

**STATE OF NEW YORK  
COURT OF APPEALS**

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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.

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**AFFIRMATION IN OPPOSITION TO PETITIONER-APPELLANT'S  
MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS**

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Court of Appeals Motion No. 2021-510 (Pin No. 84231)

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Dated: June 21, 2021

STATE OF NEW YORK  
COURT OF APPEALS

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STATE OF NEW YORK,

Petitioner-Appellant,

- against -

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

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**AFFIRMATION IN  
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Mo. No. 2021-510  
(Pin No. 84231)

ELLEN M. MITCHELL, an attorney admitted to practice in the courts of  
this State, affirms under penalties of perjury, pursuant to CPLR 2106, that:

1. I am of counsel to Michael T. Fois, General Counsel for the New York  
State Public Employment Relations Board, and John Wirenius, named herein  
solely in his capacity of Chairperson (together "PERB"), a Respondent-  
Respondent in the above-entitled proceeding, and am fully familiar with the facts  
and circumstances of this case.

2. I make this affirmation in opposition pursuant to 22 NYCRR § 500.22 (d)  
in response to a motion for leave to appeal to the Court of Appeals brought by  
Petitioner-Appellant State of New York ("State").

3. The State seeks leave to appeal from a May 14, 2020 decision and order of the Supreme Court, Appellate Division, Third Department. *See Matter of State of New York v NYS Pub Empl Relations Bd, et al.*, 183 AD3d 1061 [3d Dept 2020], attached to State’s Motion as Exhibit C. The Third Department denied a similar motion on April 16, 2021, reaffirming its decision. *See In re State of New York v NYS Pub Empl Relations Bd, et al.*, 2021 WL \_\_\_, Slip Op. \_\_ [3d Dept 2021] attached to State’s Motion as Exhibit E.

4. The State’s initial proceeding, brought pursuant to CPLR Article 78, sought to annul *State of New York (Department of Civil Service)*, 51 PERB ¶ 3027, 2018 WL 6566800 [2018], a PERB determination issued in an administrative proceeding conducted pursuant to Civil Service Law (“CSL”) § 205.5 (d). *See* State’s Motion Exh. B.

**Procedural Posture/Background**

5. In the underlying administrative proceeding, Respondent-Respondents Civil Service Employees Association, Local 1000, AFSCME, AFL-CIO (“CSEA”), District Council 37, AFSCME, AFL-CIO, Local 1359 (“DC 37”), and New York State Correctional Officers and Police Benevolent Association, Inc. (“NYSCOPBA”), as well as the Public Employees Federation, Inc. (“PEF”) (collectively, “Unions”), each filed improper practice charges with PERB alleging that the State had violated the Public Employees’ Fair Employment Act, CSL §

200, *et seq.*, commonly known as the “Taylor Law,” when it unilaterally required certain employees represented by each Union to pay an application fee for promotional and transitional examinations.

6. PERB consolidated the improper practice charges for processing, and an Administrative Law Judge (“ALJ”), after a quasi-judicial hearing, dismissed the charges.<sup>1</sup>

7. The Unions filed exceptions to that decision, and PERB reversed and remanded for a determination as to whether the charging of the examination fees was a mandatory subject of negotiation, whether PEF’s charge was timely filed, and to resolve an ambiguity in the record.<sup>2</sup>

8. On remand, the ALJ dismissed PEF’s charge as untimely, resolved the ambiguity in the record, held that the examination fees were a mandatorily negotiable subject of bargaining, and found that the State had violated the Taylor Law when it unilaterally imposed those fees.<sup>3</sup>

9. The State filed exceptions to that decision, and PERB affirmed, holding that, as the affected employees received an economic benefit by not having to pay an application fee for examinations, requiring them to pay such fees was a mandatory subject of bargaining. PERB further found that Civil Service Law § 50

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<sup>1</sup> 45 PERB ¶ 4620 [2012].

<sup>2</sup> 46 PERB ¶ 3032 [2012].

<sup>3</sup> 50 PERB ¶ 4584 [2017].

(5) does not prohibit or foreclose negotiation of the subject; and the affected employees had a reasonable expectation that the practice of not charging fees would continue, creating a past practice which may not be changed unilaterally by the State. PERB also affirmed the dismissal of PEF's charge as untimely. *See* State's Motion Exh B.

10. The State filed a Notice of Petition and Verified Petition grounded in CPLR Article 78 in Albany County Supreme Court, assigned Index No. 07226-18, seeking to annul PERB's determination. The matter was transferred by stipulation to the Appellate Division, Third Department.

11. The Appellate Division affirmed PERB's determination, and also granted PERB's counterclaim for enforcement of its remedial order. *See* State's Motion Exh C.

### **The State's Motion to Appeal to the Court of Appeals**

12. Petitioner-Appellant identifies several grounds for its appeal which overlap and intertwine. The State argues that: (1) the Third Department erred in affirming PERB's holding that the charging of fees to represented State employees for promotional and transitional examinations was a mandatory subject of negotiation; (2) the Third Department applied an incorrect standard of review to PERB's determination that Civil Service Law ("CSL") § 50 does not prohibit or foreclose negotiation of the charging of fees; (3) the Third Department failed to

address whether PERB has the authority to “control and enjoin” the actions of State agencies and lacks jurisdiction to review the State’s assessment of examination fees under CSL § 50 (5); and (4) the Third Department’s affirmance of PERB’s remedial order requiring the State to negotiate the subject of examination fees interferes with the State’s statutory duty to administer its examinations and results in the “novel” requirement that GOER, on behalf of the State, negotiate this mandatory subject of bargaining.

13. PERB respectfully submits that Petitioner-Appellant’s leave request satisfies none of the grounds for granting leave to appeal to this Court. *See* NYCRR § 500.22 (b) (4). The State raises no issue of novel or statewide importance, does not show that the Appellate Decision conflicts with any precedent of this Court, and does not show any dispute about any pertinent legal issue between the departments of the Appellate Divisions. Indeed, the State essentially merely proffers the same arguments that the Third Department rejected below.

14. Further, PERB respectfully submits that the State’s general complaints that the Third Department’s conclusions on the facts before it were incorrect do not warrant leave to appeal to the Court of Appeals.

15. Additionally, PERB respectfully submits that Appellant’s contentions are without merit.

16. The State first argues that its assessment of examination application fees is not a mandatory subject of bargaining.

17. The Appellate Division, relying upon well-established PERB caselaw affirmed by this Court and the Third Department, correctly defined the State's bargaining obligations and properly held that, as the affected employees received an economic benefit by not having to pay application fees for examinations, the subject of application fees is mandatorily negotiable. *See* State's Motion Exh C at 3-4, citing *Matter of Town of Islip v NYS PERB*, 23 NY3d 482, 491 [2014]; *Matter of Board of Coop Educ Servs Sole Supervisory Dist, Onondaga & Madison Cos v NYS PERB*, 82 AD2d 691, 693-694 [1982]; *Matter of Newark Val Cardinal Bus Drivers, Local 4360, NYSUT, AFT, AFL-CIO v NYS PERB*, 303 AD2d 888, 889 [2003], *lv denied* 100 NY2d 504 [2003]. This holding is solidly based in law and fact and is unassailable.

18. The State's argument that the Appellate Division applied an incorrect standard of review in its analysis of PERB's decision that CSL § 50 does not foreclose bargaining over the subject cannot stand. The State's Verified Petition, as well as its submissions to the Third Department, specifically request that the Third Department apply a substantial evidence standard of review. This standard of review is exactly what the Appellate Division applied: "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." See State's Motion Exh C at 3 (citations omitted). Furthermore, as the agency authorized to interpret and administer the Taylor Law, PERB's negotiability determinations, including its instant holding that examination applications fees are mandatory subjects of bargaining, are entitled to deference. See e.g. *Matter of Watertown v NYS PERB*, 95 NY2d 73, 81 [2000].

19. The Appellate Division also correctly noted that "[t]he 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," citing *Matter of Watertown v NYS PERB*, 95 NY2d at 78-79 [2000]. *Id.*

20. The Third Department then analyzed and properly rejected the State's argument that the statutory language of CSL § 50 (5) prohibits or forecloses bargaining of examination application fees, affirming PERB's holding that the statute not only fails to prohibit bargaining but in fact gives the State the discretion to do so. *Id.* at 4, citing *Matter of Bd of Educ of City Sch Dist of City of New York v NYS PERB*, 75 NY2d 660, 669 [1990].

21. In its submission to this Court, the State does not and cannot identify specific language in CSL § 50 (5) which expressly prohibits the bargaining of this subject. In fact, the State exercised its statutory discretion by not assessing



examination application fees for more than 10 years prior to its implementation of its at-issue fee schedule. *See* State’s Motion Exh B at 9-10. Further, the State admits in its Motion that it retains the discretion to impose such fees. State’s Motion at 14. The State’s assertion that the Appellate Division improperly found that the Taylor Law “outweighs” Civil Service Law is a misrepresentation at best.

22. The State’s related argument, that the Third Department erred in requiring the State to bargain the subject of examination application fees because it would require GOER to negotiate on behalf of DCS, which would result in some purported type of interference within its agencies or an inconvenience to GOER, alleges not a conflict of laws but speculates as to a possible prospective internal State issue. Similarly, the State fails to identify any “novel ruling” created by the Appellate Division’s decision.

23. The State admits in its Verified Petition that it is the employer pursuant to CSL § 201.6 (¶ 3), that GOER’s function is to assist the Governor regarding labor relations between the State and its employees including collective negotiations (¶ 4), and that the Department of Civil Service (“DCS”), which administers examinations, including the setting of application fees, is a department of the State (¶5).

24. Since 1967, PERB, having been granted exclusive jurisdiction over improper practices by the Taylor Law, has been identifying mandatory subjects of

bargaining and issuing remedial orders requiring public employers, including the State, to negotiate them. GOER regularly negotiates with the State's employee organizations, including Respondent-Respondents Unions, on behalf of its numerous agencies, over a myriad of mandatory terms and conditions of employment. In the instant matter, DCS is merely another State agency that GOER must represent, and the examination application fees at issue are simply another such mandatorily bargainable subject.

25. The State's assertion that the Third Department erred in affirming PERB's decision because PERB exceeded its jurisdiction relative to its examination of DCS' actions is simply a restatement of its argument, properly rejected by both PERB and the Third Department, that the subject of assessing examination application fees is prohibited by CSL § 50. Certainly, contrary to the State's position, neither PERB nor the Third Department held that GOER itself now possesses the authority to set application fees, or that DCS' authority under CSL § 50 (5) is null and void. Moreover, this argument lacks merit, as PERB's scrutiny was limited purely to the question of whether the State had violated the Taylor Law by unilaterally changing a mandatory subject of bargaining without negotiation. PERB simply applied its prior decisions and this Court's rulings to the facts before it. Therefore, PERB respectfully submits that this Court should also reject this argument.

**WHEREFORE**, Respondent-Respondent PERB requests that Petitioner-Appellant State's motion for leave to appeal to the Court of Appeals from the March 26, 2020 decision and order of the Appellate Division, Third Department in the above-entitled matter be denied.

DATED: Albany, New York  
June 21, 2021

Michael T. Fois  
General Counsel



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By: Ellen M. Mitchell, of Counsel  
*Attorney for Respondent*  
NYS Public Employment Relations Board  
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ESP, Agency Building 2, 20th Floor  
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## **CERTIFICATE OF COMPLIANCE**

IT IS hereby certified pursuant to 22 NYCRR § 500.13 (c)(1) that the foregoing brief was prepared on a computer using Microsoft Word. A serified, 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 this affirmation, inclusive of point headings and footnotes and exclusive of pages containing the proof of service, printing specifications statement, or certificate of compliance is 2,060 words.

Dated: June 21, 2021  
Albany, New York

STATE OF NEW YORK  
COURT OF APPEALS

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STATE OF NEW YORK,

Petitioner-Appellant,

- against -

**AFFIDAVIT  
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NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS  
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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.,

Court of Appeals  
Mot. No.: 2021-510  
(Pin No.: 84231)

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Respondents-Respondents.

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STATE OF NEW YORK    )  
                                  )  
COUNTY OF ALBANY    )

Valerie Moore, being duly sworn, deposes and says that deponent is over the age of 18 years and an employee of the New York State Public Employment Relations Board.

That on June 21, 2021, deponent served PERB's Affirmation in Opposition to Petitioner-Appellant's Motion for Leave to Appeal to the Court of Appeals via hand-deliver mail upon:

Clay J. Lodovice, Esq.  
Governor's Office of Employee Relations  
Empire State Plaza  
Agency Building 2, 12<sup>th</sup> Floor  
Albany, New York 12223

at the address(es) designated by depositing a true copy thereof enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

Valerie Moore

Sworn to before me this  
21<sup>st</sup> day of June, 2021.



SHEILA L. KENNEDY  
Notary Public, State of New York  
No. 01KE6231328  
Qualified in Saratoga County  
Commission Expires 11/22/2021

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**AFFIDAVIT  
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That on June 21, 2021, deponent served PERB's Affirmation in Opposition to Petitioner-Appellant's Motion for Leave to Appeal to the Court of Appeals via first-class mail upon:

Emily G. Hannigan, Esq.  
Lippes Mathias Wexler Friedman LLP  
54 State Street, Suite 1001  
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Erica Gray-Nelson, Esq.  
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Steven M. Klein, Esq.  
Senior Associate Counsel  
CSEA - Capitol Station  
143 Washington Avenue  
P.O. Box 7125  
Albany, New York 12224-0125

at the address(es) designated by depositing a true copy thereof enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

Valerie Moore

Sworn to before me this  
21<sup>st</sup> day of June, 2021.  
  
SHEILA L. KENNEDY  
Notary Public, State of New York  
No. 01KE6231328  
Qualified in Saratoga County  
Commission Expires 11/22/2021

