civil Service Law § 50(5)(b)'s mandate that it "establish a uniform schedule of fees" to be paid by every applicant for each specific "classes or positions or types of examinations or candidates to which such fees shall apply." Simply in the context of GOER and the State employee public employee unions, reaching a uniform schedule of fees will be practically unobtainable.

Importantly, the uniform fee schedule set forth in *General Information Bulletin No. 09-01* applies to employees applying for promotion opportunity examinations for employers and public employee unions beyond GOER and the State public employee unions. (*See* R.491). This fact magnifies the truism resulting

from PERB's determination – a uniform schedule of examination fees will no longer be feasible. If DCS must request that GOER as the State's bargaining representative and also request that the other public employers implicated by *General Information Bulletin No. 09-01* negotiate with each of their respective public employee unions prior to setting a schedule of application fees, no "uniform schedule" can realistically be established.

As a simple example of the multiple employee groups whose members apply for promotion examinations covered by GIB 09-01, reference is made to the interdepartmental title of "Secretary 1" exam presented in 2005 and 2008. (R.494, R.556). That exam consisted of **4,423 applicants** from **eleven separate employee groups** that include State employees, both represented (across multiple units) and M/C, and Thruway Authority employees, both represented and unrepresented (i.e managerial/confidential (M/C)), and Bridge Authority employees, and Canal Corporation employees. This fact pattern demonstrating the impracticality of meeting the statute's mandate of a uniform schedule of fees is also readily evident in the job titles of "Associate Personnel Administrator," "Office Services Manager," "Keyboard Specialist 2," "Keyboard Specialist 2 (Spanish Language)," "Secretary 1 (Spanish Language)," "Senior Employment Security Clerk," and "Senior Licensed Practical Nurse 1." (R.484, 518, 520, 543).

The give and take of collective negotiations across multiple employers and multiple unions, each with different priorities and concerns, renders a uniform outcome practically impossible. The process newly required by PERB's determination could take years to accomplish, especially if any individual bargaining unit's negotiation reached impasse. When implemented, PERB's determination cannot stand as against the plain language of the statute.

Additionally, this appeal further presents a novel ruling with a state-wide impact because PERB's determination will affect every municipal and regional civil service commission and the multitude of public employers to which the commissions conduct examinations for promotional job opportunities. Although this appeal specifically arises from facts tied to DCS, DOB and GOER, (and the other employers implicated by *General Information Bulletin 09-01*), the terms of Civil Service Law §50(5)(b) now deemed by PERB to be subservient to the Taylor Law also apply to each "municipal commission, subject to the approval of the governing board or body of the city or count, as the case may be, or a regional commission or personnel officer, pursuant to government agreement." (Civil Service Law § 50(5)(b)). Accordingly, this case will impact, and potentially interfere with, the administration of the Constitutionally required merit system for promotional job positions at multiple levels of government within the State of New York. (Article 5, Section 6). This wide impact, altering a statutory balance that has

existed for over five decades, and interfering with DCS's, municipal and regional commissions', ability to meet the State Constitution's requirement that these entities to assess the merit of employees, supports a grant of leave to appeal in this matter.

CONCLUSION

For the foregoing reasons, leave to appeal should be granted.

Dated: Albany, New York
May 20, 2021

Respectfully submitted,

MICHAEL N. VOLFORTE, ESQ.
Acting General Counsel
Governor's Office of Employee Relations
Attorneys for Petitioner-Appellant
Agency Building #2, 12th Floor
Albany, New York 12223
(518) 473-1416

By: /s/ Clay J. Lodovice

CLAY J. LODOVICE, ESQ.
Of Counsel

Motion for Leave to Appeal

Exhibit A

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO,

Charging Party,

CASE NO. U-29047

- and -

STATE OF NEW YORK (DEPARTMENT OF CIVIL SERVICE),

Respondent.

In the Matter of

DISTRICT COUNCIL 37, AFSCME, AFL-CIO, LOCAL 1359,

Charging Party,

CASE NO. U-29137

- and -

STATE OF NEW YORK (DEPARTMENT OF CIVIL SERVICE),

Respondent.

In the Matter of

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

Charging Party,

CASE NO. U-29179

- and -

STATE OF NEW YORK (DEPARTMENT OF CIVIL SERVICE),

Respondent.

In the Matter of

NEW YORK STATE PUBLIC EMPLOYEES FEDERATION, AFL-CIO,

Charging Party,

CASE NO. U-29409

- and -

STATE OF NEW YORK (DEPARTMENT OF CIVIL SERVICE),

Respondent.

STEVEN A. CRAIN and DAREN J. RYLEWICZ, GENERAL COUNSELS (ELLEN M. MITCHELL of counsel), for CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO

ROBIN ROACH, GENERAL COUNSEL (ERICA GRAY-NELSON of counsel), for DISTRICT COUNCIL 37, AFSCME, AFL-CIO, LOCAL 1359

SHEEHAN, GREENE, GOLDERMAN & JACQUES, LLP (EDWARD J. GREENE, JR. of counsel), for NEW YORK STATE CORRECTIONAL OFFICERS AND POLICE BENEVOLENT ASSOCIATION, INC.

LISA M. KING, GENERAL COUNSEL (STEVEN M. KLEIN of counsel), for NEW YORK STATE PUBLIC EMPLOYEES FEDERATION, AFL-CIO

MICHAEL N. VOLFORTE, ACTING GENERAL COUNSEL (CLAY J. LODOVICE of counsel), for Respondent

BOARD DECISION AND ORDER

These consolidated cases come to the Board on separate exceptions filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA), District Council 37, AFSCME, AFL-CIO, Local 1359 (DC 37), the New York State Correctional Officers and Police Benevolent Association, Inc. (NYSCOPBA) and the New York State Public Employees Federation, AFL-CIO (PEF), and cross-exceptions by the State of New York (Department of Civil Service) (State), to a decision of an

Administrative Law Judge (ALJ) dismissing the respective charges of the employee organizations alleging that the State violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally imposed a fee schedule for civil service promotion/transition examinations. Without reaching the issue of whether the subject of the charges is a mandatory subject of negotiations, the ALJ dismissed the charges on the ground that the charging parties had failed to demonstrate a unilateral change in a past practice.[1]

EXCEPTIONS

CSEA excepts to the ALJ's failure to determine that the subject of application fees for promotion/transition examinations is a mandatory subject under the Act and her finding that CSEA failed to prove that the State had unilaterally changed a past practice. For its exceptions, DC 37 contends that the ALJ misapplied the applicable standard for determining whether a binding past practice exists under the Act, and that the ALJ erred in concluding that the State's prior internal deliberations with respect to imposing application fees for the at-issue examinations constituted a binding past practice. Similarly, PEF asserts in its exceptions that the ALJ misapplied our precedent and erred in concluding that the State's unilateral action was consistent with a past practice of the State making periodic internal determinations as to whether to charge for the examinations. Finally, NYSCOPBA's exceptions challenge the ALJ's past practice analysis and determination, the ALJ's finding that the State did not need to negotiate the unilateral change because it was exercising its discretion under Civ Serv Law §50, and

[1] 45 PERB ¶4620 (2012). On the mutual consent of the parties, multiple extensions were granted to the parties for the filing of exceptions by CSEA, DC 37, NYSCOPBA and PEF and the response and cross-exceptions by the State.

her failure to determine whether the subject of the charges is a mandatory subject under the Act.

The State, in its response and cross-exceptions, supports the ALJ's decision but asserts she erred in failing the reach the issue of whether the subject of the charges is mandatory and whether PEF's charge is untimely.

Based upon our review of respective arguments of the parties, we reverse the decision of the ALJ to dismiss all four charges, and remand the case for further proceedings consistent with our decision.

FACTS

The applicable facts are fully set forth in the ALJ' s decision, which are based upon the parties' stipulation and the testimony of two State witnesses. They are repeated here only as necessary to address the exceptions and cross-exceptions.

The State Department of Civil Service (DCS) notified PEF in a letter dated January 30, 2009, that it would be establishing a fee structure for applications for promotion/transition examinations as part of its 2008-2009 Spending Plan and that the collection of the application fees would commence for examinations to be announced on March 13, 2009 and administered on May 30, 2009.

In General Information Bulletin Number 09-01 (Bulletin 09-01) dated March 16, 2009, the DCS Director of Staffing Services announced to State department and agency personnel, human resources, and affirmative action offices that DCS would begin assessing fees for the processing of applications for promotion/transition examinations announced on or after March 13, 2009 and administered on or after May 30, 2009. Bulletin 09-01 also announced increases in the application fees already paid for open

competitive examinations.

Following issuance of Bulletin 09-01, the State began assessing application fees for the promotion/transition examinations, and all employees in the collective negotiating units represented by the charging parties who applied for such examinations have paid the fees. It is not disputed that the fees were implemented without collective negotiations with the charging parties.

For at least ten years prior to issuance of Bulletin 09-01, the State did not require employees in the collective negotiating units represented by the charging parties to pay application fees for promotion/transition examinations and such fees were not paid by employees in those units.

DCS implemented the application fees in 2009 for fiscal reasons after its plan, which included other proposed DCS budgetary options, was reviewed and approved by the State Division of Budget (DOB). DOB approved the implementation of the fee schedule due to the State's economic condition at the time. When evaluating a proposal regarding application fees for civil service examinations, DOB considers a number of factors, including whether the proposal involves an existing or a new fee, the costs associated with implementation, the impact it will have and the likelihood that it will increase revenue within a specific time period.

In 2003, DCS had proposed to DOB that application fees for promotion/transition examinations for State employees be imposed and that fees for open competitive examinations be increased. At that time, DOB approved increasing the fees for open competitive examinations, but rejected the imposition of a fee for promotion/transition examinations. In 2004 and 2005, DOB again disapproved DCS proposals to establish

promotion/transition examination fees for State employees to achieve necessary budgetary cuts.

DISCUSSION

In *Chenango Forks Central School District (Chenango Forks)*,[2] we restated the applicable test for determining whether there is an enforceable past practice concerning a mandatory subject under the Act. Under that test, there must be a *prima facie* showing of a practice that was unequivocal and continued uninterrupted for a period of time sufficient under the facts and circumstances to create a reasonable expectation among the affected unit employees that the practice would continue. Our past practice analysis is fact-specific and, in general, a long term practice alone will constitute sufficient evidence to establish a *prima facie* case.[3] The *prima facie* showing by a charging party, however, is subject to an employer's affirmative defense that it lacked actual or constructive knowledge of the practice.

In the present case, the record firmly demonstrates the State's actual knowledge of the practice. Therefore, the application of our past practice analysis under *Chenango Forks* centers on whether the facts and circumstances demonstrate that the State's ten year practice of not charging fees to take the promotion/transition examinations created

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[2] 40 PERB ¶3012 (2007), *remanded,* 42 PERB ¶4527 (2009), *affd,* 43 PERB ¶3017 (2010), *confd sub nom, Chenango Forks Cent Sch Dist v New York State Pub Empl Rel Bd,* 95 AD3d 1479, 45 PERB ¶7006 (3d Dept 2012*) affd* 21 NY3d 255, 46 PERB ¶7008 (2013).

[3] *Manhasset Union Free Sch Dist,* 41 PERB ¶3005 (2008), *confd and remitted on other grounds sub nom.Manhasset Union Free Sch Dist v New York State Pub Empl Rel Bd,* 61 AD3d 1231, 42 PERB ¶7004 (3d Dept 2009) *on remittiur,* 42 PERB ¶3017 (2009); *City of Oswego*, 41 PERB ¶3011 (2008).

a reasonable expectation among the affected unit employees that the practice would continue.

Following our review of the record and without determining whether the subject is mandatory, we find that the unequivocal nature of the practice and its uninterrupted continuation for at least ten years demonstrates that employees in the represented units had a reasonable expectation that the practice would continue.

Contrary to the ALJ's conclusion, the present case is not analogous to *State of New York (Governor's Office of Employee Relations and Department of Health)*.[4] Under the unique facts in that case, we found that the departmental practice of sponsoring an annual picnic and permitting employees to attend without charging leave accruals was conditioned on the employer's unfettered discretion, which had been codified in the DCS Time and Attendance Manual. The facts demonstrated that in prior years the department had applied its discretion when considering annual requests for an employee picnic by PEF and CSEA representatives. As a result, we concluded that the State had not unilaterally changed the practice when it applied its discretion by denying a request for a 1990 employee picnic. In light of the contours of that particular practice, the represented employees in that case lacked a reasonable expectation that the annual picnics would continue.

Based upon the foregoing, we reverse the ALJ's decision and remand the cases for a determination as to whether the subject of the charges is a mandatory subject of negotiations, and to decide the State's timeliness defense concerning PEF's charge.

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[4] 25 PERB ¶3005 (1992), *confd, Public Employees Fedn, AFL-CIO v New York State Pub Empl Rel Bd,* 195 AD2d 930, 26 PERB ¶7008 (3d Dept 1993).

Nothing in our decision precludes the ALJ, at her discretion, from reopening the record for purposes of receiving offers of proof and/or additional evidence from the parties including evidence to resolve an ambiguity in the record: whether the at-issue practice was limited to represented employees or whether the practice and the unilateral change were also applicable to nonunit employees.

DATED: October 15, 2013
Brooklyn, New York

Jerome Lefkowitz, Chairperson

Sheila S. Cole, Member

Motion for Leave to Appeal

Exhibit B

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO,

Charging Party,

- and -

STATE OF NEW YORK (DEPARTMENT OF CIVIL SERVICE),

Respondent.

CASE NO. U-29047

In the Matter of

DISTRICT COUNCIL 37, AFSCME, AFL-CIO, LOCAL 1359,

Charging Party,

- and -

STATE OF NEW YORK (DEPARTMENT OF CIVIL SERVICE),

Respondent.

CASE NO. U-29137

In the Matter of

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

Charging Party,

- and -

STATE OF NEW YORK (DEPARTMENT OF CIVIL SERVICE),

Respondent.

CASE NO. U-29179

In the Matter of

NEW YORK STATE PUBLIC EMPLOYEES FEDERATION, AFL-CIO,

Charging Party,

- and -

CASE NO. U-29409

STATE OF NEW YORK (DEPARTMENT OF CIVIL SERVICE),

Respondent.

DAREN J. RYLEWICZ, GENERAL COUNSEL (STEVEN M. KLEIN of counsel), for CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO

ROBIN ROACH, GENERAL COUNSEL (ERICA GRAY-NELSON of counsel), for DISTRICT COUNCIL 37, AFSCME, AFL-CIO, LOCAL 1359

LIPPES MATHIAS WEXLER FRIEDMAN LLP (THIEN-NGA NGUYEN of counsel), for NEW YORK STATE CORRECTIONAL OFFICERS AND POLICE BENEVOLENT ASSOCIATION, INC.

EDWARD ALUCK, GENERAL COUNSEL (JOHN F. KERSHKO of counsel), for NEW YORK STATE PUBLIC EMPLOYEES FEDERATION, AFL-CIO

MICHAEL N. VOLFORTE, ACTING GENERAL COUNSEL (CLAY J. LODOVICE of counsel), for Respondent

BOARD DECISION AND ORDER

These cases come to us on exceptions filed by the State of New York (Department of Civil Service) (State) and a cross-exception filed by District Council 37, AFSCME, AFL-CIO, Local 1359 (DC 37) to a decision and order of an Administrative Law Judge (ALJ).[1] The ALJ found that the State violated § 209-a.1 (d) of the Public Employees' Fair Employment Act (Act) when it established a schedule of fees for

[1] 50 PERB ¶ 4584 (2017).

promotion/transition examinations (examination fees). These examination fees applied to, among others, employees represented by DC 37, the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA), the New York State Correctional Officers and Police Benevolent Association, Inc. (NYSCOPBA), and the New York State Public Employees Federation, AFL-CIO (PEF).

EXCEPTIONS

The State filed eight exceptions to the ALJ's decision. The State's first two exceptions argue that the ALJ erred in finding the subject of examination fees to be mandatorily negotiable. According to the State, negotiations over such fees are prohibited or nonmandatory. The State's third exception argues that the ALJ failed to address the specific question directed by the Board on remand and asserts that the examination fees apply to both represented and non-represented employees. The State's fourth exception argues that, because examination fees apply to both represented and unrepresented employees of the State and to other non-State public employers, the subject is nonmandatory. The State's fifth and sixth exceptions assert that the ALJ's finding of a violation and her entire remedial order are contrary to the facts and the law. The State's seventh exception asserts that, if the ALJ's decision is upheld, the Board should clarify that the remedy applies only to CSEA-represented units of State employees within the Institutional Services, Administrative Services, and Operational Services bargaining units. The State's final exception argues that the charges must be dismissed because the Department of Civil Service was not acting as the employer when it established the at-issue examination fees.

DC 37 filed a cross-exception in which it argued that the record does not support the ALJ's finding that examination fees applied to employees employed by the Thruway

Authority, the Canal Corporation, or the Bridge Authority. DC 37 otherwise supports the ALJ's decision.

CSEA and NYSCOPBA support the ALJ's decision and contend that no basis has been demonstrated for reversal.

Based upon our review of the record and our consideration of the parties' arguments, we affirm the ALJ's decision.

PROCEDURAL HISTORY

A hearing was held on the allegations in these consolidated charges on March 16, 2010. On December 11, 2012, the then-assigned ALJ issued a decision dismissing the charges on the ground that the charging parties had failed to demonstrate a unilateral change in a past practice.[2]

The charging parties and the State filed exceptions, and the Board reversed the ALJ's decision on October 15, 2013.[3] The Board held that the State had a ten-year practice of not charging bargaining unit employees examination fees. The Board remanded the case for a determination of whether the subject of examination fees was a mandatory subject of negotiations and to decide the State's timeliness defense concerning PEF's charge.[4] The Board noted that the ALJ could, at her discretion, reopen the record for purposes of receiving offers of proof and/or additional evidence from the parties "including evidence to resolve an ambiguity in the record: whether the at-issue practice was limited to represented employees or whether the practice and the

[2] 45 PERB ¶ 4620 (2012).
[3] 46 PERB ¶ 3032 (2013).
[4] *Id*, at 3072.

unilateral change were also applicable to non unit employees."[5]

The ALJ reopened the record on a limited basis to address the issues adverted to the Board, and a hearing was held on October 21, 2015. All parties were present and represented by counsel, and all parties filed briefs.

The cases were subsequently reassigned to another ALJ, who issued the decision at issue here. As mentioned above, the ALJ found that the subject of examination fees was mandatorily negotiable. She also found that PEF's charge was untimely filed. No exceptions were filed to this finding. As a result, any exceptions to the ALJ's timeliness finding have been waived.[6]

FACTS

The facts are fully set forth in the ALJs' decisions and the Board's prior decision and are discussed here only as necessary to address the exceptions.

CSEA is the duly certified collective bargaining representative for State employees in the Administrative Services Unit, the Operational Services Unit, and the Institutional Services Unit.[7]

DC 37 is the duly certified collective bargaining representative for State employees in the Rent Regulation Services Unit.[8]

NYSCOPBA is the duly certified collective bargaining representative for State employees in the Security Services Unit.[9]

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[5] *Id.*
[6] Rules of Procedure § 213.2 (b) (4); *see, eg, Village of Westhampton Dunes*, 50 PERB ¶ 3035, 3146, n. 8 (2017); *County of Chemung and Chemung County Sheriff*, 50 PERB ¶ 3022, 3090 (2017); *Village of Endicott*, 47 PERB ¶ 3017, 3052, n. 5 (2014); *NYCTA (Burke)*, 49 PERB ¶ 3021, 3072, n. 4 (2016) (citing cases).
[7] 45 PERB ¶ 4620, 4834 (2012), citing Joint Ex 1.
[8] *Id.*

In General Information Bulletin Number 09-01 (Bulletin 09-01) dated March 16, 2009, the State Department of Civil Service (DCS) Director of Staffing Services announced to State department and agency personnel, human resources, and affirmative action offices that DCS would begin assessing fees for the processing of applications for promotion/transition examinations announced on or after March 13, 2009 and administered on or after May 30, 2009.[10]

Following issuance of Bulletin 09-01, the State began assessing examination fees, and all employees in the collective negotiating units represented by the charging parties who applied for such examinations have paid the fees. It is not disputed that the fees were implemented without collective negotiations with the charging parties.

For at least ten years prior to issuance of Bulletin 09-01, the State did not require employees in the collective negotiating units represented by the charging parties to pay examination fees.

Scott DeFruscio, DCS' Director of Staffing Services, testified that Bulletin 09-01 is applicable to "any entity that participates in the examinations given by the Department of Civil Service," which includes New York State executive agencies, the Thruway Authority, the Bridge Authority, and the Canal Corporation.[11] Specifically, with regard to promotion/transition examinations, he stated that the Bulletin applies to both represented and unrepresented (i.e. managerial and confidential) employees working at those participating entities.

Section 50 of the Civil Service Law (CSL) ("Examinations generally"), attached as

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[9] *Id.*
[10] 45 PERB ¶ 4620, at 4835.
[11] Tr, at 15, 17.

an exhibit to the parties' stipulation of facts, states the following, in relevant part

> 5. Application fees. (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. Such fees shall be dependent on the minimum annual salary announced for the position, as follows: (1) on salaries of less than three thousand dollars per annum, a fee of two dollars; (2) on salaries of more than three thousand dollars and not more than four thousand dollars per annum, a fee of three dollars; (3) on salaries of more than four thousand dollars and not more than five thousand dollars per annum, a fee of four dollars; and (4) on salaries of more than five thousand dollars per annum, a fee of five dollars. If the compensation of a position is fixed on any basis other than an annual salary rate, the applicant shall pay a fee based on the annual compensation which would otherwise be payable in such position if the services were required on a full time annual basis for the number of hours per day and days per week established by law or administrative rule or order. Fees paid hereunder by an applicant whose application is not approved may be refunded in the discretion of the state civil service department or of the appropriate municipal commission.
>
> (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 or positions or types of examinations or candidates, or to establish a uniform schedule of reasonable fees different from those prescribed in paragraph (a) of this subdivision, specifying in such schedule the classes of positions or types of examinations or candidates to which such fees shall apply; 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.[12]

DISCUSSION

As the ALJ found, economic benefits are terms and conditions of employment

[12] Joint Ex 1.

and are, therefore, mandatorily negotiable.[13] We agree with the ALJ that not charging the fee for promotion/transition examinations here was such a mandatorily negotiable economic benefit. State employees would have had to pay the fee to apply for a promotion/transition exam but for the fact that for at least ten years prior to issuance of Bulletin 09-01, the State did not require employees in the negotiating units represented by the charging parties to pay examination fees. We therefore affirm the ALJ's finding that the State was not privileged to unilaterally implement a fee for promotion/transition exams without negotiating with the charging parties, unless one of the defenses offered by the State has merit.

The State first argues that examination fees are a prohibited or nonmandatory subject of bargaining pursuant to CSL § 50.

We find that the subject of examination fees is neither a prohibited nor a nonmandatory subject of bargaining. As the Court of Appeals emphasized in *City of Watertown v New York State Public Employment Relations Board*, the obligation under the Taylor Law to bargain as to all terms and conditions of employment is a "strong and sweeping policy of the State."[14] As the Court went on to explain

> 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.

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[13] *See, eg, Town of Islip*, 44 PERB ¶ 3014, 3051 (2011), *confd and remanded as to remedy sub nom Matter of Town of Islip v NYS Pub Empl Relations Bd*, 23 NY3d 482, 47 PERB ¶ 7006 (2014), *remanded to ALJ*, 48 PERB ¶ 3002 (2015); *County of Onondaga*, 12 PERB ¶ 3035, 3066 (1979), *confd County of Onondaga v NYS Pub Empl Relations Bd*, 77 AD2d 783, 13 PERB ¶ 7011 (4th Dept 1980).

[14] 95 NY2d 73, 78, 33 PERB ¶ 7007 (1990), citing *Board of Educ of the City Sch Dist of the City of New York v NYS Pub Empl Relations Bd*, 75 NY2d 660, 667; *Matter of Cohoes City School Dist v Cohoes Teachers Assn*, 40 NY2d 774, 778 (1976).

> 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.[15]

CSL § 50 contains no express prohibition on bargaining.[16] Nor is the statute "so unequivocal a directive to take certain action that it leaves no room for bargaining."[17] 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.[18] Rather, here, as in *Board of Education of the City School District of the*

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[15] *Id* at 78-79, internal citations and quotations omitted.

[16] The State, without providing specific examples, argues that other provisions of the CSL have been amended to "give way and account for collective bargaining rights established under the Taylor Law" and argues that the absence of such an amendment to CSL § 50 means that the Legislature does not intend for collective bargaining to take place. Memorandum in Support of Exceptions, at 5-6, 19-20. In the absence of precise citations to such other provisions of the CSL, we find it impossible to opine on the meaning of such alleged language in other provisions. In general, we do not find it probative that CSL § 50 does not explicitly allow for bargaining under the Taylor Law. The strong and sweeping policy in favor of bargaining would make such an explicit grant of the right to negotiate an unnecessary redundancy.

[17] *Board of Educ of the City Sch Dist of the City of New York v NYS Pub Empl Relations Bd*, 75 NY2d 660, 668, 23 PERB ¶ 7012 (1990). *See Webster Cent Sch Dist v Pub Empl Relations Bd of the State of New York*, 75 NY2d 619, 23 PERB ¶ 7013 (1990), for an example of a statute where the Legislature clearly manifested its intention that an action not be subject be subject to collective bargaining. In *Webster*, the Court found the Legislature clearly manifested its intention that school districts' decisions to participate in cooperative educational programs not be subject to collective bargaining with teachers' unions where the statute expressly addressed the subject of job protections for teachers and established a comprehensive package for a school district's decision to contract for a cooperate educational program.

[18] *See, eg, City of New York*, 40 PERB ¶ 3017 (2007) (proposal might be nonmandatory because it could impact the manner and means that police services are provided).

City of New York v New York State Public Employment Relations Board,[19] the State viewed its power to act under the statute as discretionary, and it refrained from acting at all for at least ten years. Again, as the facts make clear, for at least ten years, until the issuance of Bulletin 09-01, the State did not require employees in the collective negotiating units represented by the charging parties to pay examination fees.

Paragraph 6 of CSL § 50 itself gives the DCS wide discretion concerning the examination fees—the DCS may waive fees, abolish fees for specific classes or positions or types of examinations or candidates, or establish a schedule of fees different from those prescribed in paragraph (a) of CSL § 50. The existence of this discretion is what gives the State the ability to bargain over the fees.[20]

The State argues that, because CSL § 50 was enacted before the Taylor Law, we should not expect to see a legislative intent to remove the issue from bargaining.[21] We note that the Court of Appeals made no reference to this consideration in *Schenectady Police Benevolent Association v New York State Public Employment Relations Board*, where the Court considered whether the City of Schenectady's bargaining obligations related to disability leave requirements were preempted by General Municipal Law § 207-c (GML § 207-c). GML § 207-c was enacted in 1961, prior to the Taylor Law's enactment in 1967. Regardless of any chronology

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[19] *Board of Educ of the City Sch Dist of the City of New York v NYS Pub Empl Relations Bd*, 75 NY2d at 668.

[20] *See Board of Educ of the City Sch Dist of the City of New York v NYS Pub Empl Relations Bd*, 75 NY2d 660, at 668; *County of Westchester*, 33 PERB ¶ 3025, 3069 (2000), 33 PERB ¶ 7016 (2000); *State of New York (Department of Correctional Services—Downstate Correctional Facility)*, 31 PERB ¶ 3065 (1998); *see also State of New York (Office Mental Health-Rochester Psych Ctr)*, 50 PERB ¶ 3032, 3130 (2017) (reaffirming *Downstate Correctional Facility*).

[21] Memorandum on Behalf of the State, at 18-20.

considerations, the Court held that the Taylor Law's bargaining mandate may only be circumscribed by "plain" and "clear" legislative intent or by statutory provisions indicating the Legislature's "inescapably implicit" design to do so. *Schenectady* shows 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. As explained above, CSL § 50 leaves room for the bargaining required by the Taylor Law.

The presumption in favor of bargaining can also be overcome by a public policy, embodied in a statute, that is strong enough to justify excluding the subject from collective bargaining. A public policy strong enough to require prohibition would "almost invariably involve an important constitutional or statutory duty or responsibility."[22] For example, the Court of Appeals recently held that "the policy favoring strong disciplinary authority for those in charge of police forces" is sufficient to justify excluding police discipline from collective bargaining.[23] Local control of police discipline is a uniquely weighty public policy concern, narrowly reflected in the statute at issue. Contrary to the State's assertion here,[24] there is no such policy concern attached to setting the application fees for promotion/transition examinations.

The State asserts other reasons to find examination fees non-negotiable, all of which we find not apposite. The fact that the fees apply both to the represented employees at issue here as well as to unrepresented employees not at issue is not a

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[22] *Board of Educ of the City Sch Dist of the City of New York v NYS Pub Empl Relations Bd*, 75 NY2d 660, 667-668, quoting *Port Jefferson State Teachers Assn v Brookhaven-Comsewogue Union Free School Dist*, 45 NY2d 898, 899 (1978).

[23] See *City of Schenectady v NYS Pub Empl Relations Bd*, 30 NY3d 109, 50 PERB ¶ 7006 (2017) (internal citations omitted). *See also Town of Wallkill v CSEA*, 19 NY3d 1066 (2012); 45 PERB ¶ 7508; *PBA of City of New York, Inc v NYS Pub Empl Relations Bd*, 6 NY3d 563, 69 PERB ¶ 7006 (2006).

[24] *See* Memorandum on Behalf of the State, at 22.

reason to find examination fees not to be mandatorily negotiable. The salient issue we are asked to decide is whether examination fees are a term and condition of employment that is, therefore, mandatorily negotiable before the State may make changes to it. As explained above, we find the answer to that question to be in the affirmative. The fact that applicants may consist of other public employees or that other public employers may also charge the examination fee is of no relevance to the charges in front of us.[25] The fees here apply only to current employees. Notably, the examination fee at issue here does not apply to members of the general public, which could change the nature of our analysis.[26]

In *State of New York*, the Board found the payment of an application fee as a prerequisite to participation in open competitive civil service examinations to be a nonmandatory subject of bargaining.[27] In that case, the fee was applicable to both non-employees and State employees, and the employee organization sought for the fee to be discontinued to all applicants. The Board found that, as the impact on State employees was only incidental, the State did not violate its duty to bargain in good faith by unilaterally imposing such a fee. In so holding, however, the Board expressly found that "[t]he exemption of State employees from an application fee requirement . . . would be a financial benefit and a term and condition of employment" and that, had an exemption limited to State employees been sought, "the State would have been

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[25] For this reason, we find no merit to the exception brought by DC 37.

[26] *Compare Newark Valley Cardinal Bus Drivers, NYSUT/AFT/AFL-CIO, Local 4360*, 35 PERB ¶ 3006 (2002), *confd sub nom Newark Valley Cardinal Bus Drivers, NYSUT/AFT/AFL-CIO, Local 4360 v NYS Pub Empl Relations Bd*, 303 AD2d 888, 36 PERB ¶ 7005 (3d Dept 2003); *Buffalo Sewer Auth*, 27 PERB ¶ 3002 (1994); *State of New York (SUNY at Binghamton)*, 19 PERB ¶ 3029 (1986); *State of New York*, 13 PERB ¶ 3099 (1980).

[27] *State of New York*, 13 PERB ¶ 3099 (1980).

obligated to negotiate the matter."[28] The fee at issue in the current case, by contrast, applies only to current employees. Thus, as we held in *State of New York*, 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.

In its exceptions, the State makes the assertion, for the first time, that the charges must be dismissed because the DCS was not acting as the employer when it issued Bulletin 09-01. Having not raised this argument to the ALJ, the State may not raise the issue to us for the first time on exceptions.[29]

With respect to the State's requested modification of the ALJ's remedy, we note that the remedy already applies only to CSEA-represented units of State employees within the Institutional Services, Administrative Services, and Operational Services bargaining units. Those were the employees named in the charge filed by CSEA[30] and are the only CSEA-represented employees at issue in this proceeding. However, CSEA does not specifically object to the State's request and, to avoid any confusion, we have modified the ALJ's order and notice as requested by the State.

Having affirmed the ALJ's findings, IT IS HEREBY ORDERED that the State will forthwith:

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[28] *Id*, at 3159.

[29] *See, eg, Cortland PBA*, 51 PERB ¶ 3014, n. 12 (2018); *DC 37 (Javed)*, 50 PERB ¶ 3028, 3108, n. 15 (2017), citing, *inter alia*, *NYS Thruway Assn*, 47 PERB ¶ 3032, 3100, n. 25 (2014). *See generally City of Poughkeepsie*, 33 PERB ¶ 3029, 3079-3080 (2000); *TWU, Local 100 (Guichard)*, 31 PERB ¶ 3066, 3147 (1998); *Town of New Hartford*, 29 PERB ¶ 3076, 3181 (1996); *Mt Markham Cent Sch Dist*, 27 PERB ¶ 3030, 3073 (1994).

[30] ALJ Ex 3.

1. Cease and desist from requiring unit employees represented by CSEA,[31] DC 37, and NYSCOPBA to pay a fee for promotion/transition examinations;

2. Make unit employees represented by CSEA, DC 37, and NYSCOPBA whole for any fees paid as a result of the State's unilateral implementation of application fees for promotion/transition examinations, with interest at the maximum legal rate;

3. Negotiate in good faith with CSEA, DC 37, and NYSCOPBA; and

4. Sign and post the attached notice at all physical and electronic locations normally used to post notices of information to unit employees.

DATED: October 23, 2018
Albany, New York

John F. Wirenius, Chairperson

Anthony Zumbolo, Member

Monte A. Klein, Member

[31] This order applies only to employees in the Administrative Services Unit, the Operational Services Unit, and the Institutional Services Unit.

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the State of New York (State) represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA),[32] District Council 37, AFSCME, AFL-CIO, Local 1359 (DC 37), and the New York State Correctional Officers and Police Benevolent Association, Inc. (NYSCOPBA) that the State will forthwith:

1. Not require unit employees represented by CSEA, DC 37, and NYSCOPBA to pay a fee for promotion/transition examinations;

2. Make unit employees represented by CSEA, DC 37, and NYSCOPBA whole for any fees paid as a result of the State's unilateral implementation of application fees for promotion/transition examinations, with interest at the maximum legal rate; and

3. Negotiate in good faith with CSEA, DC 37, and NYSCOPBA.

Dated . . . . . **By** . . . . . .

on behalf of the **State of New York**
(Department of Civil Service)

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

---

[32] This notice applies only to employees in the Administrative Services Unit, the Operational Services Unit, and the Institutional Services Unit.

Motion for Leave to Appeal

Exhibit C

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

PO Box 2074, ESP
Agency Building 2, 20th Floor
Albany, New York 12220-0074
TEL: (518) 457-2678
FAX: (518) 457-2664
www.perb.ny.gov

JOHN F. WIRENIUS
CHAIRPERSON

MICHAEL T. FOIS
GENERAL COUNSEL

ELLEN M. MITCHELL
DEPUTY GENERAL COUNSEL

November 19, 2020

Clay J. Lodovice, Esq.
Assistant Counsel
NYS GOER
2 Empire State Plaza, Suite 1201
Albany, NY 12223-1250

Erica Gray-Nelson, Esq.
AFSCME DC 37
125 Barclay Street, Room 510
New York, New York 10007

Emily G. Hannigan, Esq.
Lippes Mathias Wexler Friedman LLP
54 State Street, Suite 1001
Albany, New York 12207

Steven M. Klein, Esq.
Senior Associate Counsel
CSEA
143 Washington Avenue
Capitol Station
P.O. Box 7125
Albany, New York 12224-0125

Re: *New York State v PERB, et al.*
Albany County Index No.: 07226-18
AD No.: 528783

Dear Counselors:

Enclosed is a true copy of the Memorandum and Judgment in the above-referenced case, which was entered in the Office of the Clerk of the Appellate Division, Third Department, on May 14, 2020, together with the notice of entry.

Very truly yours,

Ellen M. Mitchell

EMM/slk

Enclosure

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION – THIRD DEPARTMENT

In the Matter of
STATE OF NEW YORK,

Petitioner,

-against-

NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD, et al.,

Respondents

NOTICE OF ENTRY

Albany County
Index No.: 07226-18
AD Docket No.: 528783

PLEASE TAKE NOTICE that the attached is a true copy of the Memorandum and Judgment of the State of New York Supreme Court, Appellate Division, Third Department, decided and entered in the Office of the Clerk of the Appellate Division, Third Department, on the 14th day of May, 2020.

DATED: Albany, New York
November 19, 2020

Very truly yours,

ELLEN M. MITCHELL
Deputy General Counsel
Attorney for Respondent
Public Employment Relations Board
P.O. Box 2074
Empire State Plaza, Agency Building 2
20th Floor
Albany, New York 12220
Telephone: (518) 457-2578

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: May 14, 2020 528783

In the Matter of STATE OF NEW YORK,
Petitioner,
v MEMORANDUM AND JUDGMENT

NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD et al.,
Respondents.

Calendar Date: March 26, 2020

Before: Garry, P.J., Clark, Aarons, Pritzker and Reynolds Fitzgerald, JJ.

Michael N. Volforte, Governor's Office of Employee Relations, Albany (Clay J. Lodovice of counsel), for petitioner.

David P. Quinn, Public Employment Relations Board, Albany, for New York State Public Employment Relations Board, respondent.

Daren J. Rylewicz, Civil Service Employees Association, Inc., Albany (Steven M. Klein of counsel), for Civil Service Employees Association, Local 1000, AFSCME, AFL-CIO, respondent.

Robin Roach, District Council 37, AFSCME, AFL-CIO, New York City (Erica C. Gray-Nelson of counsel), for District Council 37, AFSCME, AFLJ-CIO, Local 1359, respondent.

Lippes Mathias Wexler Friedman LLP, Albany (Erin N. Parker of counsel), for New York State Correctional Officers and Police Benevolent Association, Inc., respondent.

Aarons, J.

Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Albany County) to review two determinations of respondent Public Employment Relations Board finding that petitioner committed an improper employer practice.

Petitioner is a public employer under Civil Service Law § 201 (6) (a) (1). In 2009, the Department of Civil Service (hereinafter DCS) issued a bulletin stating that, as part of the 2008-2009 budget, a fee schedule had been created for the processing of applications for promotional and transitional examinations. For at least 10 years prior to the issuance of this bulletin, however, DCS did not require the payment of fees to process these applications. As such, respondent Civil Service Employees Association, Local 1000, AFSCME, AFL-CIO, respondent District Council 37, AFSME, AFL-CIO, Local 1359 and respondent New York State Correctional Officers and Police Benevolent Association, Inc. (hereinafter collectively referred to as respondents), the collective bargaining representatives for various employees, filed improper practice charges with respondent Public Employment Relations Board (hereinafter PERB) alleging that petitioner violated Civil Service Law § 209-a (1) (d). Following a hearing, an Administrative Law Judge determined that there was no violation, specifically concluding that, even assuming that the charging of fees was a subject of mandatory negotiation, the creation of the fee schedule was an exercise of DCS's discretion. On administrative appeal, PERB reversed, finding that respondents had a reasonable expectation of a past practice and remanded the matter for a determination on the issue of whether the creation of the fee schedule was a subject of mandatory negotiation. On remand, an Administrative Law Judge concluded that the practice of not charging a fee was an economic benefit and, therefore, was a subject of mandatory negotiation. PERB subsequently upheld this determination.

Petitioner commenced this CPLR article 78 proceeding seeking annulment of PERB's determinations. PERB joined issue

and asserted a counterclaim seeking to enforce its remedial order. The proceeding was thereafter transferred to this Court.

Under the Taylor Law (see Civil Service Law § 200 et seq.), a public employer is required to bargain in good faith with its employees regarding all terms and conditions of employment (see Matter of City of Watertown v State of N.Y. Pub. Empl. Relations Bd., 95 NY2d 73, 78 [2000]; Matter of Patrolmen's Benevolent Assn. of the City of N.Y., Inc. v New York State Pub. Empl. Relations Bd., 175 AD3d 1703, 1704 [2019]). "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" (Matter of City of Watertown v State of N.Y. Pub. Empl. Relations Bd., 95 NY2d at 78-79 [internal quotation marks and citation omitted]). 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 NY2d 326, 331 [1998]; Matter of State of New York [Div. of Military & Naval Affairs] v New York Pub. Empl. Relations Bd., 187 AD2d 78, 82 [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 AD3d 1188, 1189-1190 [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 Pub. Empl. Relations Bd., 133 AD3d 1010, 1011 [2015] [internal quotation marks and citations omitted]; see Matter of State of New York v New York State Pub. Empl. Relations Bd., 176 AD3d 1460, 1463 [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 AD3d 1236, 1238 [2017]).

We reject petitioner's assertion that the application fee was not a term and condition of employment. PERB found, and we agree, that the employees at issue received an economic benefit by not having to pay an application fee for promotional examinations (see Matter of Town of Islip v New York State Pub. Empl. Relations Bd., 23 NY3d 482, 491 [2014]; Matter of Board of Coop. Educ. Servs. Sole Supervisory Dist., Onondaga & Madison Counties v New York State Pub. Empl. Relations Bd., 82 AD2d 691, 693-694 [1982]).[1] 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 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]). Accordingly, we find no error in PERB's determination that the application fee was a mandatory subject of negotiation.

Regarding the issue of a past practice, it is undisputed that, for at least 10 years prior to the bulletin advising of the creation of a fee schedule, fees were not charged to

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[1] We also note that the fees were to be applied only to promotional and transitional examinations, which target current state employees, as opposed to open examinations, which pertain to the public at large (see e.g. Matter of Newark Val. Cardinal Bus Drivers, Local 4360, NYSUT, AFT, AFL-CIO v New York State Pub. Empl. Relations Bd., 303 AD2d 888, 889 [2003], lv denied 100 NY2d 504 [2003]).

employees who wanted to take a promotional or transitional examination. It is also undisputed that there were no negotiations with respondents regarding these fees. The record further discloses that, in 2004 and 2005, proposals were submitted to establish a fee schedule for promotional and transitional examinations, but they were ultimately rejected. PERB relied on the foregoing evidence in concluding that the employees represented by respondents had a reasonable expectation that the practice of not charging fees would continue. Because substantial evidence exists supporting PERB's determination that petitioner engaged in an improper practice, it will not be disturbed (see Matter of State of New York v New York State Pub. Empl. Relations Bd., 176 AD3d at 1464; Matter of Hampton Bays Union Free School Dist. v Public Empl. Relations Bd., 62 AD3d 1066, 1066 [2009], lv denied 13 NY3d 711 [2009]).

Finally, PERB's counterclaim for a judgment of enforcement of its remedial order should be granted given that it "could be reasonably applied, was not unduly burdensome and seemingly furthered the goal of reaching a fair negotiated result" (Matter of State of N.Y. v New York State Pub. Empl. Relations Bd., 176 AD3d at 1465 [internal quotation marks, brackets and citations omitted]; see Civil Service Law § 213 [d]). Petitioner's remaining contentions have been considered and are unavailing.

Garry, P.J., Clark, Pritzker and Reynolds Fitzgerald, JJ., concur.

ADJUDGED that the determinations are confirmed, without costs, petition dismissed, and respondent Public Employment Relations Board is entitled to a judgment of enforcement of its remedial order.

ENTER:

Robert D. Mayberger
Clerk of the Court

Motion for Leave to Appeal

Exhibit D

COPY

Docket No. 528783

To be argued by Clay J. Lodovice
Time requested 10 minutes

APPELLATE DIVISION – THIRD DEPARTMENT
STATE OF NEW YORK

In the Matter of

STATE OF NEW YORK,

Petitioner,

NOTICE OF MOTION FOR REARGUMENT AND/OR LEAVE TO APPEAL TO THE COURT OF APPEALS

-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.

Date Filed:
December 16, 2020

PLEASE TAKE NOTICE, that upon the annexed affidavit of Clay J. Lodovice, sworn to on the 16th day of December 2020, the Memorandum and Judgment of the Appellate Division, Third Department, entered in the office of the clerk of the Appellate Division, Third Department, on May 14, 2020,

unanimously confirming the determinations of the New York State Public Employment Relations Board, the record on appeal to the Appellate Division, Third Department, and upon the briefs filed therein, and upon all the papers, pleadings, and proceedings herein, the Petitioner-Appellant will move at a term of the Appellate Division of the Supreme Court, Third Department, to be held at the courthouse thereof, at Robert Abrams Building for Law and Justice, State Street Albany, New York, on the 8th day of February 2021, at the opening of court on that day, or as soon thereafter as counsel can be heard, for reagrument of and/or an order granting leave to the Petitioner-Appellant to appeal to the Court of Appeals from the Memorandum and Judgment of the Appellate Division, Third Department, pursuant to Civil Practice Law and Rules 5602(a)(1)(i), and for such other further relief as the court may deem just and proper.

Dated: December 16, 2020

MICHAEL N. VOLFORTE, ESQ.
Acting General Counsel
Governor's Office of Employee Relations
Attorneys for Petitioner
Agency Building #2, 12th Floor
Albany, New York 12223
(518) 473-1416

By: _____

CLAY J. LODOVICE, ESQ.
Of Counsel

TO: NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD
and JOHN WIRENIUS as Chairperson of the NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD
Attn: Michael T. Fois (Ellen M. Mitchell, Deputy General Counsel)
P.O. Box 2074
Empire State Plaza, Building #2, Floor 18
Albany, New York 12220-0074

CIVIL SERVICE EMPLOYEES ASSOCIATION,
LOCAL 1000, AFSCME, AFL-CIO
Attn: Daren J. Rylewicz (Steven M. Klein, of counsel)
143 Washington Avenue
Albany, New York 12210

DISTRICT COUNCIL 37, AFSCME, AFL-CIO, LOCAL 1359
Attn: Robin Roach (Erica C. Gray-Nelson, of counsel)
125 Barclay Street
New York, New York 10007

NEW YORK STATE CORRECTIONAL OFFICERS
AND POLICE BENEVOLENT ASSOCIATION, INC.
Lippes Mathis Wexler Friedman, LLP
Attn: Emily G. Hannigan
54 State Street
Albany, New York 12207

Docket No. 528783

APPELLATE DIVISION – THIRD DEPARTMENT
STATE OF NEW YORK

In the Matter of

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
CLAY J. LODOVICE

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

CLAY J. LODOVICE, being duly sworn, deposes and says:

1. I am an attorney duly admitted to practice in the courts of the State of New York and am of counsel to the Office of Employee Relations, commonly referred to as the Governor's Office of Employee Relations (GOER). GOER is

the representative of the Petitioner-Appellant, State of New York, in this matter and represented the State of New York for the proceeding before the New York State Public Employment Relations Board (PERB) that forms the basis of this appeal.

2. I handled the proceeding before the Supreme Court, Albany County, and was appellate counsel in this court. Additionally, I represented GOER before PERB in the matter underlying this appeal. Consequently, I am familiar with the facts and with the questions of law involved in these appeals.

3. This affidavit is submitted in support of an application by the Petitioner-Appellant for reargument of the appeal, or, in the alternative, for leave to appeal to the Court of Appeals.

4. It is respectfully submitted that this Court overlooked controlling issues of fact and law as set forth below.

5. Attached hereto as **Exhibit A** is a copy of the Memorandum and Judgment of Appellate Division, Third Department, herein made and entered on May 14, 2020.

6. Attached as **Exhibit B** is a copy of the Notice of Entry of the Memorandum and Judgment, dated November 19, 2020, received by the Petitioner-Appellant on November 25, 2020.

STATE OF NEW YORK
Governor's Office
of
Employee Relations

7. The appeal involved was taken from successive Board Decision and Order determinations issued by PERB on October 15, 2013, and October 23, 2018, respectively. Copies of the PERB determinations, hereinafter referred to as the First Board Decision and Second Board Decision, respectively, are attached hereto as **Exhibits C** and **D**. (R.32, R.40).

8. The Article 78 petition was transferred directly to this Court and no determination was issued by the Supreme Court, Albany County, on the merits of the proceeding. (R.631).

9. This Court confirmed the PERB determinations, dismissed the petition, and granted PERB's counterclaim for a judgment of enforcement of its remedial order. (*See* Exhibit A).

10. GOER is an office within the executive department of the State of New York. Such office is established under Article 24 of the Executive Law and is charged with assisting the Governor regarding labor relations between the State and its employees. Such assistance may include acting as the Governor's agent in discharging the powers and duties conferred on the Governor by the Public Employees' Fair Employment Act, as amended, including, without limitation, conducting collective negotiations with recognized or certified employee organizations (hereinafter referred to as the "public employee unions") and executing agreements reached pursuant thereto. (*See* Executive Law § 653). This

assistance includes, among other things, acting as the State's representative, as an employer, in matters before PERB.

11. GOER does not administer or implement rules for examinations, appointments, or promotions for employees in the civil service of the State. That responsibility is vested with the State Civil Service Commission. (*Compare* Civil Service Law §§ 6, 7).

12. At all relevant times, the Department of Civil Service ("DCS") is a department of the State of New York established under Article 2 of the Civil Service Law. The president of the Civil Service Commission is the head of DCS. (Civil Service Law § 7). The Civil Service Commission is tasked with the responsibility to "proscribe and amend suitable rules and regulations for carrying into effect the provisions [the Civil Service Law] and section six of article five of the constitution of the state of New York, including ... rules for examinations, promotions, ... of employees in the classified service of the state." (Civil Service Law § 6).

13. The DCS does not conduct collective negotiations with public employee unions with respect to terms and conditions of employment for employees of the State. That responsibility is Legislatively vested with GOER.

14. Respondent PERB is a board established under the Public Employees' Fair Employment Act, codified at Civil Service Law Article 14. (*See*

also Civil Service Law § 205). The Public Employees' Fair Employment Act is commonly referred to as the "Taylor Law."

15. This appeal, at its core, presents to the Court an issue of statutory interpretation with respect the Legislatively defined authority and roles for these three (3) separate and distinct offices and department of the State of New York – GOER, DCS and PERB – in the context of setting application fees for promotion examinations taken by State employees, a subject Legislatively codified at Civil Service Law § 50(5).

16. Namely, the appeal challenges PERB's interpretation of Civil Service Law § 50(5)(b) that has the effect of removing the Legislatively-prescribed authority to determine and set application fees from the DCS and newly transferring that responsibility to GOER, subject to the Taylor Law's general mandate to collectively bargain terms and conditions of employment with public employee unions.

17. Civil Service Law § 50(5)(b) provides, in pertinent part, that:

> (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** ... may elect to waive application fees, or to abolish fees for specific classes of positions or types of examinations or candidates, or to establish a uniform schedule of reasonable fees different from those prescribed in paragraph (a) of this subdivision, specifying in such schedule the classes of positions or

> types of examinations or candidates to which such fees shall apply; 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.

(emphasis supplied).

18. PERB determined that the Taylor Law's general command to negotiate terms and conditions of employment required that the subject of application fees for promotion examination be mandatorily negotiated despite the Legislature's clear statement in Civil Service Law § 50(5)(b) that vests the authority to waive, abolish or otherwise establish a uniform schedule of fees solely and exclusively to the DCS, subject only to the approval of the Director of the Budget[1] ("DOB").

19. To reach its determination, PERB necessarily held that its authority under the Taylor Law superseded DCS's authority defined by Civil Service Law § 50(5)(b).

20. Contrary to PERB's statutory interpretation, by enactment of Civil Service Law § 50(5)(b), the Legislature expressly vested to the DCS, subject only to the approval of DOB, the authority to establish a reasonable schedule of

[1] The Director of the Budget is the "head of the division of the budget ... who shall be appointed by the governor." Executive Law Article 8, at § 180.

application fees for promotion/transition examinations different than the fee structure mandated to be paid by applicants in CSL § 50(5)(a).

21. By the express terms of Civil Service Law § 50(5), the Legislature designated only DCS and DOB with the authority to set examination application fees and, in doing so, the Legislature excluded GOER from the responsibility or requirement to play a *mandatory role* in the setting of application fees for examinations administered by the DCS for potential promotional employment opportunities sought by State employees.

22. Contrary to the express terms of Civil Service Law § 50(5)(b), PERB's determination newly mandates GOER to act as the necessary party, along with multiple public employee unions, to the process of establishing a schedule of application fees to take promotion examinations different than the fee structure mandated to be paid by applicants in Civil Service Law § 50(5)(a). The outcome of PERB's determination is inconsistent with, and renders null, the statutory scheme enacted by the Legislature within Civil Service Law § 50.

23. PERB's determination effectively removes DCS's participation, subject only to DOB approval, in the determination to waive, abolish or otherwise establish a reasonable schedule of fees to apply for a promotional examination. Rather, PERB has transferred that function to GOER, subject to the approval in

the collective bargaining process by the multiple public employee unions representing State employees.

24. Although not parties to this proceeding, with respect to the several other public employers whose employees may choose to apply for potential promotional employment opportunities that are administered by the DCS,[2] the outcome of PERB's determination newly mandates those employers to act as a necessary party, along with multiple public employee organizations, to the process of establishing a reasonable and uniform schedule of application fees for promotion/transition examinations different than the fee structure mandated to be paid by applicants in CSL § 50(5)(a). In this vein, PERB's determination has a Statewide implication for any public employer whose employees may seek to apply for a promotional job opportunity.

25. Furthermore, PERB's determination has the practical outcome of transferring the final determination of the schedule of examination fees to be paid

[2] The group of additional public employers that would be newly required to be parties to the process of setting application fees for examinations administered by the DCS for potential promotional employment opportunities includes the New York State Thruway Authority, New York State Canal Corporation, New York State Teachers Retirement System and the New York State Bridge and Tunnel Authority. (*See* R.491, 492-567; *see also* Verified Petition, ¶ 20). The Taylor Law specifically defines these employers as separate and distinct from the State of New York, as employer. (*See* Civil Service Law § 201(6)(a)). If PERB's determination is upheld, these several employers will be, by administrative fiat, inserted into Civil Service Law § 50(5)(b) in the place of DCS and DOB.

by individuals applying for promotional examination opportunities from DCS, subject to DOB approval, to the multiple public employee unions that have members that apply for a potential promotional job opportunity, even if that potential promotional job opportunity is outside of the member's current employee bargaining unit. This outcome will prevent the establishment of a statutorily required "uniform schedule of reasonable fees." (Civil Service Law § 50(5)(b)).

26. As detailed in the Verified Petition, Respondent challenges PERB's statutory interpretation that holds the provisions of Civil Service Law § 50(5) to have been superseded and rendered null by the Taylor Law.

27. In its decision and judgment confirming the PERB determination, this Court limited its review to whether PERB's statutory interpretation was "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. Exhibit A, at p.3, *citing* Matter of DeOliveira v PERB, 133 AD3d 1010, 1011 [2015] [internal quotation marks and citations omitted]; *see* Matter of State of New York v PERB, 176 AD3d 1460, 1463 [2019]; Matter of Albany Police Officers Union, Local 2841, Law Enforcement Officers Union Dist. Council 82, AFSCME, AFL-CIO v PERB, 149 AD3d 1236, 1238 [2017].

28. Unlike the issue of law raised in the current case, the cases cited by this Court each presented issues reviewing PERB's application of finding of facts as interpreted through the terms of the Taylor Law. The cases cited by this Court did not address PERB's administrative interpretation of statutory provisions outside of the Taylor Law that specifically vest the authority to act with distinct State offices and/or departments. By citing to these cases, this Court appears to have improperly granted deference to PERB's determination on questions founded solely upon statutory interpretation.

29. The core question presented in this proceeding is one of statutory interpretation, *i.e.* the question of whether the Taylor Law superseded the specific grant of authority to DCS and DOB in Civil Service Law § 50(5)(b).

30. Accordingly, the Petitioner respectfully submits that a Court must review the issue presented *de novo*, without deferring to PERB's interpretation of the statute, because "the question is one of pure statutory construction 'dependent only on apprehension of legislative intent [with] little basis to rely on any special competence'" of PERB. (*See* Matter of Rosen v. PERB, 72 N.Y.2d 42, 47-48, 560 N.Y.S.2d 534 [1998] *quoting* Kurcsics v. Merchants Mut. Ins. Co., 49 N.Y.2d 451, 459, 426 N.Y.S.2d 454 [1980]; *see also* New York City Transit Authority v. PERB, 8 N.Y.3d 226, 231, 832 N.Y.S.3d 132 [2007]).

31. Rather than review PERB's interpretation of Civil Service Law § 50(5) *de novo*, the Court relied on PERB's assessment of whether the record contained 'substantial evidence' to support a finding of law, rather than fact.

32. Petitioner respectfully submits that the Taylor Law's general command regarding collective bargaining is not sufficient to displace the more specific authority granted to DCS and DOB by Civil Service Law § 50(5)(b). (*See e.g.* Matter of City of Schenectady v. PERB, 30 N.Y.3d 109, 116, 64 N.Y.S.3d 644 [2017]; *see also* City of Long Beach v. PERB, 187 A.D.3d 745, -- N.Y.S.3d --, [2nd Dept., 2020]).

33. By placing the authority to set application fees for promotion examinations specifically with DCS and DOB, to the exclusion of GOER, the Legislature manifested the intent that the subject of application fees is excluded from collective bargaining as it relates to State employees.[3]

34. If the Legislature intended for the subject matter to be bargained, it had the opportunity to place GOER in the stead of DCS contemporaneously with the five (5) times Civil Service Law § 50(5) was amended by the Legislature subsequent to the enactment of the Taylor Law. (*See* L.1985, c.845, § 1; L.1989, c. 61, § 195; L.2006, c.449, § 1; L.2017, c.404, § 1; and L.2018, c.35 § 1).

[3] In contrast, the Legislature has accounted for the application of the Taylor Law, i.e. "Article Fourteen," within several areas of the Civil Service Law. *See e.g.* Civil Service Law § 65, 75, 76, etc.

35. Furthermore, the Court did not address the implication of PERB's determination upon the statutorily defined functions across GOER and DCS as those functions pertain to the distinctly defined roles of collectively bargaining with public employee unions and the administration of the Constitutionally required merit and fitness system applicable to civil employees, respectively. In fact, neither the existence of GOER nor GOER's statutorily required role in the collective bargaining process were mentioned within the Memorandum and Judgment.

36. Additionally, the Petitioner-Appellant asserts that PERB acted in excess of its jurisdiction when it proceeded to hear the public employee unions' challenge against the setting of application fees by DCS, and approved by DOB, in accordance with Civil Service Law § 50(5)(b). Accordingly, PERB's determination should be vacated and rendered null.

37. The record established that DCS and DOB acted in accordance with the terms of Civil Service Law § 50(5)(b) for several years prior to the implementation of fees challenged by the public employee unions herein. The initially assigned Administrative Law Judge relied upon the credible record evidence that demonstrated a detailed history of DCS and DOB acting in accordance with the terms of Civil Service Law § 50(5)(b) for several years and opined as follows:

> The [public employee unions] did not rebut the State's evidence establishing that DCS has, in the past, submitted, or considered submitting, promotion exam fee proposals to the Division of Budget as part of its yearly budget process; nor did the [public employee unions] rebut the State's evidence that the Division of Budget has applied various objective criteria in its yearly determination as to whether or not such proposals should be approved and applied. Rather, the [public employee unions] assert that the State's deliberations were inconsistent and not communicated to the unions. I reject both of these arguments.

(R. 130, 146).

38. Although this Court noted that "in 2004 and 2005, proposals were submitted to establish a fee schedule for promotional and transitional examinations, but they were ultimately rejected," it is unclear from the terms of the Memorandum and Judgment (1) whether this fact was weighed within the context of the procedure required by Civil Service Law § 50(5)(b), or (2) whether this Court contemplated that the proposals were submitted by DCS to DOB or, alternatively, incorrectly contemplated that the proposals were submitted by GOER to the public employee unions in the context of collective bargaining. (Exhibit A, p.5).

39. In the Second Board Decision, PERB did not set forth a statutory basis upon which possessed it jurisdiction to review DCS's statutorily based action of setting of application fees that had been approved by DOB. Rather,

PERB asserted that the question of whether it acted in excess of its jurisdiction was not raised to the ALJ and, therefore, cannot be raised to the PERB Board. (R.13).

40. By statute, although the PERB Board is created within the DCS, the DCS and Civil Service Commission are prohibited from supervising, directing or controlling the PERB Board in the performance of its functions under the Taylor Law. (Civil Service Law § 205(6)). Conversely, the PERB Board is not empowered to control or enjoin the functions of DCS.

41. This Court did not specifically address the Petitioner-Appellant's assertion that PERB did not possess jurisdiction to review the DCS and DOB setting of application fees. The Court collectively denied this remaining contention as unavailing. (Exhibit A, p.5).

42. The precise questions of law sought to be reargued, or, in the alternative, to be brought up for review to the Court of Appeals, could be formulated as follows:

a. Does the Taylor Law's general command that the State, as employer, through GOER, negotiate terms and conditions of employment with public employee unions supersede the terms of Civil Service Law § 50(5)(b) which expressly vests to DCS, subject only to DOB approval, the authority to establish a reasonable schedule of

application fees for promotion examinations different than the fee structure mandated to be paid by applicants in CSL § 50(5)(a), and, in doing so, nullify DCS's role in setting such fees and transfer it to GOER, subject to collective negotiations with public employee unions?

b. In other words, does PERB's determination have a sufficient statutory justification to direct that GOER negotiate application fees for promotion examinations with public employee unions rather than the allowing application fees to be determined and set by the DCS, subject only to DOB approval?

c. Does the Taylor Law grant PERB jurisdiction to review and enjoin DCS's statutory authority to set application fees, with DOB approval, for promotional examinations administered by DCS?

43. For the foregoing reasons, Petitioner-Appellant respectfully requests that this Court grant this motion for reargument of the Memorandum and Order, dated May 14, 2020.

44. In the alternative, if this Court does not grant Petitioner-Appellant's motion for reargument of the Memorandum and Order, Petitioner-Appellant requests that permission to appeal to the Court of Appeals be granted for review of the questions set forth in paragraph 42, herein.

STATE OF NEW YORK
Governor's Office
of
Employee Relations

Dated: Albany, New York
December 16, 2020

Clay J. Lodovice

Subscribed and sworn to before me
this 16th day of December 2020

NOTARY PUBLIC

TIFFINAY M. RUTNIK
NOTARY PUBLIC, STATE OF NEW YORK
Registration No. 02RU6388977
Qualified in Albany County
Commission Expires March 18, 2023

STATE OF NEW YORK
Governor's Office
of
Employee Relations

Motion for Leave to Appeal

Exhibit E

STATE OF NEW YORK
APPELLATE DIVISION – THIRD DEPARTMENT

In the Matter of

STATE OF NEW YORK,

Petitioner,

-against-

NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD; JOHN WIRENIUS as Chairperson of the NEW YORK STATE PUBLIC 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.

NOTICE OF ENTRY

Appeal No. 528783

PLEASE TAKE NOTICE that the within is a true and complete copy of the Decision and Order on Motion duly entered in the above-entitled matter in the Office of the Clerk of the Supreme Court, Appellate Division, Third Department, on April 16, 2021.

Dated: April 20, 2021

LIPPES MATHIAS WEXLER FRIEDMAN LLP

By: _____
Emily G. Hannigan, Esq.
Attorneys for Respondent NYSCOPBA
54 State Street, Suite 1001
Albany, New York 12207
(518) 462-0110

Received via personal service
04/21/2021, 1:10 p.m.
By AMP

TO: **VIA PERSONAL SERVICE / PROCESS SERVER**
Governor's Office of Employee Relations
2 Empire State Plaza, 12th Floor
Albany, NY 12223

VIA PERSONAL SERVICE / PROCESS SERVER
NYS Public Employment Relations Board
and John Wirenius, Chairperson
P.O. Box 2074
2 Empire State Plaza, 20th Floor
Albany, NY 12220-0074

VIA E-MAIL
Civil Service Employees Association, Inc.
Box 7125, Capitol Station
143 Washington Avenue
Albany, NY 12210

VIA E-MAIL
District Council 37, AFSCME, AFL-CIO
Local 1359
125 Barclay Street, Room 510
New York, NY 10007

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: April 16, 2021 528783

In the Matter of STATE OF NEW YORK,
Petitioner,

v

NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD et al.,
Respondents.

DECISION AND ORDER ON MOTION

Motion for reargument or, in the alternative, for permission to appeal to the Court of Appeals.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied, without costs.

Garry, P.J., Clark, Aarons, Pritzker and Reynolds Fitzgerald, JJ., concur.

ENTER:

Robert D. Mayberger
Clerk of the Court

Motion for Leave to Appeal

Exhibit F

NEW YORK STATE DEPARTMENT OF CIVIL SERVICE
DIVISION OF STAFFING SERVICES
GENERAL INFORMATION BULLETIN No. 09-01

TO:	Department and Agency Personnel, Human Resources, and Affirmative Action Offices
FROM:	Blaine Ryan-Lynch, Director of Staffing Services
SUBJECT:	Fees for Processing Promotion/Transition and Open-Competitive Applications and the New Application Form for NYS Examinations
DATE:	March 16, 2009

The Department of Civil Service, as part of its 2008-2009 Spending Plan is establishing a fee for the processing of applications for promotion/transition examinations. The Department will begin assessing fees for promotion/transition applications for examinations announced on or after March 13, 2009 and administered on or after May 30, 2009. The promotion/transition fee schedule is:

Exam Title Grade	Fee
Grades 3-12	$10
Grades 13-18	$15
Grades 19-23	$20
Grades 24 and above	$25

The fee associated with each examination will be indicated on the examination announcement in accordance with this schedule and is due at the time the application is submitted. The fee is charged to defray the cost of processing applications, is non-refundable and, therefore, will not be returned if the candidate decides s/he did not want to apply for that test, the application is disapproved, the candidate does not take the test, or the candidate is not successful on the examination. Also, the fee payment cannot be transferred to another examination.

The Department encourages applicants to apply online. The online application process can be accessed from an online examination announcement. Online payment of the application processing fee must be made by credit card (MC or VISA only). Currently the online application process requires separate applications for open competitive and promotion/transition examinations.

Additionally, in connection with its 2009-2010 Department Budget, the Department will be raising open-competitive examination fees by $5. The new fee structure will be as follows:

Exam Title Grade	Fee
Grades 3-12	$25
Grades 13-18	$35
Grades 19-23	$40
Grades 24 and above	$45

The fee increase will be reflected on examination announcements issued on or after March 27, 2009 for examinations administered on or after June 13, 2009.

The Department has also introduced a new paper application form, Application for NYS Examination (NYS-APP) to replace both the former Application for NYS Examination Open to the Public (OC-APP) and the Promotion/Transition Examination Application (XD-5). Please discontinue use of the old forms and recycle any supplies you have. The NYS-APP is available for download on our website (www.cs.state.ny.us). Printed NYS-APP forms are available from our mailroom. The NYS-APP can be used to apply for open-competitive, promotion and transition examinations or a combination of the three. Fee payment with a paper NYS-APP must be made by check or money order.

You may wish to share this information with your employees. Your Staffing Services Representative is available to assist your staff with any questions they may have.

Motion for Leave to Appeal

Exhibit G

Bargaining Unit Descriptions

Column Header	Bargaining Unit	Union
NYSCOPBA	SECURITY SERVICES UNIT	NYS Correctional Officers and Police Benevolent Association
CSEA	ADMINISTRATIVE SERVICES UNIT	Civil Service Employee Association
	OPERATIONAL SERVICES UNIT	Civil Service Employee Association
	INSTITUTIONAL SERVICES UNIT	Civil Service Employee Association
PEF	PUBLIC EMPLOYEE FEDERATION	Public Employees Federation
MC	MANAGERIAL/CONFIDENTIAL GROUP	Management Confidential - Unrepresented
TRS	NYS TEACHERS RETIREMENT SYSTEM	Teachers Retirement System - CSEA
TWAY - MC	NYS THRUWAY AUTHORITY - MC	Thruway - Management Confidential - Unrepresented
TWAY-MNT	NYS THRUWAY AUTHORITY - MNT,TO	Thruway - MNT, TO
TWAY -TEC	NYS THRUWAY AUTHORITY - TEC-SP	Thruway - Tec-SP
BRIDGE AUTH	NYS BRIDGE AUTHORITY	Bridage Auth- Management Confidential - Unrepresented
NYSCOPBA NON-ARB	SECURITY SERVICES UNIT Non-Arbitration Elligible	NYS Correctional Officers and Police Benevolent Association
CANAL CSEA	NEW YORK STATE CANAL CORP-OSU	Canal Corp CSEA
CANAL PEF	NEW YORK STATE CANAL CORP-PST	Canal Corp PEF
CANAL MC	NEW YORK STATE CANAL CORP-MC	Canal Corp Management Confidential - Unrepresented
PBANYS	AGENCY LAW ENFORCEMENT SERVCS	Police Benevolent Association of New York State
M&NA CSEA	MILITARY AND NAVAL AFFAIRS	Civil Service Employee Association
M/C	COMMISSION ON INVESTIGATION-MC	Management Confidential - Unrepresented
C82	SECURITY SUPERVISORS UNIT	NYS Law Enforcement Officers' Union, District Council 82, AFSCME, AFL-CIO
PERB	PUBLIC EMPLOYMENT RELATIONS BD	Management Confidential - Unrepresented
DC-37	HOUSING AND COMMUNITY RENEW-RA	District Council 37 of AFSCME, AFL-CIO
UUP	UUP - LIFEGUARDS	United University Professions
CASUAL	CASUAL	Non-Represented
C82	SECURITY SUPVRS UNIT Non-Arbitration Elligible	NYS Law Enforcement Officers' Union, District Council 82, AFSCME, AFL-CIO
UNKNOWN	Unknown	Unable to determine Bargaining Unit at time of application