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EMILY G. HANNIGAN
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VIA FEDERAL EXPRESS

June 17, 2021

Clerk of the Court
State of New York
Court of Appeals
20 Eagle Street
Albany, NY 12207-4095

**Re: Matter of State of New York v. PERB
Mo. No. 2021-510 (PIN No. 84231)**

Dear Clerk of the Court:

We represent Respondent New York State Correctional Officers and Police Benevolent Association, Inc. ("NYSCOPBA") in the above-referenced matter.

Enclosed please find an original and one (1) copy of our Affirmation in Opposition to Petitioner-Appellant's Motion for Leave to Appeal, with attached Affidavits of Service.

Should you have any questions or require anything further from us, please do not hesitate to contact us.

Respectfully Submitted,

Emily G. Hannigan
EGH/gsp
Enclosures



TO: Governor's Office of Employee Relations
ATTN: Clay Lodovice, Esq.
2 Empire State Plaza, 12th Floor
Albany, NY 12223

NYS Public Employment Relations Board
and John Wirenius, Chairperson
ATTN: Ellen M. Mitchell, Esq.
P.O. Box 2074
2 Empire State Plaza, 20th Floor
Albany, NY 12220-0074

Civil Service Employees Association, Inc.
ATTN: Steven Klein, Esq.
Box 7125, Capitol Station
143 Washington Avenue
Albany, NY 12210

District Council 37, AFSCME, AFL-CIO
Local 1359
ATTN: Erica Nelson-Gray, Esq.
55 Water Street – 22nd Floor
New York, NY 10041

COURT OF APPEALS
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.

EMILY G. HANNIGAN, Esq. affirms as follows under the penalty of perjury
pursuant to CPLR 2106:

1. I am an attorney admitted to practice before the Courts of the
State of New York, and I am a partner of the firm of Lippes Mathias Wexler
Freidman, LLP, attorneys for Respondent New York State Correctional Officers and
Police Benevolent Association, Inc. (hereinafter "NYSCOPBA").

**Affirmation in
Opposition to Motion for
Leave to Appeal**

**Mo. No. 2021-510
AD No. 528783
Albany Cty. Index No.
07226-18**

2. Lippes Mathias Wexler Friedman, LLP, has represented Respondent NYSCOPBA in this matter before the Appellate Division, Third Department, Albany County Supreme Court and before the Public Employment Relations Board (“PERB”) below, and thus I am fully familiar with the facts and legal issues involved in this appeal.

3. I make this affirmation in opposition to Petitioner-Appellant the State of New York’s motion for leave to appeal to the Court of Appeals from the unanimous Memorandum and Judgment of the Appellate Division, Third Department, entered on May 14, 2020, confirming two determinations of Respondent Public Employment Relations Board (“PERB”) finding that Petitioner-Appellant committed an improper employer practice, dismissing the petition and granting Respondent PERB a judgment of enforcement of its remedial order (Petitioner-Appellant’s Motion for Leave to Appeal: Ex. C).

4. The present motion should be denied because there is no significant question of law or Departmental split that merits this Court’s review of the uniform findings of Respondent PERB and the Appellate Division, Third Department. Furthermore, it is respectfully submitted that this appeal does not present a novel issue or an issue of public importance. See, 22 NYCRR part 500.22.

5. Petitioner-Appellant offers four arguments in support of its motion for leave to appeal to this Court.

6. First, Petitioner-Appellant erroneously contends that the Appellate Division, Third Department incorrectly held that examination fees are mandatorily negotiable pursuant to the Public Employees Fair Employment Act (Civil Service Law, Article 14, hereinafter referred to as the “Taylor Law”) (Petitioner-Appellant’s Memorandum of Law: p. 14-17).

7. The Appellate Division, Third Department, expressly addressed the issue of whether examination fees are mandatorily negotiable pursuant to the Taylor Law in its May 14, 2020, Memorandum and Judgment, stating:

“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]) [footnote omitted.] 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 N.Y.2d 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" (Petitioner-Appellant's Motion for Leave to Appeal: Ex. C, p. 4).

8. The Appellate Division, Third Department's decision on this issue is supported by relevant statutes and case law.

9. Petitioner-Appellant offers mere speculation about the "practical outcome" of the decisions below, but fails to cite any legal authority, in furtherance of its claim that "PERB's statutory interpretation is not valid" (Petitioner-Appellant's Memorandum of Law: p. 16). Petitioner-Appellant's disagreement with the decision below and its perceived inconvenience of bargaining with employee organizations over the at-issue application fees is not a meritorious ground for seeking leave to appeal to this Court.

10. Second, Petitioner-Appellant erroneously contends that the Appellate Division, Third Department applied the incorrect standard of review when it granted deference to PERB's interpretation of the Civil Service Law § 50(5) (Petitioner-Appellant's Memorandum of Law: p. 17-20).

11. In making this claim, Petitioner-Appellant mischaracterizes the Appellate Division, Third Department's explicit agreement with PERB's interpretation of the Civil Service Law as "grant[ing] deference" to PERB's interpretation of the law.

12. Notwithstanding, as the agency charged with implementing the fundamental policies of the Taylor Law, PERB is presumed to have developed an expertise and judgment that requires courts to accept its decisions with respect to matters within its competence, including but not limited to whether an examination application fee is a term and condition of employment, and whether the creation of a fee schedule for examinations is a prohibited or permissive subject of bargaining (see generally, *Chenango Forks Cent. Sch. Dist. v New York State Pub. Employment Relations Bd.*, 21 NY3d 255, 261 [2013]; see also *Matter of Incorporated Vil. of Lynbrook v New York State Pub. Empl. Relations Bd.*, 48 NY2d 398, 404 [1979]).

13. The Appellate Division, Third Department, properly reviewed whether PERB's determination, made as the result of a hearing, at which evidence was taken, was supported by substantial evidence. See, CPLR 7803 (4). Contrary to Petitioner-Appellant's assertion, the Appellate Division, Third Department, was not required to review Respondent PERB's determinations *de novo*. As such, Petitioner-Appellant has not set forth a meritorious ground to seek leave to appeal to this Court.

14. Third, Petitioner-Appellant erroneously contends that the Appellate Division, Third Department failed to address whether PERB has the authority to "control and enjoin" the actions of the New York State Department of Civil Service ("DCS") and the New York State Division of Budget ("DOB") and

further contends that PERB lacked jurisdiction to review DCS's statutorily based action of setting application fees that had been approved by DOB. (Petitioner-Appellant's Memorandum of Law: p. 20-22).

15. Petitioner-Appellant failed to raise this defense at PERB, and therefore, it is not preserved for review. Notwithstanding, Petitioner-Appellant's claim is not meritorious.

16. Respondent NYSCOPBA filed the at-issue improper practice charge after Petitioner-Appellant, the State of New York, unilaterally implemented promotional examination fees without negotiating with NYSCOPBA, in violation of the Taylor Law.

17. The Governor's Office of Employee Relations ("GOER") which represented Petitioner-Appellant before PERB, is the State's representative for all relations between the State and its employees, charged with conducting collective negotiations with labor unions pursuant to the Taylor Law. See, Executive Law § 653.

18. DCS and DOB are New York State agencies that implemented GOER's decision to charge the promotional examination fees on behalf of the State.

19. The State of New York is the "employer" in this matter, and the State of New York, as well as its functionary agencies including GOER, DCS and DOB are bound by the decisions below.

20. As such, Petitioner-Appellant's argument that PERB's lack of jurisdiction over the subject matter serves as a basis to grant leave to appeal to this Court should be rejected.

21. Finally, Petitioner-Appellant's assertion in support of its motion for leave to appeal to this Court, that Respondent PERB's determination is a "novel ruling" because it will force GOER to collectively bargain with Respondents regarding the imposition of promotional examination fees, is patently false (Petitioner-Appellant's Memorandum of Law: p. 23-27).

22. PERB's determination that promotional examination fees are a mandatory subject of bargaining and that the State of New York violated the Taylor Law when it failed to negotiate in good faith with Respondents is not a novel concept at all. The Taylor Law has required public employers to negotiate in good faith with employee organizations with respect to terms and conditions of employment for over fifty years. See, Civil Service Law § 204 (3).

23. In finding promotional examination fees to be a term and condition of employment and a mandatory subject of bargaining, PERB and the Appellate Division, Third Department, appropriately required Petitioner-Appellant to negotiate promotional examination fees in good faith with Respondents.

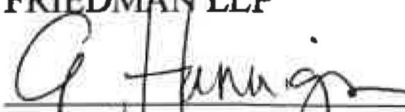
24. Respondent NYSCOPBA submits that the May 14, 2020, unanimous Memorandum and Judgment of the Appellate Division, Third

Department, was correct as to the facts and the law, and that Petitioner-Appellate has not submitted a meritorious basis upon which to grant leave to appeal.

WHEREFORE, it is respectfully requested that Petitioner-Appellant's motion for leave to appeal to the Court of Appeals be denied in its entirety, together with any other and further relief that the Court deems just and proper.

Dated: June 17, 2021

LIPPES MATHIAS WEXLER
FRIEDMAN LLP



Emily G. Hannigan
Attorneys for Respondent NYSCOBPA
54 State Street
Suite 1001
Albany, NY 12207

DISCLOSURE STATEMENT
Pursuant to 22 NYCRR Part 500.1(f)

Respondent-Respondent New York State Correctional Officers and Police Benevolent Association, Inc. (hereinafter “NYSCOPBA”) is a nongovernmental not-for-profit corporation duly organized and existing under the laws of the State of New York. NYSCOPBA has no parent corporation, subsidiaries or affiliates.

COURT OF APPEALS
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
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EMPLOYMENT RELATIONS BOARD; CIVIL
SERVICE EMPLOYEES ASSOCIATION, LOCAL
1000, AFSCME, AFL-CIO; DISTRICT COUNCIL
37, AFSCME, AFL-CIO, LOCAL 1359; and NEW
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Respondents-Respondents.

AFFIDAVIT OF SERVICE

Mo. No. 2021-510

AD No. 528783

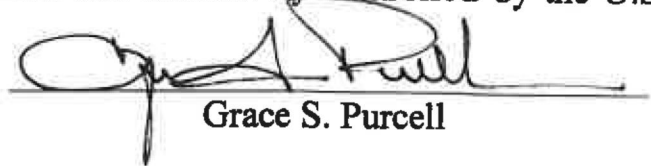
Albany Cty. Index No. 07226-18

GRACE S. PURCELL, being duly sworn, deposes and says:

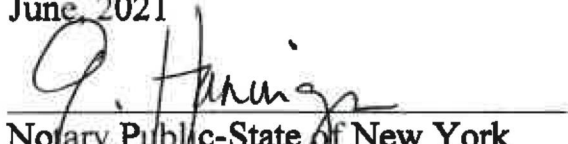
1. That she is and at all times hereinafter mentioned is over 18 years of age; that she is employed with the firm of Lippes Mathias Wexler Friedman, LLP, the attorneys for Respondent NYSCOPBA in the above-entitled action.
2. That on the 17TH day of June, 2021, she served a copy of the Affirmation in Opposition to Motion for Leave to Appeal in the above-referenced matter on:

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

by depositing said document in a postage-paid envelope in a U.S. mailbox located on Hudson Street, Albany, New York, maintained and exclusively controlled by the U.S. Postal Service within New York State.


Grace S. Purcell

Sworn to before me this 17th day of
June, 2021


Notary Public-State of New York
EMILY G. HANNIGAN
Notary Public, State of New York
No. 02HA6311024
Qualified in Albany County
Commission Expires Sept. 8, 2022

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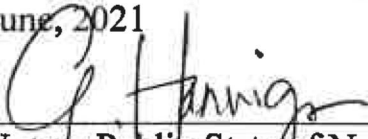
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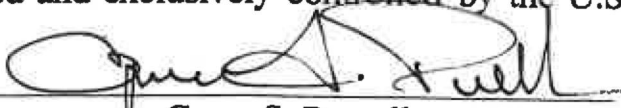
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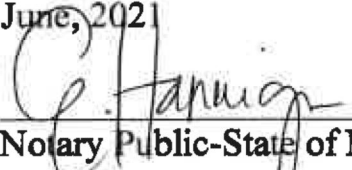
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