STATE OF NEW YORK
COURT OF APPEALS

In the Matter of the Application of the

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 No. 2021-510

Third Department
Docket No. 528783

Albany County
Index No. 07226-18

AFFIRMATION IN OPPPOSITION TO MOTION FOR LEAVE TO APPEAL

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STATE OF NEW YORK
COURT OF APPEALS

In the Matter of the Application of the **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.**	**AFFIRMATION IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL** **Motion No. 2021-510** **Albany County Index No. 07226-18**

STEVEN M. KLEIN, an attorney duly admitted to practice law in the State of New York, affirms, under penalties of perjury, pursuant to CPLR §2106, that:

1. I am of counsel to DAREN J. RYLEWICZ, attorney for the Respondent-Respondent CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,[1] LOCAL 1000, AFSCME, AFL-CIO ("CSEA"), and I submit this affirmation, pursuant to 22 NYCRR §500.22(d), in Opposition to Petitioner-Appellant's

[1] Respondent-Respondent CSEA is a not-for-profit corporation, but Petitioner-Appellant State of New York omitted CSEA's "Inc." status in the caption to its motion.

("Appellant's") Motion for Leave to Appeal to the Court of Appeals from the Memorandum and Judgment of the Appellate Division, Third Department, made and entered on May 14, 2020.

2. I represented CSEA before the Appellate Division, in Supreme Court, and before the Public Employment Relations Board ("PERB") below, and thus am fully familiar with the facts and legal issues involved in this appeal.

3. It is CSEA's position that the questions presented for review in this matter are not novel or of public importance, do not involve a conflict of opinion between Appellate Divisions, and that the decision at-issue does not conflict with any prior decisions of this Court. *See*, 22 NYCRR § 500.22(b)(4). Thus, the motion should be denied.

4. Appellant proffers four reasons why this Court should grant leave to appeal.

5. First, it argues that in confirming the PERB decisions below, the Appellate Division wrongly concluded that fees for promotional examinations administered by the State Department of Civil Service ("DCS") are mandatory subjects of bargaining under the Public Employees Fair Employment Act (Civil Service Law, Article 14, commonly referred to as the "Taylor Law").

6. CSEA respectfully asserts that PERB and the Appellate Division correctly so held.

7. Appellant's second argument for why this Court should permit it to appeal is that the Appellate Division applied the incorrect standard when it reviewed PERB's analysis of the interplay between the Taylor Law and Civil Service Law §50(5)(b), the statute that concerns itself with State promotional examination fees.

8. CSEA respectfully asserts that the Appellate Division applied the correct standard of review when it determined that there was substantial evidence in the record to support PERB's determination that nothing in CSL §50(5)(b) removed the subject of promotional examination fees from the realm of mandatory subjects of bargaining.

9. The Appellant further claims that the Appellate Division erred when it failed to resolve what Appellant believes was a relevant issue in this case, to wit whether PERB had authority to issue a bargaining order binding DCS, the State Division of Budget ("DOB") and the State Governor's Office of Employee Relations ("GOER").

10. It is CSEA's position that DCS, DOB and GOER are all merely functionary arms of the State, which is the employer in this matter, and that nothing in the Taylor Law, the Civil Service Law, the State Finance Law or the Executive Law mandates a different conclusion.

11. Finally, the Appellant attempts to manufacture a "novel" issue for this Court's consideration by asserting that PERB's holding below presents such an issue

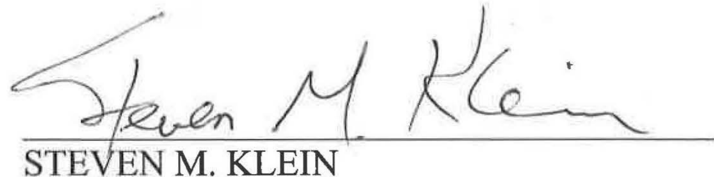
because it requires GOER to now bargain promotional examination fees with the unions for the affected State employees, including CSEA.

12. Such an argument, however, merely restates the Appellant's first argument in a different manner, because if PERB and the Appellate Division correctly found below that promotional examination fees are a mandatory subject of bargaining, the Taylor Law mandates that the Appellant's statutory negotiating agent, GOER, will have to bargain this issue with the CSEA and the other unions for the affected State employees.

13. Based on this, CSEA submits that the Appellate Division, Third Department's May 14, 2020, Memorandum and Judgment was correct on the facts and the law and, therefore, Appellant's Motion for Leave to Appeal is without merit and should be denied by this Court.

WHEREFORE, it is respectfully requested that Appellant's Motion for Leave to Appeal to the Court of Appeals be denied, with such other, further, and different relief as the Court deems just and proper.

Dated: June 16, 2021
Albany, New York



STEVEN M. KLEIN

DISCLOSURE STATEMENT

Respondent-Respondent CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO, sued herein as "CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 1000, AFSCME, AFL-CIO (hereinafter "CSEA"), is a not-for-profit corporation duly organized and existing under the laws of the State of New York. CSEA is affiliated as Local 1000 with the American Federation of State, County, and Municipal Employees, an unincorporated association, which, in turn, is a member of the American Federation of Labor - Congress of Industrial Organizations.

PRELIMINARY STATEMENT

The Petitioner-Appellant, State of New York ("State" or "Appellant"), brought this Article 78 proceeding seeking judicial review of two Decisions, dated October 15, 2013 and October 23, 2018, respectively, that were issued by the State Public Employment Relations Board ("PERB") in PERB Case Number U-29047. (R. 32, 40) These two PERB Decisions found that a 2009 decision by the State Department of Civil Service ("DCS") to begin charging fees for State workers to take promotional examinations violated Section 209-a.1(d) of the Public Employees Fair Employment Act ("Act") (Civil Service Law §§200 *et seq.*) because the State failed to negotiate in good faith with those employees' unions, including the Respondent-Respondent Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO ("CSEA" or "Respondent"), before unilaterally deciding to charge such fees.

CSEA and the three other Respondents-Respondents separately answered the verified petition, all asserting, *inter alia*, that the two PERB Decisions were not arbitrary, capricious, or contrary to law. (R. 568-624) By Order of Transfer dated March 5, 2019, and entered March 11, 2019, this proceeding was transferred to the Appellate Division, Third Department. (R. 631-633)

By Memorandum and Judgment decided and entered on May 14, 2020, the Appellate Division dismissed Appellant's petition and confirmed the two PERB Decisions. (Appellant's Motion, Exhibit C) Appellant moved for reargument and/or

leave to appeal before the Appellate Division, and that motion was denied by Decision and Order decided and entered on April 16, 2021. (App. Mot., Exs. D, E)

CSEA now asks this Court to deny this final appeal and find that the Appellate Division correctly confirmed the two PERB Decisions at issue in this Article 78 proceeding because they were not arbitrary, capricious, or contrary to any provision of law.

ARGUMENT

POINT I

THE APPELLATE DIVISION DID NOT ERR IN SUSTAINING PERB'S FINDING THAT PROMOTIONAL EXAMINATION FEES ARE MANDATORILY NEGOTIABLE.

Appellant's first argument for why this Court should grant leave is that the Appellate Division incorrectly found that promotional examination fees are a mandatory subject of bargaining despite Civil Service Law §50(5)(b). (App. Mot., p. 14) This argument is somewhat disingenuous. PERB held that the fees were mandatorily negotiable, and the Appellate Division upon review held that PERB's finding was neither arbitrary nor capricious.

In upholding PERB's legal finding, the Appellate Division correctly relied on prior precedent from this Court holding that if a statute contains no express prohibition on bargaining but, rather, gives the employer discretion over the decision, PERB could find the decision to be mandatorily negotiable. *Board of Education of*

the City School District of the City of New York v. PERB, 75 N.Y.2d 660 (1990); see also *Newark Valley Central School Dist. v. PERB*, 83 N.Y.2d 315 (1994); *Webster City School Dist. v. PERB*, 75 N.Y.2d 619 (1990). Appellant has not identified any such express prohibition in Civil Service Law §50(5)(b) and readily concedes that the decision whether to impose the fees is discretionary. (App. Mot., p. 14) Based on this, Appellant's first basis for why this Court should grant leave should be rejected.

POINT II

THE APPELLATE DIVISION APPLIED THE CORRECT STANDARD OF REVIEW TO PERB'S DECISION.

Appellant's second argument for why this Court should grant leave is that the Appellate Division applied the incorrect standard of review to PERB's Decision when it stated that its "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." (App. Mot., Ex. C, p. 3)

This Court has stated, however, that in "cases involving the issue of mandatory or prohibited bargaining subjects under the Civil Service Law, we have defined our review power as a limited one: '[s]o long as PERB's interpretation is legally permissible and so long as there is no breach of constitutional rights and protections, the courts have no power to substitute another interpretation.' (*Matter of West Irondequoit Teachers Assn. v. Helsby*, 35 N.Y.2d 46, 50, 358 N.Y.S.2d 720, 315

N.E.2d 775.)." *Board of Education of the City School District of the City of New York v. PERB*, 75 N.Y.2d at 666.

While it is also true that "where the issue is one of statutory interpretation, dependent on discerning legislative intent, judicial review is not so restricted, as statutory construction is the function of the courts, not PERB [*Id.*]," this does not absolutely preclude PERB from interpreting the statute. In *Board of Education of the City School District of the City of New York,* for example, PERB out of necessity had to interpret Education Law § 2590–g(14) in order to determine if the employer's decision to require financial disclosure was mandatorily negotiable. *Id.* at 663-664. This Court did not hold that PERB had no authority to do so; rather, it reviewed PERB's interpretation to determine whether it was "irrational, unreasonable nor affected by any error of law [*Id.* at 671.]," the same standard applied in this case by the Appellate Division. Based on this, Appellant's second basis for why this Court should grant leave should be rejected.

POINT III

THE APPELLANT'S ARGUMENT THAT PERB LACKED JURISDICTION OVER DCS OR DOB IS WITHOUT MERIT.

The Appellant's third argument for why this Court should hear its appeal is that the Appellate Division never addressed its claim that PERB lacked jurisdiction over both DCS and DOB because they were acting pursuant to Civil Service Law §50(5)(b) when they unilaterally implemented the promotional examination fees in

2009. (App. Mot., p. 20) This argument should be rejected, however, because DCS and DOB were merely the two State agencies that implemented the decision to charge the at-issue fees on behalf of the State, which is by statute (Civil Service Law §201.6) the employer of the affected employees.

Moreover, the State agency representing the Appellant in this proceeding, GOER, is the same State agency that represented the State at PERB. Statutorily, GOER, an Executive Branch agency, is the State's representative for all labor relations functions, including representation in all proceedings under the Taylor Law. Executive Law §653. GOER's appearance is further evidence that it is the State that is the employer in this matter, and it is the State, with all its functionary agencies, that is bound by PERB's Decision.

Finally, as was noted by PERB below, Appellant never raised this argument to either of the PERB ALJs who held fact-finding hearings and initially ruled on all of the State's defenses and, therefore, it was not preserved for review by PERB or the Appellate Division. (R. 52) Based on this, Appellant's third basis for why this Court should grant leave should be rejected.

POINT IV

APPELLANTS HAVE NOT RAISED ANY NOVEL ISSUES FOR THIS COURT'S REVIEW.

Appellant's final argument is that PERB's holding will result in the "novel" situation of forcing GOER, among other employer representatives, to bargain with

the unions of those affected public employees with regard to the imposition of promotional exam fees. (App. Mot., p. 23) CSEA submits, however, that such a situation is far from "novel" and, in fact, exists each and every time PERB finds a mandatory subject of bargaining. This is exactly what the Taylor Law envisions when it requires that:

> For the purpose of [Article 14], to negotiate collectively is the performance of the mutual obligation of the public employer and a recognized or certified employee organization to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment .... [Civil Service Law §204.3]

Here, as was noted in Point I, *supra*, PERB found that promotional examination fees are a term and condition of employment, and the Appellate Division agreed. Once such a finding is properly made, the Taylor Law requires the parties to negotiate in good faith. There is nothing new or novel about this concept – it dates back to 1967, the year the Legislature passed and Governor Rockefeller signed the statute into law. Based on this, Appellant's fourth and final basis for why this Court should grant leave should be rejected.

CONCLUSION

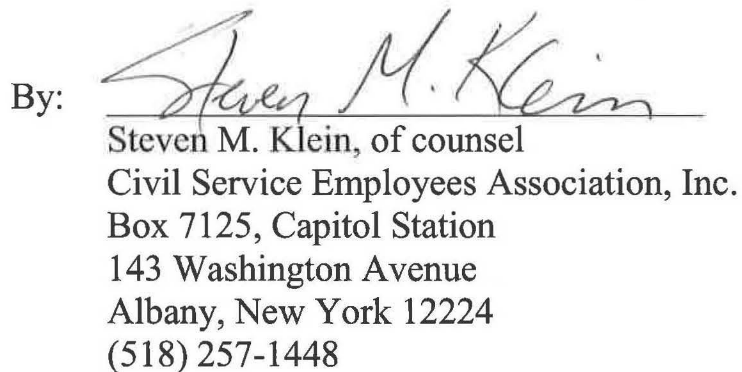
In sum, it is CSEA's position that the arguments relied upon by the Appellant in this matter are not novel or of public importance, do not involve a conflict of opinion between Appellate Divisions, and that the Appellate Division's Decision

does not conflict with any prior decisions of this Court. *See* 22 NYCRR §500.22(b)(4). Thus, Appellant's Motion for Leave to Appeal should be denied.

Dated: June 16, 2021
Albany, New York

Respectfully submitted,

DAREN J. RYLEWICZ
Attorney for Respondent-Respondent CSEA



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CERTIFICATE OF COMPLIANCE

Pursuant to 22 NYCRR § 1250.8(J), the foregoing affirmation and memorandum of law was prepared on a computer. A proportionally spaced typeface was used as follows:

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

The total number of words in the affirmation and memorandum of law, inclusive of point headings, footnotes and certificate of compliance is 2146.

PL/20-0962/SMK/smk/Affirmation#961817