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COURT OF APPEALS

STATE OF NEW YORK

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STATE OF NEW YORK,

Appellant,

-against-

NO. 5

PERB,

Respondent.

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20 Eagle Street  
Albany, New York  
January 4, 2023

Before:

ACTING CHIEF JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE SHIRLEY TROUTMAN

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1           ACTING CHIEF JUDGE CANNATARO: Our next appeal is  
2           number 5, matter of State of New York v. PERB.

3           Whenever you're ready, Counsel.

4           MR. LODOVICE: Thank you.

5           If I may reserve four minutes for rebuttal?

6           ACTING CHIEF JUDGE CANNATARO: You have four  
7           minutes.

8           MR. LODOVICE: Thank you.

9           If it may please the court. My name is Clay  
10          Lodovice. I am an attorney with the State of New York  
11          Office of Employee Relations.

12          As set forth in our papers, the Office of  
13          Employee Relations is the agency entity responsible for  
14          acting as the governor's agent for collective bargaining  
15          for the State of New York as employer.

16          To be clear, as I also set forth in our papers,  
17          we do not represent the Department of Civil Service in its  
18          role as the administrator of the American Fitness System.  
19          This Department of Civil Service, through the president of  
20          the Civil Service Commission, is a distinct entity for that  
21          purpose.

22          I also want to note one, kind of, reference as  
23          I'm walking through. Subsequent to the filing of the  
24          papers, the Office of Employee Relations returned to its  
25          statutory name, Office of Employee Relations, rather than



1 the Governors' Office of Employee Relations. So I'll refer  
2 to OER rather than GOER throughout the statement.

3 The first point - - -

4 JUDGE GARCIA: Counsel, what would your  
5 definition be - - - if we're looking at an issue, what's  
6 your definition of a term and condition of employment? How  
7 would we apply that term?

8 MR. LODOVICE: It is something that applies to  
9 the individual in their status as an employee of the public  
10 employer. It has to be tied to employment. It's my  
11 salary; it's my wages; it's my leave accruals; it's the - -  
12 - what - - - how much am I paid for overtime, under what  
13 circumstances do we schedule a shift - - -

14 JUDGE SINGAS: Is it a fee for a promotional  
15 exam? Is that a term and condition?

16 MR. LODOVICE: No. I would say that it's not,  
17 and I would say that on several reasons.

18 First of all is the statute is very clear that  
19 the fee is applied to applicants or candidates for  
20 prospective future employment, whether it be for an open  
21 competed exam or a promotional exam. The statute makes no  
22 distinction between the status of the individual as opposed  
23 to as a - - - someone from the public or someone who is the  
24 - - - has a qualification for that future appointment for  
25 promotion. Has to be a public employee.



1           So the statute in itself distinguishes it as  
2           applicant or candidate.

3           ACTING CHIEF JUDGE CANNATARO: That's a fair  
4           characterization to someone looking in from the outside,  
5           but from the perspective of the employee, they're an  
6           employee looking for career advancement. They want to move  
7           up in their - - - in their workplace. So that - - - the  
8           ability to do that without fees being attached to it could  
9           very well, from their perspective, be a term and condition  
10          of their employment.

11          MR. LODOVICE: Well, that is also true for the  
12          individual who is standing on the street as - - - who is  
13          not a public employee at that time or not an employee who's  
14          not - - -

15          ACTING CHIEF JUDGE CANNATARO: Well, they're  
16          certainly not advancing in their career as a government  
17          employee if they're not employed by the government at the  
18          time.

19          MR. LODOVICE: Well, I would also state - - - and  
20          I think two further points on this in terms of being a term  
21          and condition for the employment.

22          The other is I think you should look in terms of  
23          the statutes of the cases that underline the question if  
24          this is a mandatory subject of bargaining. Refer to the  
25          207-C cases, the Board of Education case. In each and



1 every one of the statutes that's presented to the court,  
2 the language used by the legislature refers to an employee  
3 for the case of 207-C and, you know, the derivative 207-A,  
4 those cases refer to like a police officer, a deputy  
5 sheriff, an undersheriff, and speak to which the employer  
6 can handle.

7 There's the Board of Education for the city of  
8 New York; the statute in that class spoke specifically of  
9 the city board, what it could do in terms of financial  
10 disclosure as it relates to an officer, employee of the  
11 city school district.

12 JUDGE RIVERA: Is it possible to look at this as  
13 a bifurcated inquiry, the first step being, is the fee a  
14 term - - - excuse me. Is the exam, and a particular score  
15 on the exam, taking the exam, a term and condition of  
16 employment and yet find that the fee, and setting the fee,  
17 paying the fee, is not necessarily a term and condition of  
18 employment? Is it possible to look at it that way?

19 MR. LODOVICE: Yes. I actually - - - I think  
20 there's more layers to that. I think the first inquiry the  
21 court must make is to answer the question of whether the  
22 Department of Civil Service, through its authority under  
23 Civil Service Law section 6, section 7, and then through  
24 section 50 - - - it's acting as an employer. We presented  
25 it is not. It is acting in its individual authority



1 derivative of a responsibility under the United States - -  
2 - or the New York Constitution - - -

3 JUDGE WILSON: Let's suppose that's right for a  
4 second. Doesn't that just kind of push the bargaining  
5 question down to who is the employer? Right?

6 MR. LODOVICE: Yes.

7 JUDGE WILSON: So essentially, instead of saying,  
8 You can bargain for this to be waived; you can bargain for  
9 your employer to reimburse you for it?

10 MR. LODOVICE: So yes. No, well, I think that -  
11 - - yes. The reimbursement I think is actually the correct  
12 answer in the long term.

13 JUDGE WILSON: Because the Civil Service  
14 Department can say it's a \$100 fee, and that's what it is  
15 and nobody can challenge that, but what you can, perhaps,  
16 can do - - - or the question is it mandatory or permissive,  
17 so on, is with your particular bargaining unit, can you ask  
18 - - - negotiate for a reimbursement of that fee?

19 MR. LODOVICE: Yes. If we reached the point that  
20 it's an employer, it's a term and condition of employment,  
21 and then what's the question of whether the statute exempts  
22 it, then we'd get down to that part - - - and this goes to  
23 the case that both CSEA and NYSCOPBA talk about to  
24 establish the idea that this is an economic benefit.

25 And one of the provisions they put out there is



1 tuition reimbursement. And tuition is something that the  
2 state university system or other education system would  
3 set, and then there's a negotiated reimbursement for  
4 employees who choose to further education, whether to  
5 advance their job or for other reasons, and we have a  
6 negotiated reimbursement.

7 But what is not negotiable is the ability of the  
8 State University of New York, who, for this purpose, would  
9 stand in the same status as the Department of Civil Service  
10 of setting tuition, which will affect the public employees,  
11 whether they be SUNY employees or OER employees or PERB or  
12 correction officers who choose to do that. But the  
13 negotiability is not tuition. SUNY is privileged to - - -  
14 to set the tuition, but once that is set and an employee is  
15 impacted by that, they can negotiate it.

16 So here what we believe, and I think our brief  
17 touched, is that the appropriate outcome is Civil Service  
18 can act in its status as, you know, the administrator of  
19 the merit and fitness system pursuant to the statute that  
20 is a very specific statutory directive of rights and  
21 obligations, and then once it's set, whether it be \$15,  
22 \$100, each of the respective public employee unions within  
23 the state of New York can approach OER and say, We would  
24 like to negotiate to offset the impact of that; we want to  
25 create a pool of money so we can reimburse those employees.





1 That's perfectly appropriate. That's what the tuition  
2 reimbursement is.

3 JUDGE WILSON: Is that permissive or mandatory,  
4 that bargaining?

5 MR. LODOVICE: I would - - - I would proffer that  
6 that's a mandatory subject to negotiation. I don't want to  
7 commit to what Mr. Fois would say, but I believe that  
8 that's an - - - that would be where the economic benefit  
9 is.

10 Similar for the other public employers that are  
11 covered by the general information bulletin, the Thruway  
12 Authority, the Canal Corporation, the Bridge Authority,  
13 they can also approach their public employer and make the  
14 same demands saying, Department of Civil Service, through  
15 its statutory authority, just increased the open  
16 competitive exam fee and the promotion exams and we've been  
17 paying it; so we would like to negotiate a fund to offset  
18 the impact had on our purse.

19 We believe that's perfectly appropriate, but that  
20 does not say or mean that the Department of Civil Service,  
21 when it's acting in its statutory role, derivative of the  
22 United - - - or the U.S. - - - the New York Constitution,  
23 article 5, section 6 - - - that - - - to administer the  
24 merit and fitness system, that that is negotiable, or that  
25 Civil Service is acting as employer, or that the fee is a



1 term and condition of employment.

2 ACTING CHIEF JUDGE CANNATARO: Isn't this the  
3 issue, that PERB said they weren't going to consider  
4 because it hadn't been made in front of the ALJ - - -

5 MR. LODOVICE: Yes.

6 ACTING CHIEF JUDGE CANNATARO: - - - whether it's  
7 the right?

8 MR. LODOVICE: In terms of the employer - - -

9 ACTING CHIEF JUDGE CANNATARO: Employer, yeah.

10 MR. LODOVICE: - - -but they - - - they have  
11 considered the - - - whether it's a term and condition of  
12 employment. And they've said, Just because it's money,  
13 it's an economic benefit. And in that case, I would also  
14 probably shift it more closer to the court.

15 The Office of Core Administration, as we all know  
16 as attorneys, there's a biannual fee. That figure is set  
17 in the statutes, so I think even PERB would say is  
18 nonmandatory, the 375. But recently, the court system  
19 applied and passed through an administrative fee. I think  
20 it's to - - - whatever the credit card cost is. There's  
21 like a 3 percent fee applied to the 375.

22 Under PERB's view, that - - - the attorneys  
23 within the Office of Court Administration, who are public  
24 employees and are representatives, they have enjoyed for  
25 years not having to pay that fee. Now that has been set,



1 it impacts them because it's money; they've had an economic  
2 benefit. So it makes any fee set by the employer paid by  
3 the public employee arguably an economic benefit that's a  
4 term and condition of employment.

5 JUDGE RIVERA: I'm sorry. Is your point that not  
6 every economic benefit is a term and condition of  
7 employment?

8 MR. LODOVICE: It has to be tied to the  
9 employment situation, and this is not. It's tied to a  
10 candidate for potential employment.

11 And with this, I think it's important to  
12 highlight that - - - I think it's somewhat of a shifting  
13 argument if we move through with PERB the question of  
14 whether PERB is saying that - - -

15 JUDGE RIVERA: But you can't hold a job without  
16 having taken the exam and scoring wherever you need to  
17 score. Isn't that correct?

18 MR. LODOVICE: That's true for the open  
19 competitive examinations also.

20 And the reason I'm making that point is that PERB  
21 is asserting, I think - - - as I understand it, the only  
22 reason Civil Service's fee in this case is negotiable is  
23 because Civil Service is within the pyramid of the  
24 executive, one of the sixty or so appointing agencies that  
25 are under the state of New York. And because Civil Service



1 is doing it as it relates to employees in that group, it's  
2 negotiable.

3 But it necessarily means, if you take that  
4 argument to its logical conclusion, that it is not a term  
5 and condition of employment as it relates to public  
6 employers, other than the state of New York, to which the  
7 Department of Civil Service is assessing the fee.

8 So for the Thruway authority, there can be no  
9 argument that Civil Service is acting as public employer,  
10 these are the Thruway authority, the Canal Corporation; or  
11 other municipalities to which it may administer fees and,  
12 you know, assess these fees.

13 So PERB has made it so like - - - we have a  
14 multi-lane highway to which fifty - - - section 50 covers  
15 the administration of exams, open competitive exams,  
16 promotion exams, and PERB is effectively saying that Civil  
17 Service stands as the public employer only to a subset of  
18 promotional exams, which is a small group of that, and then  
19 there's this whole other lane that the statute covers for  
20 open competitive.

21 And respectfully, we believe that when the court  
22 makes its de novo review, independently assessing the  
23 statutory balance that we have here, it must look at Civil  
24 Service 50 - - - Civil Service Law 50, as a complete  
25 statute, not simply under the prism of the small subset - -



1 - although maybe - - - numerically large because the  
2 State's a large employer - - - the small subset of state  
3 employees.

4 JUDGE RIVERA: How does our limited review affect  
5 this analysis if at all, if at all?

6 MR. LODOVICE: I believe that you should weigh  
7 the - - - you know, it's an independent de novo review.  
8 PERB has no deference in this case, and I think that they  
9 have no deference on several legal issues, first, whether  
10 Department of Civil Service, pursuant to the constitutional  
11 mandate, pursuant to the authority vested in the Civil  
12 Service Commission through Civil Service Law 6, Civil  
13 Service Law 7, and then 50 - - - whether it's acting as  
14 employer. I think there's no deference to PERB.

15 The second question is whether or not this is a  
16 term and condition of employment because there's a fee  
17 applied to - - - there should be no deference to PERB. It  
18 is de novo review.

19 And then the third statutory part, which I don't  
20 think we've touched upon, is whether or not if it - - - if  
21 Civil Service is acting as an employer, whether this is a  
22 term and condition of employment, whether it is exempt from  
23 bargaining pursuant to the plain and clear language of  
24 section 50.

25 JUDGE WILSON: I'm sorry. There's a little



1 nuance I want to make sure I got right, which is you're  
2 saying it's not a term and condition of employment if  
3 you're thinking about the fee that is set by the Department  
4 of Civil Service, but it is a term and condition of  
5 employment if you're thinking about bargaining within your  
6 unit to get a reimbursement?

7 MR. LODOVICE: To get a reimbursement. And we  
8 wouldn't dispute the reimbursement.

9 JUDGE WILSON: Right. It could be the exact same  
10 money, right?

11 MR. LODOVICE: Could be the - - -

12 JUDGE WILSON: And it goes to exact same purpose,  
13 paying for the promotional exam, but it has a different  
14 legal structure?

15 MR. LODOVICE: The difference is - - - and it may  
16 be like the cart and the horse issue. The difference is  
17 Civil Service can set the fee because the statute says they  
18 can set the fee.

19 JUDGE WILSON: You're saying that's not  
20 bargainable - - -

21 MR. LODOVICE: That is not bargainable. Once - -  
22 -

23 JUDGE WILSON: - - - but the reimbursement of  
24 that fee, even if it's a complete reimbursement, is  
25 mandatorily bargainable?



1 MR. LODOVICE: Which goes back to the example of  
2 tuition reimbursement, or - - -

3 JUDGE WILSON: Okay.

4 JUDGE RIVERA: Let me - - - I - - - now I'm  
5 confused. Does that mean they could negotiate not to pay  
6 the fee - - -

7 MR. LODOVICE: No.

8 JUDGE RIVERA: - - - and no one ever pays the  
9 fee?

10 MR. LODOVICE: No.

11 JUDGE RIVERA: I didn't think so. Okay.

12 MR. LODOVICE: No, because Civil Service still  
13 has the right to - - - well, they have the right to do  
14 three things. They can abolish the fee, they can waive the  
15 fee, or they can set a uniform fee and then set forth the  
16 class of the candidates and types of exams. So Civil  
17 Service can do that.

18 But once they do that, it is okay and - - - for  
19 the CSEA, NYSCOPBA, to approach the State of New York to  
20 say, Our members now have to pay \$15 every time they apply  
21 for an exam; we would like to have a, you know - - - a fund  
22 of money that we administer or that pays - - - or that we -  
23 - -

24 JUDGE RIVERA: Where is the money coming from?

25 MR. LODOVICE: It comes out of labor management



1 funding. We have lots of - - - like, it can come out of  
2 the tuition reimbursement funding. But that's something  
3 that would be negotiated.

4 Similar for the groups of employees that we have  
5 in this group, the Teamster union that's in the Thruway  
6 authority could go to the Thruway authority and say, Civil  
7 Service just assessed this against our folks; we would like  
8 to create a fund for this.

9 JUDGE SINGAS: Suppose we found that the fees  
10 were a permissive subject of bargaining. Does that make  
11 the terms and condition argument academic?

12 MR. LODOVICE: Well, I think that you still need  
13 to determine that the Civil Service is acting as employer  
14 and the application fee is a term and condition of  
15 employment, and then the third layer is whether or not it's  
16 exempt under the water-down test and think that.

17 And I see the white line - - - the white - - - I  
18 just want to - - -

19 ACTING CHIEF JUDGE CANNATARO: Can you just  
20 quickly explain why it is you think it would be exempt?  
21 Because this statute looks very permissive to me.

22 MR. LODOVICE: I would disagree that it's  
23 permissive. And I think that - - - going back to decisions  
24 in the City of Long Beach and then a little further back to  
25 the City of Schenectady case, you talk about when there's a





1 specific statutory directive, that that evidences the  
2 legislative intent to - - -

3 ACTING CHIEF JUDGE CANNATARO: The directive is  
4 you can abolish, you can waive, you can do a lot of things.  
5 You have a lot of options available.

6 MR. LODOVICE: Well, I think that you have to  
7 look into - - - first, Civil Service Law 6 and 7 both  
8 provide that the Civil Service Commission and the president  
9 of the commission can prescribe rules for the  
10 administration of exams.

11 Then there's section 50, and it's very clear - -  
12 - and this is where I think it's a specific statutory  
13 directive.

14 First - - - and this only assuming Civil Service  
15 is the employer for this - - - that the legislature was  
16 very specific on who makes the decision as it relates to  
17 the fee. It's Civil Service with approval of DOB. And our  
18 record shows that there was period of time - - - annual  
19 review for both Civil Service and Department of Budget  
20 applied objective and reasonable criteria to make that  
21 determination consistent with the statutory mandate.

22 The second specific statutory directive to this  
23 is that the legislature limited what Civil Service is  
24 permitted to do. First, it can waive the fee, it can  
25 abolish the fee, and then it can - - - or it can establish



1 a uniform schedule of fees. And then schedule of fees  
2 legislature tells Civil Service that they must be specific  
3 in their notice what is the class of positions for that  
4 uniform fee, what is the type of examinations for the fee,  
5 and what is the type of candidate. And there's only one  
6 exception to that specific directive granted to Civil  
7 Service approving is for employees that are - - - or  
8 individuals that are unemployed and the head of household.  
9 So there's even a built-in exception of what they can do.

10 So the statute's very clear in what Civil Service  
11 is allowed to do in the context of defeat. And this is all  
12 within the statute that directs Civil Service how to  
13 conduct competitive examinations, which is both open-  
14 competitive and promotional.

15 And finally, OER is excluded. And this is unlike  
16 other provisions of the Civil Service Law where - - - like  
17 Civil Service 75, 76 direct that negotiation applies to  
18 these things that's in the employment context.

19 And there's other statutes within the Civil  
20 Service Law - - - I think it's 159(a), 159, 161 - - - talk  
21 about Civil Service, division of budget, and the directive  
22 of OER working together.

23 So the legislature knows how to include OER in  
24 the context of discussions with Civil Service and division  
25 and budget, and they excluded OER. So if we're talking



1 about Civil Service as employer, within the state of New  
2 York as the public employer, the legislature had been very  
3 specific that OER, as the agent of the governor in  
4 collective bargaining, is excluded.

5 ACTING CHIEF JUDGE CANNATARO: Thank you,  
6 Counsel.

7 We can get the rest of this on rebuttal.

8 MR. LODOVICE: Thank you.

9 MR. FOIS: Thank you, Your Honor.

10 Michael Fois for the New York State Public  
11 Employment Relations Board.

12 Everything you heard from OER today turns upon  
13 this distinction they believe is relevant - - - employer,  
14 not employer; who is this, who is that - - - interesting  
15 arguments they did not bother to raise before PERB. The  
16 reimbursement argument, not raised before PERB. Most of  
17 the sub ways he rephrased the same argument, not raised  
18 before PERB.

19 UNIDENTIFIED SPEAKER: I think they were  
20 questions. So are you convinced now that they've been  
21 raised before you?

22 MR. FOIS: Well, yeah. But I do think the  
23 general procedure where a court in review of administrative  
24 determination does not reach behind - - - beyond the  
25 material presented to the administrative law judge, who is



1           then reviewed by the board.

2                       JUDGE GARCIA: But I think they were examples of  
3 why this is not, right? That's what the questioning, I  
4 think, was getting out, not these are specific legal  
5 arguments that needed to be raised so that you can consider  
6 them. I think they were examples of what would a term and  
7 condition, what wouldn't, what could be bargained in  
8 comparison to what this would or would not be.

9                       So what would your definition of term and  
10 condition be?

11                      MR. FOIS: Term and condition of employment is  
12 something - - - and there's many different at areas in  
13 which they arise; they arise directly from contract. In  
14 this context, we are looking at a term and condition of  
15 employment that arose through a past practice.

16                      A term and condition of employment is as self-  
17 explanatory in the sense that it impacts the employee's  
18 employment and is something he has a reason to expect will  
19 continue.

20                      JUDGE RIVERA: Where have we held that a past  
21 practice of something that's not a term and condition of  
22 employment morphs into a term and condition of employment,  
23 as opposed to a past practice regarding something that is a  
24 term and condition of employment?

25                      MR. FOIS: Okay. I think I - - -



1 JUDGE RIVERA: In my case, can you - - - I may  
2 have missed it.

3 MR. FOIS: Let me see if I understand where Your  
4 Honor is coming from. I'm not aware of a court case that  
5 says that something that was not otherwise - - - could not  
6 otherwise qualify as a term and condition of employment  
7 becomes one because of past practice.

8 I understood Your Honor's question as saying is  
9 starting at 8 p.m. a term and condition of employment? Is  
10 driving a car a term and condition of employment? Anything  
11 - - - almost anything, unless it's filed from another  
12 statute, can become a term and condition of employment.

13 JUDGE GARCIA: Let's assume, but take Judge  
14 Rivera's question as I understand it - - - we all agree it  
15 isn't a term and condition of employment, but they've been  
16 doing it. Does that make it then a benefit that they have  
17 to bargain over?

18 MR. FOIS: No, no. And the reason why this is a  
19 term and condition of employment is based on a significant  
20 amount of not just PERB precedent, but this court's  
21 precedent, that where the employer operates in a manner to  
22 create an economic benefit, that economic benefit is a term  
23 and condition of employment.

24 ACTING CHIEF JUDGE CANNATARO: So because this  
25 was an item of financial relief or financial benefit to



1 these employees, it therefore translates to a term and  
2 condition?

3 MR. FOIS: Exactly. Term and - - - there are  
4 term and conditions which are not directly related to  
5 money.

6 ACTING CHIEF JUDGE CANNATARO: What about the  
7 fact that there are a lot of other people out there, in the  
8 broadest view of this scheme, that don't - - - that for  
9 whom - - - there is no waiver of the fee, so it's not an  
10 economic benefit of any kind?

11 MR. FOIS: Then it's not an economic benefit for  
12 them.

13 JUDGE RIVERA: So every economic benefit is a  
14 term and condition of employment?

15 MR. FOIS: It may be a term and condition of  
16 employment. If the economic benefit stems in the first  
17 interest on the contract, it is a term and condition of  
18 employment from the moment the contract is signed.

19 If there is a practice or - - - by an employer  
20 which says, You can have a car - - - it's not in your  
21 contract. When you were hired, you didn't have a car, but  
22 now I'm giving you a company car. And for ten years I let  
23 you drive that car, and at no point do I tell you I'm  
24 thinking taking back the car, or at no point I say, You can  
25 only keep the car if you won't use it for this or that.



1 Then there's a question of whether, because of that past  
2 practice, the economic benefit of having the car is a term  
3 and condition of employment. That - - -

4 JUDGE GARCIA: But who made the decision to give  
5 you a car in your hypothetical? Who made that decision?

6 MR. FOIS: The employer.

7 JUDGE GARCIA: Who's the employer in your  
8 hypothetical?

9 MR. FOIS: I didn't specify, but I think the  
10 question I'm sure Your Honor's getting at is in a  
11 multileveled scenario - - -

12 JUDGE GARCIA: Right.

13 MR. FOIS: - - - where you have department X,  
14 department Y, what have you, who is the employer? They all  
15 create - - -

16 JUDGE GARCIA: I'm assuming you have a contract  
17 there.

18 MR. FOIS: Anyone in the chain of command, if you  
19 will, the pyramid structure of your employment hierarchy,  
20 can create a term and condition of employment by giving you  
21 an economic benefit.

22 If the governor says, For all state employees,  
23 you now get free lunch, and for ten years governor after  
24 governor gives you a free lunch, I don't know what the  
25 answer's going to be before PERB. But it's a legitimate



1 question to be phrased to PERB - - -

2 JUDGE RIVERA: So then - - - so then if - - -  
3 let's go with what you've said there. If we were to agree  
4 with that, does that mean that if an employer then changes  
5 their mind, or has tried to change their mind and was  
6 unsuccessful - - - I think that's part of the argument  
7 that's somehow on the record. They had tried to get DOB's  
8 permission for the fees, couldn't get it, finally did, et  
9 cetera, et cetera.

10 Anyway, does that mean that the employer now  
11 forever moving forward must negotiate, or only for those  
12 who are currently employed?

13 MR. FOIS: Well, first, it would definitely be  
14 limited to those who are currently employed. However, I  
15 can't answer past that because you need far more  
16 information.

17 The question, if it's not in a contract, is would  
18 a reasonable employee believe it would continue?

19 In one case briefed before you was the Spence  
20 case; it involved cars. In that case, the employees  
21 testified that they were aware that every year the employer  
22 decided whether or not you can have a car. So it's found  
23 not to be a term and condition of employment.

24 In Town of Islip, it was the reverse.

25 JUDGE RIVERA: Yeah, but in Town of Islip, unless





1 I've misunderstood that case, and you can correct me, the  
2 court started out by saying PERB has always considered it a  
3 term and condition of employment and didn't do - - - the  
4 court didn't do a separate analysis to figure out if it was  
5 a term and condition of employment.

6 This strikes me as different. This is actually  
7 on the table. Is this a term and condition of employment?  
8 And as I understand this argument, it's for the court to  
9 decide in the first place.

10 MR. FOIS: I think if you go through the - - -  
11 not the progeny, the genesis. Go through the case law.

12 JUDGE RIVERA: Okay.

13 MR. FOIS: Yes, it was obviously PERB that first  
14 said it was a term and condition of employment. But I am  
15 reasonably certain that it was argued, at least at the  
16 lower levels, that PERB got it wrong.

17 In other words, there were multiple arguments in  
18 Town of Islip. One was that PERB was wrong, and two, that  
19 the remedy was too extreme based on the courts involved.  
20 They lost on one; they won in the other.

21 And so I don't think you get the Court of Appeals  
22 opinion in Town of Islip as structured if not debated  
23 through, and I believe it was addressed by the appellate  
24 division, but I'm honestly - - - you caught me by surprise.  
25 I didn't - - -



1 JUDGE RIVERA: Do we have to defer to your  
2 determination that it's a - - -

3 MR. FOIS: On term and condition of employment?

4 JUDGE RIVERA: - - - term and condition of  
5 employment? Right, his argument is all of this is de novo?

6 MR. FOIS: No. As for as deference on the  
7 questions that arise under the Taylor Law, mandatory  
8 bargainable, term and condition of employment, past  
9 practice, deference. Questioning of statutory  
10 interpretation, whether or not either explicitly or by  
11 clean and plain language, inescapably, implicitly - - - the  
12 statute forecloses.

13 Normally this court does de novo; however, there  
14 have been times the court has granted PERB some deference  
15 on that question based on PERB's expertise. And since - -  
16 -

17 ACTING CHIEF JUDGE CANNATARO: Can we talk about  
18 that for a second?

19 MR. FOIS: Yeah.

20 ACTING CHIEF JUDGE CANNATARO: 50(5), is that  
21 exempt? Because we were hearing about how it is exempt  
22 from - - -

23 MR. FOIS: Is what exempt? I missed the first  
24 part of your question.

25 ACTING CHIEF JUDGE CANNATARO: 50 sub-5, whether



1 that creates an obligation that's exempt from bargaining.  
2 Can we address that question?

3 MR. FOIS: Okay. Yes.

4 I do not believe it does. I do not believe it  
5 does, and I believe PERB is correct. I believe that - - -  
6 as far as a standard review on that question, that's the  
7 Court of Appeals' choice; you could go de novo on that.  
8 I'd rather you grant deference, but I can't insist upon it.

9 But no, it's not exempt.

10 ACTING CHIEF JUDGE CANNATARO: Why is that?

11 MR. FOIS: Because the language of the statute  
12 itself on its face makes it clear that the legislature set  
13 up a wide range of things DSC could do, none of which it  
14 can do explicitly by itself - - - it then needs to go to  
15 DOB - - - and specific things that it can't do, such as  
16 charging fees to veterans, unemployed, people on public  
17 assistance.

18 You compare that to what you had in Long Beach,  
19 where it was explicit an employer can terminate you after  
20 one year, and yet things related to that explicit grant of  
21 authority were found to still be bargainable.

22 In this case, there is no requirement by the  
23 legislature for a uniform system. In fact, the statute  
24 mandates that there will never be a uniform system because  
25 certain people will always be exempt.



1 JUDGE SINGAS: Yeah. But otherwise they are  
2 asking for uniformity?

3 MR. FOIS: Oh, yeah. No, there's no doubt the  
4 legislature has indicated to Department of Civil Service  
5 that when we have you to operate, there are certain ways we  
6 want you to consider to choose between.

7 JUDGE SINGAS: So what would - - - what would the  
8 practical effects be if we affirm? What would that look  
9 like? It would be fees of varying - - - they could vary by  
10 hundreds of dollars, and there could be thousands of  
11 different applications?

12 MR. FOIS: No.

13 JUDGE SINGAS: What does it look like  
14 practically?

15 MR. FOIS: PERB's decision does not go past three  
16 - - - bargaining units representing by three unions of  
17 current state employees. That's it. It doesn't - - -

18 JUDGE SINGAS: That's it for now, but as soon as  
19 a decision comes, that will be expanded, or could  
20 potentially be - - -

21 MR. FOIS: Only if - - -

22 JUDGE SINGAS: - - - to other units.

23 MR. FOIS: Well, only if some other group of  
24 employees said that they had a reasonable expectation.

25 PEF, another union, tried to get in on this.



1 They were too late. And they're not. And if you rule in  
2 our favor, PEF cannot say, Well, now I can go for it.

3 ACTING CHIEF JUDGE CANNATARO: So it's only this  
4 group of - - -

5 MR. FOIS: Only this group. It has no other legs  
6 to it.

7 JUDGE RIVERA: And again, I'm sorry; it is  
8 repetitive of me. So bear with me.

9 It only applies to those who are current  
10 employees?

11 MR. FOIS: Absolutely. This is what was - - - it  
12 is - - - the decision is limited to the IP that was filed  
13 before PERB. Not only that - - -

14 JUDGE RIVERA: Maybe decades before.

15 MR. FOIS: Yeah, yeah.

16 JUDGE RIVERA: They're gone, but nevertheless - -  
17 -

18 MR. FOIS: Yeah.

19 JUDGE RIVERA: - - - it won't go beyond this  
20 group?

21 MR. FOIS: It isn't, because this case is based  
22 on the concept of past practice. And nonemployees do not  
23 have an expectation that can raise to a past practice.

24 A past practice analysis defined a term and  
25 condition exists only regarding current employees. There's



1 no way to - - - so not only doesn't this decision speak to  
2 it, the analysis of this decision would not apply.

3 And in fact, PERB has faced this question before,  
4 and regarding noncurrent employees, open-competitive exam  
5 said, There's nothing under the Taylor Law prohibiting the  
6 fees.

7 So that question was raised before this one, but  
8 this one is very narrow.

9 JUDGE RIVERA: Why isn't he right, that what is  
10 negotiable is simply the reimbursement?

11 MR. FOIS: Well, first off, they're not mutually  
12 exclusive concepts. The fact that a reimbursement could be  
13 a term and condition of - - - could be negotiable. It  
14 could be a term and condition of employment if it's been  
15 done in the past. It could be something that the parties  
16 can put in contract negotiations seeking the future.

17 That does not impact at all whether, for  
18 undisputed for ten years - - - and to be clear, they  
19 omitted - - - stipulated to ten years in this record. No  
20 one was ever charged this fee.

21 So since 1958, employees have come in, worked for  
22 the State of New York, and if you were a current employee  
23 looking for a promotion, they didn't pay a fee. That is a  
24 key factor - - -

25 JUDGE RIVERA: Can I just clarify something for



1 the record? How often were they trying - - - let's stay  
2 with the ten years - - - were they trying, requesting from  
3 DOB to be able to - - -

4 MR. FOIS: There is testimony - - -

5 JUDGE RIVERA: How long was that?

6 MR. FOIS: There is testimony, not including the  
7 one that led to the IP, of four instances. That's what  
8 they put in the record, from 1958 to the present. Now, in  
9 defense of them, they were focusing on 1999 and onwards.  
10 So they might've been able to find somebody from 1999.

11 On two occasions, there was - - - DSC decided we  
12 would like to do it, talk to Department of Budget.  
13 Department of Budget said no.

14 On the other occasion, internally there was some  
15 discussion in front of DECS about doing it, and they  
16 decided not even to ask Department of Budget.

17 What's important, however, is these were  
18 nonpublic. No employee's reasonable expectation could've  
19 been impacted by these considerations, unlike in the other  
20 cases, such as Spence where the employees were aware that  
21 the employer was considering changing the practice, trying  
22 to preserve its discretion, and what have you.

23 Internal operations of the State - - - I'm not  
24 saying they were improper. All I'm saying is that they  
25 don't impact the reasonable expectation of an employee if



1 the employee has no way to know about it.

2 ACTING CHIEF JUDGE CANNATARO: So you're saying  
3 if they had somehow externalized this dialogue about  
4 whether or not to start charging the fee, that would have  
5 defeated the argument that was made previously about the  
6 expectation of this financial benefit?

7 MR. FOIS: It would've been a very serious factor  
8 PERB had to consider. We would have to look at the entire  
9 record, how well known it was, and what have you. But  
10 absolutely, we would have had to consider whether employees  
11 were aware or made aware that a benefit they had might be  
12 changing. We would've had to take that into consideration.

13 That was not in the record before PERB. In the  
14 record before PERB, what they argued is internally we  
15 always thought we could change this. Look, in the last  
16 decade, on three occasions we tried before we succeeded.  
17 That's what they put before PERB. They never even claimed  
18 before PERB that anyone outside of the conference room at  
19 DCS or DOB was aware of this.

20 ACTING CHIEF JUDGE CANNATARO: Thank you,  
21 Counsel.

22 MR. FOIS: Thank you very much.

23 MR. HICKEY: Good afternoon. Kevin Hickey on  
24 behalf of NYSCOPBA.

25 There's a lot of moving parts here, and so I'm





1 coming in in relief on a few of these topics.

2 I want to first touch on the issue of - - - I  
3 think the State said that a term and condition of  
4 employment by their definition is one that is based on  
5 their status as an employee. I think that's quite telling  
6 here in the sense that you take a promotional exam when you  
7 are an employee. So I think we check that box of the  
8 definition.

9 And the second box of the definition was whether  
10 or not it's based on something akin to an economic benefit,  
11 a salary, wage, leave, overtime.

12 What happened here is the reason why we're all  
13 here is for years they waived this fee for employees. No  
14 employee had to be charged a fee - - -

15 JUDGE WILSON: It's promotional and transfer,  
16 right?

17 MR. HICKEY: True. But I think when we're  
18 talking about - - -

19 JUDGE WILSON: So the transfer could be to an  
20 open-competitive position.

21 MR. HICKEY: That's true.

22 JUDGE WILSON: So does that affect what you said  
23 just previously?

24 MR. HICKEY: Well, a transfer would be a current  
25 employee as well.



1 JUDGE WILSON: Yeah. But the person - - -  
2 somebody - - - I could apply for the job - - - well, I am  
3 an employee. Sorry.

4 One of my daughters could apply.

5 MR. HICKEY: Well, yeah. I think it does - - -  
6 but I think - - - for purposes of what the decision was  
7 here is the lion's share of the people were people that  
8 were taking a promotional examination and the people that  
9 are involved in here as well and the litigants in this  
10 case.

11 What they were were employees, so I think - - -

12 JUDGE GARCIA: I'm sorry, Counsel. Just to be  
13 clear, and I just don't know the answer to this.

14 MR. HICKEY: Sure.

15 JUDGE GARCIA: A promotional exam is only open  
16 internally?

17 So I want this level of supervisor, you can only  
18 apply within that unit, or can you also have outside  
19 candidates, let's say, from other state agencies or maybe  
20 within different bargaining units?

21 MR. HICKEY: I'm not as well versed, and maybe  
22 one of my colleagues here can explain as to whether or not  
23 people can go from outside. My understanding is they might  
24 be able to, but I - - - but I do not know the answer. Mr.  
25 Klein, when he gets up, you can maybe peck that - - - pick



1 that question up.

2 JUDGE GARCIA: Would that affect your analysis if  
3 you can have outside candidates come in and apply for  
4 what's also a promotional exam from within position?

5 MR. HICKEY: When you say outside candidates, you  
6 mean people that are not - - -

7 JUDGE GARCIA: Different state agencies not  
8 within the bargaining unit.

9 MR. HICKEY: Other state agencies? My - - - my  
10 position here is that the State of New York is the  
11 employer, and so employees that had not prior had to pay a  
12 fee for years for promotional examinations, those employees  
13 would not have to pay.

14 JUDGE GARCIA: But the PERB, I think, lawyer just  
15 told us that that's - - - only applies to these specific  
16 units who are present in this kind of action.

17 MR. HICKEY: Yeah, the decision in this case is  
18 limited to these employees.

19 And so for this case, our employees, the security  
20 unit, and CSEA's employees would be the only ones that  
21 benefit from - - - from this ruling.

22 I see that I have minute left, and there's other  
23 topics.

24 We have not even touched on the question of the  
25 broad and sweeping rights that the Taylor Law has given.



1 And I would argue that the Taylor Law, when it came about,  
2 because it came less than years after this Civil Service  
3 Law, it made a considerable change to the Taylor Law.

4 The change is such the word "broad" and - - - or  
5 the "strong and sweeping" is what the standard has been  
6 applied by this court over and over again, "strong" meaning  
7 it's a powerful public policy, "sweeping" meaning it dips  
8 into areas that it probably didn't, prior.

9 At this section - - - section 50 is contained in  
10 the same Civil Service Law as the Taylor Law. The Taylor  
11 Law now brings into section 50 for this limited area where  
12 it's talking about what happens to terms and conditions of  
13 employees. I would argue that the Taylor Law has now made  
14 it a mandatory subject to bargaining.

15 JUDGE GARCIA: Did the waiver follow your  
16 employees to other jobs outside of this - - - where you are  
17 now? So if you're doing a transfer, would then you be  
18 entitled to the waiver even though if it's a different  
19 bargaining unit that has the position open?

20 MR. HICKEY: I would argue that yes, if their - -  
21 - their status as an employee, if they continue to be a  
22 employee of the State of New York, then yes.

23 ACTING CHIEF JUDGE CANNATARO: To get back to the  
24 statement you made before that question, why is it a  
25 mandatory subject to bargaining? Why could it not be a



1 permissive subject to bargaining given the amount of  
2 discretion that seems to me to be contained in the statute?

3 MR. HICKEY: Well, I would argue that the way the  
4 - - - the case law that's followed is, is that the only  
5 time it becomes a permissive area of bargaining is when the  
6 legislature has committed the entire topic.

7 And I would argue here that the entire topic is -  
8 - - at first is a charge a fee to open competitive, then  
9 they can waive that fee or abolish it or find some other  
10 way of going - - - that area right there then is where it  
11 becomes mandatory. And that small area is now - - - it's  
12 not permissive because permissive would say - - -

13 ACTING CHIEF JUDGE CANNATARO: What small area  
14 are you talking about?

15 MR. HICKEY: Yeah, let me retry. Rewind and  
16 retry.

17 So what I mean is, is that on that limited area  
18 of whether or not to waive, abolish, et cetera - - -

19 ACTING CHIEF JUDGE CANNATARO: Yeah.

20 MR. HICKEY: - - - the way the case law has  
21 always been is, is that it's permissive if you can commit  
22 the entire process. There is no process here. It's just -  
23 - - it's very open-ended; it's very discretionary.

24 And so in that area is the room to bargain, and  
25 there's a lot of case law that we - - - that's out there



1 that says if there's room to bargain can be read into the  
2 statute, then it should be read into the statute because  
3 it's a broad and sweeping policy - - - or strong and  
4 sweeping policy of the State of New York.

5 So I would argue that in that narrow area when  
6 the State of New York chooses - - -

7 JUDGE RIVERA: If I'm getting you right, because  
8 the statute allows them not to impose the fee, that's why  
9 you can bargain it?

10 MR. HICKEY: Yes, because it gives them - - -

11 JUDGE RIVERA: To persuade them not to get  
12 something else from that.

13 MR. HICKEY: Persuade them not - - - because that  
14 area is wishy-washy. It says you may choose to not charge  
15 a fee. Well, where - - - what better way to find out  
16 whether or not you should charge a fee is to negotiate with  
17 your employees to determine whether or not you should  
18 charge a fee.

19 So that's where I think the room to negotiate  
20 should be read into it from this long precedent - - -

21 JUDGE RIVERA: Do you agree what's not negotiable  
22 is that an exam would be a requirement for a job position?

23 MR. HICKEY: An exam is not negotiable.

24 JUDGE RIVERA: That's what I mean.

25 MR. HICKEY: It's part of the merit and fitness



1 system. I would argue - - -

2 JUDGE RIVERA: So it's whether to impose a fee  
3 and the amount is the negotiable party?

4 MR. HICKEY: Correct.

5 JUDGE RIVERA: Why isn't it correct that it's the  
6 reimbursement that's negotiable, not the setting on the  
7 fee?

8 MR. HICKEY: Well, because I think that's get  
9 back to Your Honor's good question with regard to the  
10 permissive aspect. I think the only time where the court  
11 has found that it's permissive is when they commit the  
12 entire process to a government official.

13 I would argue that this entire process has not  
14 been. It's just very generic. It's open to waiver. It's  
15 open to abolishing. It's open to fifty years, as this  
16 record has shown, of not charging a fee to certain classes  
17 of people and certain types. And then frankly there's even  
18 parts in there that talk about refunding fees in section  
19 50(a) - - - so 50(5)(a). I missed a 5 in there.

20 So - - -

21 ACTING CHIEF JUDGE CANNATARO: All right. Thank  
22 you, Counsel.

23 MR. HICKEY: Thank you.

24 MR. KLEIN: Good afternoon. May it please the  
25 court. Steve Klein for CSEA.



1 I think we got to get our terms straight here and  
2 figure out what we're talking about with employees.

3 Promotional exams are internal only. They don't  
4 apply to nonemployees. If I'm not a state employee in one  
5 of the CSEA units, I can't take a promotional exam for that  
6 position going up. So that's got to be made clear.

7 This is a term and condition of employment  
8 because it only applies to current employees.

9 JUDGE GARCIA: So a transfer position is  
10 different?

11 MR. KLEIN: There is no such thing as a transfer  
12 exam. It's transitional. That's the phrase in the  
13 statute, and a transitional exam fee is very similar to a  
14 promotional exam, still limited to only current employees.  
15 It's just another type of exam.

16 JUDGE GARCIA: But it's the same pool that can  
17 apply?

18 MR. KLEIN: It's the same pool of current  
19 employees who can apply.

20 JUDGE GARCIA: Within the unit?

21 MR. KLEIN: Yes.

22 So - - - now, you asked a question about whether  
23 this right - - -

24 JUDGE RIVERA: Well, let's just clarify that.

25 So let's say I work for a particular agency, and





1 so there's no way that I can apply for a promotion because  
2 - - - to another agency because I'm working in this agency;  
3 is that - - -

4 MR. KLEIN: You can apply.

5 JUDGE RIVERA: - - - am I right?

6 MR. KLEIN: The place you're going to through the  
7 promotion is set by the exam itself, and what Civil Service  
8 has decided unilaterally, which it can do under the merit  
9 and fitness provision of the Constitution - - - what Civil  
10 Service has decided, the exam promotes you to and where  
11 those positions are.

12 We're not challenging any of that. None of that  
13 is at issue in this case. All that is at issue is whether  
14 current employees get to take those exams for free to go to  
15 other positions within the same employer, the State, not  
16 the agency.

17 JUDGE RIVERA: Regardless of the agency.

18 MR. KLEIN: Correct.

19 JUDGE RIVERA: Right.

20 MR. KLEIN: So I can promote from Corrections to  
21 OASAS. I can promote from OMH to OPWDD. That's not the  
22 issue.

23 JUDGE WILSON: You're saying promote, but you are  
24 including in that a lateral move to a different agency.

25 MR. KLEIN: Well, it wouldn't be lateral. It



1 would be a promotion.

2 JUDGE WILSON: Well, why not?

3 MR. KLEIN: But for example - - - well, let me  
4 give an example.

5 JUDGE WILSON: Sure.

6 MR. KLEIN: I'm an LPN, licensed practical nurse.  
7 I'm represented if I work for the State in almost all  
8 positions by CSEA. I want to take a promotional exam to an  
9 RN position in - - -

10 JUDGE WILSON: No, I'm asking something  
11 different. So your example isn't helping me.

12 MR. KLEIN: Okay. I'm sorry.

13 JUDGE WILSON: Let's say I'm an LPN for a  
14 particular division and I want to move to a completely  
15 division of the State in the same position as an LPN.

16 MR. KLEIN: That's not a promotion. That's  
17 called a transfer under - - -

18 JUDGE WILSON: Right.

19 MR. KLEIN: - - - the Civil Service Law,  
20 entirely different provision of Civil Service Law.

21 JUDGE WILSON: And the fee for that is waived?  
22 The fee for that is - - -

23 MR. KLEIN: There's no fee.

24 JUDGE RIVERA: There's no exam.

25 MR. KLEIN: It's a transfer; there's no test.



1                   ACTING CHIEF JUDGE CANNATARO: There's no exam,  
2                   is there?

3                   MR. KLEIN: There's no exam. All you're doing is  
4                   transferring from one appointing authority to another under  
5                   section 70. That's not a promotion.

6                   JUDGE RIVERA: It's promotion and transitional,  
7                   not promotion and transfer?

8                   MR. KLEIN: Correct.

9                   JUDGE GARCIA: So your position is essentially  
10                  the fee follows the employee here. So whatever promotional  
11                  exam you're going for, it's waived, even if it's in a  
12                  different agency in a different bargaining unit.

13                  MR. KLEIN: The fee - - - the waiver of the fee  
14                  applies to employees within the units that challenged the  
15                  taking away of the benefit - - -

16                  JUDGE GARCIA: Right.

17                  MR. KLEIN: So right away we're limited just to  
18                  CSEA and NYSCOPBA - - -

19                  JUDGE GARCIA: I understand that.

20                  MR. KLEIN: - - - and DC 37.

21                  JUDGE GARCIA: But let's say you apply to a  
22                  different agency covered by a different bargaining unit for  
23                  a promotional exam - - - which I think, as I understand it,  
24                  you can do - - - the fee is waived?

25                  MR. KLEIN: Let me go back to my example.



1 I'm an LPN represented by CSEA. I want to  
2 promote to an RN title, registered nurse title, represented  
3 by PEF. I can do - - - that fee should be waived and has  
4 been waived for many years.

5 JUDGE GARCIA: No matter what agency is going to  
6 employ?

7 MR. KLEIN: Right.

8 Once I'm now an RN and I want to take a  
9 promotional exam to a nurse administrator position, those  
10 are both PSNT positions - - - PEF's not in this case - - -  
11 those people have to pay for the - - - they have to pay the  
12 application fee. That's different.

13 So it doesn't follow the employee once they're  
14 out of our unit. It only applies to employees represented  
15 by the unions that timely challenged the change.

16 JUDGE RIVERA: So in your example, if I'm getting  
17 this right, the LPN in the PEF - - -

18 MR. KLEIN: The LPN is CSEA.

19 JUDGE RIVERA: No, no. But let's say - - - yes,  
20 I got that example.

21 MR. KLEIN: Okay.

22 JUDGE RIVERA: Now let's say it's an LPN or maybe  
23 this is not possible. In the PEF who takes the exam has to  
24 pay?

25 MR. KLEIN: PEF doesn't represent LPNs.



1 JUDGE RIVERA: So what - - - LPN is going to an  
2 RN? I see.

3 MR. KLEIN: So you have a CSEA - - - you have a  
4 CSEA represented LPN who wants to promote to a registered  
5 nurse title. That title is represented by PEF, totally  
6 different state bargaining unit.

7 JUDGE RIVERA: Because PEF doesn't have an LPN,  
8 they start out with the RN?

9 MR. KLEIN: Correct.

10 JUDGE RIVERA: Okay.

11 ACTING CHIEF JUDGE CANNATARO: I'm sorry,  
12 Counsel. You're out of time. But thank you.

13 MR. KLEIN: Thank you.

14 MR. LODOVICE: Thank you.

15 Just one real quick point before I go into  
16 rebuttal, the - - - PERB raised the issue of whether they  
17 should be subject to arbitrary and capricious and/or  
18 substantial evidence for a hearing when it goes to the  
19 supreme court. Ultimately, we don't think that was an  
20 appropriate raise. We think PERB waived that by agreement  
21 of the stipulation of transfer in this case.

22 But to the extent that the court does touch on  
23 this, we want to refer you to Civil Service Law section  
24 213, subsection 3. That is the statute of judicial review  
25 and enforcement for PERB's case. It's part of their



1 enabling statute. That statute specifically provides for  
2 transfer to the appellate division for questions raised  
3 under 7803 subsection 4, which is substantial evidence. So  
4 its own statute provides for a substantial evidence  
5 transfer to the appellate division. So we believe that's  
6 already covered by statute.

7 The most important, I think, for rebuttal is PERB  
8 makes the - - - and I don't know what other word to use  
9 other than nonsensical claim that the decision in this case  
10 will only have an impact on the three bargaining units here  
11 and their respective units - - - units.

12 We would agree that this case applies  
13 specifically to them as it relates to the 2009 setting of  
14 the promotional fee in - - - by Department of Civil  
15 Service. It's retroactive. At this point, if we lose, we  
16 walk out of this room, the fee for those three unions and  
17 their units is zero, and it's whatever the general  
18 information bulletin says for the other units tests. So  
19 there's no longer a uniform fee.

20 But going forward is we walk out this door - - -  
21 if Civil Service, exercising its authority, seeks to waive,  
22 abolish, or otherwise set a uniform schedule of fees, or if  
23 a municipal service commission does this pursuant to  
24 section 50, this case will now mean that all of those - - -  
25 those entities, whether it's Civil Service or the



1 Commission, has to meet with their public employ - - -  
2 request their public employer negotiate this and get  
3 approval from the unions going forward.

4 So this case has a global impact on all - - -

5 JUDGE RIVERA: Only for those who are currently  
6 employees?

7 MR. LODOVICE: Well, the - - - well, the - - -

8 JUDGE RIVERA: That was my question about the  
9 reasonable expectation and the factors.

10 MR. LODOVICE: Only the - - - it's current  
11 employees just because PERB is narrowly defining, saying  
12 that we only mean this for the State of New York employees,  
13 for the small set of state employees who are taking  
14 promotional exams, but the promotional exam structure - - -

15 JUDGE RIVERA: Well, and reasonable expectation  
16 is based on a prior practice. That's what I understood  
17 their position was.

18 MR. LODOVICE: Yeah, yes.

19 JUDGE RIVERA: So any one new, right?

20 MR. LODOVICE: But the next time they set the  
21 test. So in 2023, Civil Service wants to modify the fee,  
22 the promotional exam will apply to the employees that are  
23 current. Similarly, it'll apply to the - - - potentially  
24 apply to public employees who choose an open-competitive  
25 exam for that.



1                   So it applies in - - - the one point Mr. Klein  
2                   pointed out is CSEA represents, and I hope I get this  
3                   right, the LPNs, and PEF represents the RNs. So what - - -  
4                   here the question is when we - - - the RN test is - - - the  
5                   fee is for the position as an RN. Do we - - - does Civil  
6                   Service have to negotiate with PEF, who is the eventual  
7                   position, or do they have to negotiate with the CSEA or PEF  
8                   or NYSCOPBA for the people that want to apply for that  
9                   exam.

10                   So there's a question of how many unions do you  
11                   have to negotiate for each class of positions, each  
12                   promotional line. Because as Mr. Klein pointed out, the  
13                   promotional lines sometimes start in one unit and end in  
14                   another, and it could start in two units and end in  
15                   another. So it - - -

16                   JUDGE RIVERA: But I thought his point was it's  
17                   the person because they're the one with the reasonable  
18                   expectation.

19                   MR. LODOVICE: But we - - - our position is why  
20                   this is a term and condition of employment because the fee  
21                   applies to the exam for the promotional and point. The  
22                   fact that some individual chooses to apply for that  
23                   promotional position doesn't mean that the fee resides in  
24                   the employee; it resides in the test.

25                   JUDGE GARCIA: If we adopt that rule, if we





1 affirm, you charge the fee for others as \$100 an exam or  
2 whatever; let's - - - hypothetically. And now you want to  
3 raise it to \$110. Would that be bargainable now in the  
4 future?

5 MR. LODOVICE: If - - - if we lose this case,  
6 yes. And I also want to point out, it would be bargainable  
7 if we try to go take PEF from fifteen down to zero.

8 We can't - - - negotiation is - - - if it's - - -  
9 you know, PERB is saying, Well, the economic benefit was  
10 zero and now it's fifteen so it's negotiable. If it was  
11 fifteen and we moved it to ten, moved it to twenty, either  
12 situation would be negotiable. And in part, that's like a  
13 labor concept- - - fists in the velvet glove. We can't  
14 raise or lower things at a whim because it undermines the  
15 bargaining obligation.

16 So the fact that it went from zero to fifteen or  
17 fifteen to zero, that doesn't go to the question of  
18 bargainibility. It's just a question of like what's the  
19 outcome of bargainibility. Just like we can't raise or  
20 lower wages, you know, for that - - - so.

21 And the last point I would just say is that in  
22 terms of - - - is the idea of the - - - the Department of  
23 Transportation Vehicle cases. It did not rise and fall - -  
24 - if we are - - - if we reach the past practice case.  
25 Those cases did not rise and fall on whether or not that



1           there was notice sent to the employees because - - - like  
2           of an annual view. In each of those cases, PERB held that  
3           because there was a published internal policy that put  
4           employees on notice, that the employer rate change  
5           discretion - - - acting on that discretion cannot create a  
6           past practice. So therefore the employer can act.

7                       The only difference in this case as opposed to  
8           the Department of Transportation Vehicle case for the PEF -  
9           - - Spence v. State, or the picnic case, the DOH cases, is  
10          in those cases it was internal agency policies that accrue  
11          only because the unions in their initial instance did not  
12          object to them. So they accrue to a retained discretion.

13                      Here, we have a statutory declaration to - - - in  
14          response to the public policy established by the  
15          Constitution to administer examination fees that retain  
16          discretion.

17                      Here, PERB is saying that an internal  
18          administrative policy that accrued over time - - - it  
19          stands at a greater level than a legislative declaration to  
20          implement the strong public policy derivative of the New  
21          York State Constitution.

22                      JUDGE RIVERA: I know your red light is there,  
23          but just very quickly.

24                      Do you agree with this point that counsel from  
25          PERB made that those efforts to impose the fee that DOB did



1 not - - - did not authorize - - - or unsuccessful efforts  
2 were all internal, no employee would know about it? Is  
3 that correct? I just want to make sure that's correct.

4 MR. LODOVICE: That is correct, but I don't think  
5 that that's the correct analysis based on the DOT vehicle  
6 case or the picnic case. In both of those cases, they  
7 talked about an - - - an announced - - - like, for DOT, it  
8 was very specific. I litigated that case, so I know. The  
9 reason that the state won is because the DOT internal  
10 policy said that we can give or take cars at the discretion  
11 of the state.

12 So the PERB board held and argued successfully at  
13 the appellate division that because the internal policy  
14 retained discretion, there cannot be a reasonable  
15 expectation of any employee under that policy that they  
16 keep a car for telecommuting purposes.

17 So it was the internal agency policy that made a  
18 statement of retained discretion that PERB held to vitiate  
19 any reasonable expectation. So therefore, the employer was  
20 privileged to act to take - - - give or take cars based on  
21 that policy.

22 Here, we have a statutory declaration that Civil  
23 Service, only subject to the approval of DOB, can modify  
24 the fee under those specific restrictions we talked about  
25 before.



1           So if you apply the vehicle case under DOT and  
2           the picnic case for DOH, which was years before, but most  
3           recently that DOT case where - - - I'm relying on what PERB  
4           argued in the appellate division. Because there's a  
5           pronouncement to the employees, the employee is on notice,  
6           the union is on notice that this benefit can change at the  
7           discretion of Civil Service. That employee cannot have a  
8           reasonable expectation it will not change.

9           ACTING CHIEF JUDGE CANNATARO: The notice here is  
10          the statute?

11          MR. LODOVICE: It's the statute. It's clear the  
12          Civil Service can change it under the statute.

13          The fact that the internal deliberation, which we  
14          established was objective and reasonable and, you know,  
15          they comply with the statutory provisions, both Civil  
16          Service and DOB, was internal, because it's really a  
17          budgeting process of why they did this, is of no  
18          consequence for the PERB analysis under the DOT case  
19          because it's the statement of policy that drove the  
20          decision for PERB.

21          JUDGE RIVERA: But I - - - I may have  
22          misunderstood it. But I thought the point was the fact  
23          that you have that discretion - - - DCS has, excuse me - -  
24          - DCS has that discretion to seek out the approval of DOB  
25          and to be able to modify the fees is what then makes it a



1 subject of negotiation. It's - - - it is that fact.

2 MR. LODOVICE: Well, we would argue - - -

3 JUDGE RIVERA: What you say is without notice, he  
4 says yes, that's right, with notice that it can be  
5 negotiated.

6 MR. LODOVICE: In the first instance, we would  
7 argue that that's a specific statutory directive that  
8 exempts it from collective bargaining, but if you don't  
9 find that, if you reach the past practice argument, which I  
10 hope that this was correctly - - - I interpreted what Mr.  
11 Fois was saying, that you can only have a past practice if  
12 you have a term and condition of employment. One cannot  
13 accrue into the other; you have to - - - so it's only if it  
14 a term and condition of employment.

15 But once that is there, you have to do the  
16 analysis - - - PERB's like, first is it mandatory, then is  
17 it unequivocal, did it occur for a period of time, and was  
18 it for - - - under reasonable expectation. And we present  
19 that based on the DOT case, that PERB is very clear that  
20 when there's a statement of retained discretion, there  
21 cannot be a reasonable expectation of an employee that the  
22 benefit will not change. Well, therefore, the employer is  
23 privileged to act based on that discretion, and that is  
24 from - - - our - - - it's been our position, but it is very  
25 clearly PERB's decision both at the board level and at the



1           appellate division for the DOT case.


2                           ACTING CHIEF JUDGE CANNATARO: Thank you,  
3           Counsel.

4                           MR. LODOVICE: Thank you.

5                           (Court is adjourned)

6   C E R T I F I C A T I O N

7  
8                           I, Xavier Austin Reyna, certify that the  
9           foregoing transcript of proceedings in the Court of Appeals  
10          of State of New York v. PERB, No. 5 was prepared using the  
11          required transcription equipment and is a true and accurate  
12          record of the proceedings.

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