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.

AFFIRMATION IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL

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Of Counsel

Dated: June 17, 2021

COURT OF APPEALS OF THE 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, 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.

Albany County

Index No. 07226-18

AFFIRMATION IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL

ERICA C. GRAY-NELSON, 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 ROBIN ROACH, attorney for the Respondent-Respondent DISTRICT COUNCIL 37 and its affiliate, LOCAL 1359, AFSCME, AFL-CIO (hereinafter "DC37" or "Union"), and I submit this Affirmation in Opposition to Petitioner-Appellant State of New York's ("Appellant") Motion for Leave to Appeal to the Court of Appeals, pursuant to Civil Practice Law and Rules

§ 5602(a)(1)(i) from the Memorandum and Judgment of the Appellate Division, Third Department, made and entered on May 14, 2020; and reaffirmed in a Decision and Order dated April 16, 2021.

2. I represented Respondent DC37 in the court proceedings, and before the New York State Public Employment Relations Board ("PERB") below, and thus I am fully familiar with the facts and legal issues involved in this appeal.

3. In support of the Motion for Leave to Appeal, Appellant presents four grounds for the appeal: 1) The Third Department incorrectly decided that examination fees were mandatorily negotiable; 2) the Third Department applied the incorrect standard of review when it deferred to PERB's interpretation of a statute outside PERB's; 3) the Third Department's decision failed to address the question of whether PERB's statutory authority to address improper practices also grants it the authority to control and enjoin the actions of the Department of Civil Service ("DCS") with the approval of the Director of the Budget ("DOB"); and, 4) the holding that the Taylor Law removes DCS's statutory authority, subject to the DOB's approval to establish uniform application fees for DCS-administered promotion examinations, and that the Governor's Office of Employee Relations ("GOER") is obligated to collectively bargain any change to any uniform application fee schedule for promotional examination, is a "novel ruling warranting this Court's review." (Appellant Memorandum of Law, pp.14-27).

4. Pursuant to Executive Law § 653, GOER is the State employer's statutory collective bargaining agent on behalf of the Petitioner-Appellant; and DCS, also an arm of the State, is charged with administering civil service examinations including promotional examinations, a term and condition of employment as affirmed by the Third Department.

5. PERB's First and Second Decisions, which are the bases for Appellant's appeal to the Third Department and the grounds upon which the motion before this Court is based, are annexed to Appellant's Memorandum of Law in Support of Motion For Leave To Appeal (hereinafter "App. Memo of Law") as Exhibits A and B, respectively.

6. Respondent DC37 asserts that Appellant's grounds for permission to appeal the Third Department's decision respecting PERB's findings in the proceedings below are without merit; nor, do PERB's decisions present a "novel ruling" subject to review by this Court.

7. In the first instance, Appellant's contention the Third Department incorrectly decided that promotion examination fees were mandatorily negotiable is unsupported by the relevant statutes and case law. *See generally CSL* § 50(5); *CSL* §§ 200 *et seq.*

8. The Third Department expressly addressed this point in its May 14, 2020, Memorandum and Judgment, stating:

> We are unpersuaded by petitioner's contention that, under Civil Service Law § 50(5), the creation of a fee schedule was a prohibited or permissive subject of bargaining. As PERB noted, this statute contains no express prohibition on the bargaining of application fees (see Matter of Board of Educ. of City School Dist. of City of N.Y. v. New York State Pub. Empl. Relations Bd., 75 N.Y.2d 660, 668, 670, 555 N.Y.S.2d 659, 554 N.E.2d 1247 [1990]; Matter of State of New York [Div. of Military & Naval Affairs] v. New York Pub. Empl. Relations Bd., 187 A.D.2d at 82, 592 N.Y.S.2d 847). The statute also gives petitioner discretion to charge or abolish fees (see Civil Service Law § 50[5][b] and, therefore, is not "so unequivocal a directive to take certain action that it leaves no room for bargaining" (Matter of Board of Educ. of City School Dist. of City of N.Y. v. New York State Pub. Empl. Relations Bd., 75 N.Y.2d at 668, 555 N.Y.S.2d 659, 554 N.E.2d 1247). Furthermore, the decision to impose an application fee for promotional and transitional examinations is not an inherent or fundamental policy decision related to petitioner's primary mission (see Matter of New York City Tr. Auth. v. New York State Pub. Empl. Relations Bd., 19 N.Y.3d 876, 880, 948 N.Y.S.2d 842, 972 N.E.2d 83 [2012]. Accordingly, we find no error in PERB's determination that the application fee was a mandatory subject of negotiation. [App. Memo of Law, Ex. C, p. 4.]

9. The Third Department further noted, "'The presumption in favor of bargaining *may be overcome only in special circumstances* where the legislative intent to remove the issue from mandatory bargaining is plain and clear'" (*quoting Matter of the City of Watertown v. State of N.Y. Pub. Empl. Relations Bd.*, 95 N.Y.2d 73, 78-79 (2000) (emphasis added). Appellant has not shown any such

special circumstances that would require the parties to remove the subject of promotion examination fees from mandatory bargaining.

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

11. It appears Appellant has taken the position that if some other entity or department has the authority to, for example, set fees or modify benefits then it is relieved of its own obligation to bargain over said new fees or over the change to benefits previously enjoyed by covered public bargaining unit members. (App. Memo of Law, p.14)

12. This was clearly not the legislative intent of the Taylor Law. *See generally, Matter of the City of Watertown*, 95 N.Y.2d 73; *Matter of Patrolmen's Benevolent Assn. of the City of N.Y., Inc.*, 175 A.D.3d 1703. This Court has held that unless a statute is clear a subject is prohibited from or is a permissive subject

of bargaining, a public employer is obligated to engage in mandatory bargaining with its represented employees. *See Matter of Board of Educ. of City School Dist. of City of N.Y. v. New York State Pub. Empl. Relations Bd.*, 75 N.Y.2d 660, 668, 670, 555 N.Y.S.2d 659, 554 N.E.2d 1247 (1990); *Matter of State of New York [Div. of Military & Naval Affairs] v. New York Pub. Empl. Relations Bd.*, 187 A.D.2d at 82, 592 N.Y.S.2d 847 (1993)).

13. Appellant's misinterpretation of the statutes and misrepresentation of the PERB decisions presents a classic case of "mixing apples and oranges". Appellant has concluded that PERB's mandate that GOER had an obligation to negotiate the change to a benefit previously enjoyed by Respondent Union members means that GOER now has authority to set, waive, or abolish fees in DCS's stead. (App. Memo of Law, pp.14-15).

14. This is quite a leap considering nothing in the PERB decisions below compels such a conclusion. Nowhere in the Second Decision does PERB conclude or imply that DCS's authority under *CSL* § 50(5) has been rendered null and void; nor does the Decision have any such practical effect. (*See* App. Memo of Law, Ex. B).

15. Collective negotiations could result in any likely agreements between negotiating parties; for example, the uniform schedule of fees could remain

unchanged, but the State may offer comparable benefits in other areas, or may agree to subsidize the costs of the fees. That is the nature collective negotiation.

16. Thus, by directing Appellant to negotiate through GOER as its designated bargaining agent with public employee unions over newly established promotional examination fees does not in any way alter or subvert the authority of DCS to set said fees. The mere fact that it may be inconvenient for GOER to negotiate over the fees with each public employee union does not render PERB's statutory interpretation of the Taylor Law invalid.

17. Appellant's second ground for leave to appeal is equally unpersuasive. The Third Department applied the correct standard of review when it determined there was substantial evidence in the record to support a finding that "'. . . PERB's decision was legally permissible, rational and thus not arbitrary and capricious.'" (App. Memo of Law, Ex. C, p.3; *quoting Matter of DeOliveira v. N.Y.S. Pub. Empl. Relations Bd.*, 133 A.D.3d 1010, 1011 (2015) (internal quotation marks and citations omitted); *Matter of State of New York v. N.Y.S. Pub. Empl. Relations Bd.*, 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. N.Y.S. Pub. Empl. Relations Bd.*, 149 A.D.3d 1236, 1238 (2017)).

18. More importantly, no conflict of law exists between *CSL* § 50 and §§200 *et seq*. In reaching its determination, PERB noted that "CSL§ 50 contains no

express prohibition on bargaining." (App. Memo of Law, Ex. B, p.9). Furthermore, as previously noted, Appellant presents no special circumstances that would warrant removal of the subject of examination fees from mandatory bargaining. *See* generally, *Matter of the City of Watertown,* 95 N.Y.2d 73.

19. Appellant argues that this issue is a matter of statutory interpretation. (App. Memo of Law, p.18). Yet, ignores the clear and plain language of Civil Service Law § 50, which does not contain any language prohibiting the subject of examination fees from bargaining. In order to avoid the inconvenience of bargaining with multiple unions over the subject of application fees, Appellant makes its sweeping conclusions without support in facts or law.

20. Appellant's third ground for leave for appeal appears to be a restatement or extension of its second ground for leave. Appellant contends here that PERB erroneously assumed jurisdiction over "the public employee unions' challenge to the setting of application fees by DCS." (App. Memo of Law, pp.20-21). Appellant further argues that the Second Decision "did not set forth a statutory basis to establish that [PERB] possessed jurisdiction to review DCS' statutorily based action of setting application fees that had been approved by DOB." (App. Memo of Law, p.22). And, as a consequence of PERB's decision, it enjoined DCS and DOB from setting application fees.

21. First, this argument misstates the basis for the improper practice charges brought before PERB. Respondent DC37 brought an improper practice charge in the proceedings below to challenge *GOER's* failure, as the authorized collective bargaining agent for the State, to negotiate over the rescission of a benefit (i.e., no-fee promotion exams) prior to implementing said fees. (R. 72-77).

22. Second, as previously noted, nothing in the PERB decisions undermines the authority of DCS and DOB as prescribed in *CSL* § 50. Appellant fails to comprehend that DCS and DOB's actions regarding the setting of application fees for promotional examinations were not at issue in the proceedings below. Appellant's failure to bargain over the fees prior to imposing them on Respondent DC37 bargaining unit members *was*.

23. Thus, the matter of whether PERB had or assumed jurisdiction over DCS in making its determination is irrelevant. DCS itself did not appear as a party in the proceedings. As such, this basis for permission to appeal has no merit.

24. As a fourth basis for granting its leave to appeal, Appellant posits that there is a holding in this case 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 . . . must collectively bargained any change to a uniform application fee scheduled

with each union . . . is a novel ruling warranting this Court's review." (App. Memo of Law, p.23).

25. Appellant does not cite to anywhere in any of the decisions below where such a holding exists.

26. Nevertheless, the question of whether the Taylor Law authorizes a public employer to engage in bargaining over new requirements established under other entities or departments is not a novel issue making it reviewable by this Court. *See e.g., District Council 37, AFSCME, AFL-CIO v. Bd. of Educ. of the City School Dist. of the City of New York*, 48 P.E.R.B. ¶ 4554 (2015), *aff'd,* 49 P.E.R.B. ¶ 3024 (2016) (holding that the employer was required to negotiate over the distribution of parking permits even though it argued that it had no control over the New York City Department of Transportation's decision to reduce the number of available parking permits); *District Council 37, AFSCME, AFL-CIO v. Bd. of Educ. of the City School Dist. of the City of New York*, 49 P.E.R.B. ¶ 4582 (2016) (finding that the requirements set forth in the Justice Center's Code of Conduct for Custodians of People with Special Needs issued by the New York State Justice Center for the Protection of People with Special Needs, pursuant to *Social Services Law* §§ 488 *et seq.*, did not obviate the Department of Education's obligation to negotiate over the Code of Conduct).

27. Thus, PERB has consistently held that a public employer may not escape its bargaining obligation simply by claiming some other entity or department was responsible for the change that impacted the at-issue mandatory subject of bargaining, and which led the public employer to violate the Taylor Law.

28. As such, it is irrefutable that Appellant has not provided any valid grounds warranting this Court's grant of leave to appeal. Therefore, Respondent DC37 maintains that the Third Department's May 14, 2020, Memorandum and Judgment should stand and Appellant's Motion for Leave to Appeal is without merit.

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

Dated: June 17, 2021
New York, New York

Erica Gray-Nelson

Erica C. Gray-Nelson
Senior Assistant General Counsel

DISCLOSURE STATEMENT

Pursuant to 22 NYCRR Part 500.1(f), Respondent-Respondent DISTRICT COUNCIL 37, LOCAL 1359, AFSCME, AFL-CIO, is a not-for-profit corporation duly organized and existing under the laws of the State of New York. Local 1359 is an affiliated local of District Council 37, American Federation of State, County, and Municipal Employees, an unincorporated association, which is a member of the American Federation of Labor - Congress of Industrial Organizations.

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, inclusive of point headings, footnotes, disclosure statement and certificate of compliance is 2568.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK
COUNTY OF Albany SS.:

Robyn Montgomery, being duly sworn, says: I am not a party to the action, am over 18 years of age and reside at:

____.

On the 18 day of June, 2021, I served one copy of the annexed Affirmation in Opposition to Motion for Leave to Appeal to the following at their last known address(es) set forth below:

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

by the following method (choose one):

☑ personally delivering the papers and giving them to the following individual:
Shannon Piper / [signature].

☐ mailing the papers enclosed in a sealed envelope, with postage prepaid thereon, in a post office or official depository under the exclusive care and custody of the U.S. Postal Service within the State of ____________________.

☐ placing the papers in the custody of an overnight delivery service prior to the latest time designated by the overnight delivery service for overnight delivery.

(Signature) Robyn L. Montgomery
(Print Name) Robyn L. Montgomery

Sworn to before me this 21st
day of June 2021

[signature]
Notary Public

Notary Public, State of New York
Qualified in Schenectady County
Commission Expires ... 20 24

AFFIDAVIT OF SERVICE

STATE OF NEW YORK
COUNTY OF Albany SS.:

Robyn Montgomery, being duly sworn, says: I am not a party to the action, am over 18 years of age and reside at:

_____.

On the 18 day of June, 2021, I served one copy of the annexed Affirmation in Opposition to Motion for Leave to Appeal to the following at their last known address(es) set forth below:

Michael T. Fois, Esq.
NYS Public Employment Relations Board
PO Box 2074, ESP
Agency Building 2, 20th Floor
Albany, NY 12220

by the following method (choose one):

☑ personally delivering the papers and giving them to the following individual: Sheila Kennedy

☐ mailing the papers enclosed in a sealed envelope, with postage prepaid thereon, in a post office or official depository under the exclusive care and custody of the U.S. Postal Service within the State of _____.

☐ placing the papers in the custody of an overnight delivery service prior to the latest time designated by the overnight delivery service for overnight delivery.

(Signature) Robyn L. Montgomery
(Print Name) Robyn L. Montgomery

Sworn to before me this 21st day of June, 2021

Notary Public

[illegible]
Notary Public, State of New York
Qualified in Schenectady County
No. 01GR6110004
Commission Expires June 1, 2024

AFFIDAVIT OF SERVICE

STATE OF NEW YORK
COUNTY OF Albany SS.:

Robyn Montgomery, being duly sworn, says: I am not a party to the action, am over 18 years of age and reside at:

_____.

On the 18 day of June, 2021, I served one copy of the annexed Affirmation in Opposition to Motion for Leave to Appeal to the following at their last known address(es) set forth below:

Clay J. Lodovice, Esq.
Governor's Office of Employee Relations
Empire State Plaza
Agency Building 2, 12th Floor
Albany, NY 12223

by the following method (choose one):

☑ personally delivering the papers and giving them to the following individual:
Amy M. Petragnani.

☐ mailing the papers enclosed in a sealed envelope, with postage prepaid thereon, in a post office or official depository under the exclusive care and custody of the U.S. Postal Service within the State of

_____.

☐ placing the papers in the custody of an overnight delivery service prior to the latest time designated by the overnight delivery service for overnight delivery.

(Signature) Robyn L. Montgomery
(Print Name) Robyn L. Montgomery

Sworn to before me this 21st
day of June, 2021

Notary Public

Notary Public, State of New York
Qualified in Schenectady County
No. 01GR6110604
Commission Expires June 1, 2024

AFFIDAVIT OF SERVICE

STATE OF NEW YORK
COUNTY OF Albany SS.:

Robyn Montgomery, being duly sworn, says: I am not a party to the action, am over 18 years of age and reside at:
20 Kraus Road - Albany NY 12203.

On the 21 day of June, 2021, I served one copy of the annexed Affirmation in Opposition to Motion for Leave to Appeal to the following at their last known address(es) set forth below:

Steven Klein, Esq.
Senior Associate Counsel
Civil Service Employees Association
143 Washington Avenue, Capitol Station
P.O. Box 7125, Albany, NY 12224

by the following method (choose one):

☑ personally delivering the papers and giving them to the following individual:
Steven M. Klein.

☐ mailing the papers enclosed in a sealed envelope, with postage prepaid thereon, in a post office or official depository under the exclusive care and custody of the U.S. Postal Service within the State of _____.

☐ placing the papers in the custody of an overnight delivery service prior to the latest time designated by the overnight delivery service for overnight delivery.

(Signature) Robyn L. Montgomery
(Print Name) Robyn L. Montgomery

Sworn to before me this 21st
day of June 2021

Notary Public

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