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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF KENT,

Respondent,

-against-

No. 63

LEFKOWITZ,

Appellant.

20 Eagle Street
Albany, New York 12207
March 30, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Okay. Good afternoon
2 everyone.

3 Our first matter on this afternoon's
4 calendar is number 63, Matter of Kent v. Lefkowitz.

5 MR. QUINN: Good afternoon, Your Honors.
6 May I reserve two minutes for rebuttal, please.

7 CHIEF JUDGE DIFIORE: You may.

8 MR. QUINN: My name is David Quinn, I
9 represent the appellant, New York State Public
10 Employment Relations Board. The issue on this appeal
11 is whether the Appellate Division should have
12 deferred to PERB's construction of a side-letter
13 agreement and the effect that the side-letter
14 agreement had on the State PEF bargaining
15 obligations, under the Taylor Law.

16 The side-letter agreement is the totality of the
17 party's collective negotiations regarding the wages to be
18 paid to per diem seasonal track employees. These are
19 employees who are hired - - -

20 JUDGE RIVERA: Is there anything in the
21 side letter that indicates some negotiation related
22 to the minimum?

23 MR. QUINN: No. The side-letter agreement
24 does not expressly reference the budget director's
25 discretion - - - excuse me, I stand corrected. The

1 side-letter agreement does reference the budget
2 director's discretion to set the wages for the
3 employees, but it doesn't specify the base pay. The
4 side - - -

5 CHIEF JUDGE DIFIORE: Who drafted the side
6 letter, counsel?

7 MR. QUINN: I'm sorry.

8 CHIEF JUDGE DIFIORE: Who drafted the side
9 letter?

10 MR. QUINN: Oh, I - - - I honestly do not
11 know that, Your Honor.

12 CHIEF JUDGE DIFIORE: Uh-huh.

13 MR. QUINN: I do not know who wrote the
14 side letter - - - who actually ultimately drafted the
15 side-letter agreement. What the side-letter
16 agreement, however, does, is it states that the
17 employees will receive, during 1996, '97, and '98
18 track seasons, specific wage enhancements for the - -
19 - for certain employees who meet - - -

20 JUDGE FAHEY: So it sort of addressed
21 increases, not decreases; is that correct?

22 MR. QUINN: That is correct. The side-
23 letter agreement speaks to raises. But raises on
24 what? The answer to that is raises on the base pay,
25 as set by the budget director, pursuant to the budget

1 director's statutory discretion to set the wages as
2 the budget director had been doing for many years.

3 JUDGE ABDUS-SALAAM: In what years,
4 counsel, where the raises to be given, if they were
5 to be given, as opposed to any - - - either no raise
6 or decrease in the per diem; in what years were you
7 talking about?

8 MR. QUINN: Yes. Yes. The first lump-sum
9 payment is payable in 1996 for certain employees who
10 meet specified criteria, and also others who returned
11 to work during the 1996 year. The lump-sum payment
12 is 1996 and '97. The percentage wage increases kick
13 in 1997 and 1998.

14 In 1996, however, there was no base pay,
15 there was absolutely nothing in the contract. What
16 the contract is based on, it's predicated on the very
17 fact that the budget director has the statutory
18 authority to set the minimum wage, or the base pay,
19 as I say that the budget director had been doing in
20 the past.

21 JUDGE ABDUS-SALAAM: The entire contract
22 was what, four years; is that right?

23 MR. QUINN: Your Honor, I believe the
24 contract expired in 1999. '96 to '99 - - -

25 JUDGE ABDUS-SALAAM: '96 to '99.

1 MR. QUINN: That's my understanding.

2 JUDGE ABDUS-SALAAM: Okay.

3 JUDGE GARCIA: Counsel, what would the
4 standard of review be for the Appellate Division?
5 They cited a measure of deference. What is your view
6 of what that measure of deference should be?

7 MR. QUINN: The Appellate Division Third
8 has repeatedly held, as has this court, that the
9 standard of review of the PERB's construction of a
10 contract is that it accords great deference to PERB's
11 construction of the collective bargaining agreement
12 and its effect on the collective bargaining
13 obligations under the Taylor Law. That's been
14 consistently the standard of review.

15 JUDGE GARCIA: Arbitrary and capricious?

16 MR. QUINN: Meaning that if board - - - if
17 the PERB's - - - yes. Meaning that the PERB's
18 determination must be reasonable, rational, and
19 supported by the language of the agreement. That's
20 the standard that has been applied in the past; I
21 don't believe that that's the standard that the
22 Appellate Division applied here.

23 JUDGE PIGOTT: Well, you went farther than
24 that. I mean, you were here about two years ago, if
25 you may remember, in the Town of Islip.

1 MR. QUINN: Yes, I was.

2 JUDGE PIGOTT: And you quote from that
3 decision where you said this court has consistently
4 held that as in - - - "As the agency charged with
5 implementing the fundamental policies of the Taylor
6 Law, the Board is presumed to have developed an
7 expertise in judgment that requires us to accept a
8 construction" - - - "its construction as not
9 unreasonable."

10 And that one involved a Local Law that made it
11 illegal for employees to drive county vehicles in - - -
12 for personal use. And yet PERB prevailed in that by
13 saying that they could override a Local Law against that
14 by saying, because it was a custom in practice of the
15 county in that situation, or the town, to permit it.

16 It would seem to me to be - - - give an awful
17 lot of deference to PERB, and I don't see a difference
18 here; in fact, I see that this one looks easier to me to
19 me because of the complicated nature of seasonal employees
20 at a seasonal venue, and determining how they're - - - how
21 they are to be paid. I don't know why we would think more
22 of that than PERB.

23 MR. QUINN: I agree.

24 JUDGE PIGOTT: That was a softball.

25 MR. QUINN: It surely was, Your Honor.

1 The Appellate Division in this case - - - I
2 believe the actual words of the Appellate Division's
3 decision boiled down to that it just didn't believe that
4 the side letter supported the expansive reading given by
5 PERB, and basically to the Appellate Division's analysis -
6 - - in its words, and to its reading - - - in its words,
7 that it would have reached a different conclusion.

8 JUDGE RIVERA: Have the director ever, as a
9 historical matter, reduced pay?

10 MR. QUINN: There is record evidence that
11 in one year - - - and if I'm not mistaken, Your
12 Honor, it was 1991 - - - that the budget director
13 did, in fact, lower the pay prior - - - relative to a
14 prior year.

15 It was not cognizable as an improper
16 practice, because PEF - - - at least the record
17 indicates that PEF was unaware of that unilateral
18 reduction. But in fact, as a matter of exercise of
19 discretion, there is record evidence that in 1991 the
20 budget director did, in fact, lower the wages over a
21 prior year.

22 But as I say, that was not cognizable as a
23 separate and independent improper practice.

24 JUDGE RIVERA: Uh-huh. So is there
25 anything to suggest that they were not aware of that

1 decision when they came to the table to bargain?

2 MR. QUINN: As I - - - there is no
3 bargaining history with respect to the 1996, '99
4 agreement vis-a-vis the seasonal employees.

5 JUDGE RIVERA: Okay.

6 MR. QUINN: The only evidence we have of
7 negotiations regarding wages for those employees are
8 the words of the side-letter agreement.

9 JUDGE RIVERA: Uh-huh.

10 MR. QUINN: And as I say, that agreement,
11 at least from PERB's perspective, was minimally
12 reasonably clear that when the parties sat down and
13 negotiated, they negotiated based on the fundamental
14 understanding that the budget director had that
15 discretion.

16 JUDGE RIVERA: Right. What was - - - do
17 you know the percentage of the reduction in pay in
18 1991?

19 MR. QUINN: I'm so - - -

20 JUDGE RIVERA: I'm sorry. Do you know the
21 percentage reduction in 1991?

22 MR. QUINN: I do not.

23 JUDGE RIVERA: Thank you.

24 MR. QUINN: I do not, Your Honor.

25 JUDGE RIVERA: Okay.

1 MR. QUINN: And the only thing that I know
2 is that it's in the record that there was a reduction
3 in 1991 that was not cognizable as a violation of the
4 Taylor Law because they didn't know about it.

5 JUDGE FAHEY: Would you agree that if - - -
6 if you say that PERB acted rationally in considering
7 the duty-satisfaction defense, let's - - - let's say
8 that the PEF is wrong, that PERB acted rationally
9 there, wouldn't we still then have to consider
10 whether PERB acted rationally in concluding that the
11 side letter contemplated the decrease? That would be
12 the second part of our analysis, wouldn't it; do you
13 understand my question?

14 MR. QUINN: I believe so, Your Honor, yes.
15 Ultimately, the question before the court is - - -

16 JUDGE FAHEY: So then I just want to know
17 if you agree with that two-step analysis.

18 MR. QUINN: I just want to make sure I
19 understand it before I agree with it. I want to make
20 sure that I understand. The - - - if PERB acted
21 rationally in construing the side-letter agreement,
22 then the second question is whether PERB reasonably
23 concluded or rationally concluded that the side-
24 letter agreement encompassed the part - - - the
25 totality of the parties' collective negotiations. Is

1 have to expressly state the expectation of a
2 decrease. All it has to do is expressly state that -
3 - -

4 JUDGE FAHEY: Who would negotiate that way?

5 MR. QUINN: We might think that this
6 agreement is not the best agreement on the planet.
7 But it's the agreement that they cut.

8 JUDGE FAHEY: Well, you're two pretty
9 sophisticated negotiators. So I would - - - I would
10 not fault either of you on that area. So it's - - -
11 it seems to me that - - - one of the things that
12 strikes me is normally you would say, well, there are
13 all these things that were decided so it must be
14 included in there.

15 Except when I look at it, I think there are
16 all these issues that are decided, so this one isn't
17 included in there, which says to me that it becomes
18 more difficult to figure out how the side letter
19 contemplated, because it contemplated so many other
20 things. You see my - - - what I'm saying?

21 MR. QUINN: The Latin phrase that I am very
22 poor at reciting is, "Expressio unius est exclusio
23 alterius". I think that that's the phrase. But
24 basically, because it's not in there is precisely why
25 it's contemplated. They negotiated expressly and

1 specifically with respect to wages, and in fact made
2 reference to the discretion.

3 JUDGE FAHEY: My poor understanding of
4 contract law is that if it's not in the contract,
5 it's not part of the contract.

6 JUDGE PIGOTT: Well, what occurred to me
7 was, we don't know how many, we don't know what the
8 jobs are, we don't know if these are the same
9 employees from season to season, we don't know if you
10 decided to hire four times more employees within a
11 budget that then required the reduction of the - - -
12 of the pay. We don't know that they may have to wear
13 uniforms or don't - - - all of that was within the
14 knowledge of you folks that do this stuff, and not us
15 folks who sit here and oversee it.

16 And so it seems to me that for us to say,
17 aha, you know, you didn't put in there that they
18 don't have to wear uniforms or they do have to wear
19 uniforms, so we're going to decide that they do have
20 to wear uniforms. I just don't understand why we
21 would get that far into the weeds on these things.
22 That's why you're the experts. That's another
23 softball.

24 MR. QUINN: Yes, Your Honor, and I
25 appreciate them very much.

1 CHIEF JUDGE DIFIORE: Thank you, counsel.

2 MR. QUINN: I believe that's it. Thank you
3 very much.

4 CHIEF JUDGE DIFIORE: Counsel.

5 MS. SHERIDAN: Good afternoon, Your Honors.
6 Julie Sheridan representing GOER and Racing and
7 Wagering.

8 I have very little to add this afternoon to
9 the discussion - - - Mr. Quinn's discussion, the
10 discussion that briefs about the language that's in
11 the side letter and how that rationally supports
12 PERB's conclusion that the parties bargained over
13 this issue. It bargained over wages, it bargained
14 over whether or not - - -

15 JUDGE ABDUS-SALAAM: Are we to - - - are we
16 to take the bargaining about the wages to mean that
17 in '90- - - - I guess it's '97 and '98, there were
18 increases that were specifically included in the side
19 agreement, but nothing in '96? Are we to take that
20 that there was a negotiation over wages?

21 MS. SHERIDAN: Well, of course there was a
22 negotiation over wages. There was a very detailed
23 multi-page section in the side letter that deals with
24 compensation. And it has very detailed provisions
25 about lump-sum payments for '97 - - - April '97 going

1 forward, April '96 going forward, salary increases;
2 it doesn't explicitly say anything about the '96 base
3 wage rate.

4 JUDGE RIVERA: But do all of those
5 increases, as - - - as your opponent notes, depend on
6 the base?

7 MS. SHERIDAN: They must.

8 JUDGE RIVERA: Okay.

9 MS. SHERIDAN: A percentage has to be
10 calculated - - -

11 JUDGE RIVERA: All right. So then - - -

12 MS. SHERIDAN: - - - on something.

13 JUDGE RIVERA: Okay. So then it's - - -
14 why would that not have been negotiated, or why is
15 there not a reference to the base? Can we - - -

16 MS. SHERIDAN: Because - - -

17 JUDGE RIVERA: - - - then say it's
18 reasonable for them to say, you've left the base to
19 the full discretion of the director because you
20 focused on everything else?

21 MS. SHERIDAN: That - - - that has been the
22 practice in this state with respect to seasonal
23 employees' base rates for a very long time.

24 JUDGE RIVERA: Uh-huh.

25 MS. SHERIDAN: And PEF is a very

1 sophisticated public-sector bargainer.

2 JUDGE ABDUS-SALAAM: So they can negotiate
3 raises, but they can't deal with reductions because
4 they don't know what the base is. So whatever the
5 base is, you can get a raise, but they can't deal
6 with the reductions because that's up to the
7 director?

8 MS. SHERIDAN: Well, they tried, as the
9 record shows - - - the hearing discussion, they tried
10 in subsequent years to negotiate a way, at the budget
11 director's discretion, to set that base-wage rate,
12 and they were unsuccessful.

13 They neg - - - perhaps they tried to
14 negotiate it this year, we don't know, and the lack
15 of a bargaining history, you know - - - if we had
16 one, it would make - - - it would have made PERB's
17 jobs easier, it would make this court's job easier.
18 But it's just implausible to think that wage rates
19 for these workers weren't discussed; this is
20 compensation.

21 JUDGE FAHEY: Well - - -

22 MS. SHERIDAN: This is the primary concern
23 of a union at a bargaining table.

24 JUDGE FAHEY: We understand that argument.
25 But it's difficult for me to understand it; I guess I

1 understand, you know, the rationality of the
2 argument, it's just difficult to contemplate, given
3 all the other things you considered.

4 Here is what you're saying to me. The way
5 I'm hearing this is that we negotiate a pay increase
6 of ten percent. We don't negotiate at all what - - -
7 we don't even touch the issue of base salary, so you
8 can go in and cut the base salary by twenty-five
9 percent, therefore the negotiated raise is
10 meaningless. And no one with - - - no one - - -
11 that's fully negotiating?

12 MS. SHERIDAN: But we don't know what the
13 union negotiated in exchange for that, Your Honor.

14 JUDGE FAHEY: And if you don't know, then
15 how were we to know that it was included and properly
16 negotiated?

17 MS. SHERIDAN: Because the other provisions
18 in the side letter, especially in section 2C, which
19 expressly say the word "discretion", show that the
20 parties knew the budget director had this discretion,
21 and that after the base-wage rate was set in '96, his
22 discretion was going to be restricted. Not at '96's
23 point, but at every point after that.

24 And in fact, the three-and-a-half percent
25 increases were paid to all employees, not just

1 returning employees, by the Racing and Wagering Board
2 for every year covered by this contract, and they
3 have continued to pay salary increases - - -
4 percentage increases that were set in collective
5 bargaining agreements after that.

6 CHIEF JUDGE DIFIORE: Thank you.

7 MS. SHERIDAN: There has been no further
8 reduction.

9 CHIEF JUDGE DIFIORE: Counsel.

10 MS. KING: May it please the court. My
11 name is Lisa King and I'm the attorney for the
12 respondents, the New York State Public Employees
13 Federation.

14 CHIEF JUDGE DIFIORE: Ms. King, is it your
15 argument that there must be an express reference to
16 the exact compensation contained there?

17 MS. KING: It's my argument that the
18 standard that's applied and that PERB has set is the
19 State must establish by record evidence that there
20 was - - - it was reasonably clear that the parties
21 negotiated to conclusion on the subject of the
22 improper practice charge. That's the standard and
23 the language of the side letter does not make it
24 reasonably clear, as the Appellate Division majority
25 found.

1 CHIEF JUDGE DIFIORE: What would have made
2 it reasonably clear?

3 MS. KING: Your Honor, I'm going to make a
4 cardinal mistake and say if I could just add one
5 point before I respond to your question, which is, I
6 think it's very important that we all recognize a
7 very important determination that was made in this
8 case, which is PERB agrees, the Appellate Division
9 majority in dissent agree, that the State had to
10 negotiate the reduction in wages. There was a
11 longstanding practice of - - -

12 JUDGE PIGOTT: How do we know that they
13 didn't? That - - - that - - -

14 MS. KING: That's - - - that's a question,
15 but they had that - - -

16 JUDGE PIGOTT: I'm a little stunned.

17 MS. KING: - - - had that obligation.

18 JUDGE PIGOTT: Let me give you my thought
19 on this.

20 MS. KING: Sure.

21 JUDGE PIGOTT: You know, I was in dissent
22 on this Islip I that Mr. Quinn prevailed in, because
23 it seemed to me incredible that the Public Employees
24 Relation Board could say to a town or county that
25 your law that says you can't use public vehicles for

1 personal use, a pretty logical thing that almost
2 borders on theft of services if you do, is overridden
3 by a negotiation between a union and a town - - - not
4 even a negotiation; the town allowed this to occur.
5 And now they say, well, because you allowed this to
6 occur, your Local Law, which says that it's illegal
7 to use public transportation for personal use,
8 doesn't count anymore. That's how strong PERB is.

9 MS. KING: Right.

10 JUDGE PIGOTT: PERB makes this decision
11 knowing the expertise of PEF, the expertise of the
12 Racing and Wagering Board, reading this huge letter
13 which has all of these provisions and everything else
14 - - -

15 MS. KING: Right.

16 JUDGE PIGOTT: - - - which I assume
17 everybody knew was going into this letter at the
18 time, and then having somebody say, wait a minute,
19 the main issue is wages as a reduction, and we
20 overlooked it, and therefore it's unfair.

21 MS. KING: Right. That's - - - that's why
22 I think it's incredibly important to keep in mind
23 that the past practice, the binding past practice was
24 the wages for the seasonal track employees were never
25 decreased from the previous year. So if the State

1 wanted to be able to reduce those wages, they had to
2 negotiate that reduction. And there - - -

3 JUDGE FAHEY: Who had the burden to show
4 that this was properly negotiated?

5 MS. KING: The State.

6 JUDGE FAHEY: Then they - - -

7 MS. KING: They pled an affirmative
8 defense; they had the burden to establish it.

9 JUDGE FAHEY: So - - - so they didn't have
10 a burden to imply it; they had a burden to show it.

11 MS. KING: Correct.

12 JUDGE FAHEY: Okay.

13 JUDGE RIVERA: But in 1991, there was a
14 reduction. I know you weren't able to - - -

15 MS. KING: Right.

16 JUDGE RIVERA: - - - to contest that.

17 MS. KING: As I said, PERB agreed there was
18 a past practice, and in order to change a past
19 practice with respect to a mandatory term and
20 condition of employment, the State has to negotiate.

21 JUDGE PIGOTT: How do we know that if - - -

22 JUDGE ABDUS-SALAAM: Counsel - - -

23 JUDGE PIGOTT: I'm sorry, Judge. If you
24 were negotiating this, and they say, we're cutting it
25 twenty-five percent, you know, and you say, well, we

1 want to negotiate it, fine. You negotiate it;
2 however low you want to get is the number of
3 employees we're going to lay off. If you want to say
4 that we can only cut it ten percent, we're going to
5 cut ten percent of your - - - of your employees.

6 I would think that would have entered into
7 something. I just find it hard to believe that at
8 the end of all of this, two sophisticated parties
9 came to a conclusion that now someone says, we
10 weren't party to it, or we're surprised. And how do
11 we interfere?

12 MS. KING: Well, I think - - - I think this
13 court does - - - the Article 78 standard of review is
14 not without heat. It doesn't - - - there used to be
15 a great quote from Professor Segal about the Article
16 78 proceeding, you know, "Pull back the curtain with
17 respect to decisions of administrative agencies."

18 The court does have an obligation to review
19 whether the decision was without sound basis and
20 reason or without regard to facts. And most
21 respectfully in this case, it's my position and it's
22 the Appellate Division's position that it was. There
23 is nothing in that side letter that makes it
24 reasonably clear that a sophisticated negotiator like
25 PEF gave up one of the most basic provisions that a

1 union would want to give.

2 JUDGE PIGOTT: PERB said you did. PERB
3 said I looked at - - - you know, we're looking at the
4 whole thing, not just the side letter, but the whole
5 thing. There is give and take; there is this, there
6 is that. You know, we know you, PEF, and we know
7 State Wagering, and we know what went on here. And
8 we are saying, in our expertise - - - as Mr. Quinn
9 cited about - - - we defer not only to their
10 decisions but that are - - - there is specialized
11 knowledge in the area of public employment. And
12 therefore, they reach this decision. And absent - -
13 - it would seem to be almost bad faith, because we're
14 not talking necessarily arbitrary and capricious;
15 we're talking about going behind their expertise and
16 saying in the exercise of their expertise, they were
17 wrong. And I don't know how we do that.

18 MS. KING: Well, I don't think you have to
19 reach bad face (sic) - - - I think you have - - - bad
20 faith, I think you have to do what the Appellate
21 Division did which is a substantive review. And if
22 you look at the PERB decision, you will see that it's
23 a very conclusory decision that really doesn't
24 identify what it is in the side letter that, you
25 know, re - - - makes it reasonably clear that the

1 parties agreed to allow the State, you know - - -

2 JUDGE PIGOTT: But the Appellate Division -
3 - -

4 MS. KING: - - - the unilateral authority
5 to reduce the salaries of, you know, PEF members.

6 JUDGE PIGOTT: How do we - - - how do we do
7 this. The Appellate Division says, "Although we are
8 mindful that PERB is to be afforded a major of
9 deference with respect to the interpretation of
10 collective-bargaining agreements and similar binding
11 contracts between the State and its workers, we
12 simply do not believe", is the word that the
13 Appellate Division uses, "that the side-letter
14 agreement at issue here is amenable to the expansive
15 construction adopted by PERB and reached by
16 respondents."

17 Which seems to me they are saying, we are
18 now going to substitute our f - - - our opinion, our
19 findings, in place of PERB. And I thought that's
20 what we were not supposed to do, as I was reminded in
21 Town of Islip.

22 MS. KING: Well, the - - - the decision of
23 the Appellate Division, I think it's - - - finds that
24 determination by PERB was arbitrary - - - arbitrary
25 and capricious. And, you know, that's the standard

1 of an Article 78 review; an Article 78 review has - -
2 -

3 JUDGE PIGOTT: Well, they went further.
4 They said, "The term set forth in the language
5 utilized in the side-letter agreement did, however,
6 make it reasonably clear that PEF and the Board
7 bargained and reached an agreement on this subject,
8 thus demonstrating that the subject that formed the
9 basis for the improper-practice charge already was
10 negotiated to completion."

11 I don't know how much farther they should go - -
12 - and then simply say, but we don't think that this is
13 part of it. It just seems to me it's such a fact-finding
14 thing, which I thought was beyond our scope of review of
15 PERB.

16 JUDGE ABDUS-SALAAM: Counsel, could I just
17 go back to something - - -

18 MS. KING: Sure.

19 JUDGE ABDUS-SALAAM: - - - you said earlier
20 about mandatory. When - - - I think it's universally
21 recognized that the - - - the director has discretion
22 to set these wages, correct? And discretion was
23 actually mentioned in the side agreement. So can you
24 explain what you meant by "mandatory"?

25 MS. KING: Yes. The - - - the PERB has a

1 principle, unless a statute takes a particular
2 subject out of the collective bargaining realm, the
3 State has to bargain over it. And PERB found that
4 the increase or decrease in the wages of seasonal
5 track employees was a mandatory subject of
6 bargaining.

7 JUDGE PIGOTT: Well, the Third Department
8 talked about - - -

9 MS. KING: PERB found that, the Appellate
10 Division found that - - -

11 JUDGE PIGOTT: Let me fi - - - let me give
12 you this thought. I don't want to mislead you - - -

13 MS. KING: Sure.

14 JUDGE PIGOTT: - - - but I - - - it says in
15 their - - - in their opinion it said, "To be sure,
16 the side-letter agreement did not have to expressly
17 address the circumstances under which the affected
18 employees' salaries could be reduced, in order to
19 satisfy the State's duty to negotiate in good faith."
20 And then they went on to say the terms are the terms.

21 MS. KING: Right.

22 JUDGE PIGOTT: So they said, you don't have
23 to put it in there.

24 MS. KING: Right. So in response, I mean,
25 that is - - - the State was required to negotiate

1 over the wages of these seasonal employees. And the
2 question is, whether or not they satisfied that - - -

3 JUDGE ABDUS-SALAAM: But they did that.

4 MS. KING: - - - that duty, that
5 obligation.

6 JUDGE GARCIA: But to follow up on Judge
7 Abdus-Salaam's question, does it make any difference
8 that these were seasonal employees where the budget
9 director had this discretion, when you look at this
10 contract to determine whether or not they bargained
11 for this? Does that affect the analysis at all?

12 MS. KING: I don't - - - I don't think it
13 does, because you're still looking at whether it's a
14 mandatory subject and whether it has to be
15 negotiated. Maybe comes into play when you're
16 determining whether it was negotiated. But the fact
17 that it had to be negotiated is the same for a
18 permanent employees' salary or a seasonal employee
19 salary.

20 JUDGE GARCIA: So on whether it was
21 negotiated or not, and they mentioned discretion in
22 that side agreement - - -

23 MS. KING: Right.

24 JUDGE GARCIA: - - - wouldn't that
25 indicate that it was? I mean, they acknowledge the

1 budget director has this discretion, they have carved
2 out certain things, including raises based on minimum
3 wage, holiday pay, other things - - -

4 MS. KING: Right, right.

5 JUDGE GARCIA: - - - but base, isn't there
6 this discretion then that's left over, or that hasn't
7 - - - you know, that they haven't then made any
8 specific provision on? Isn't that a little bit
9 different than the standard negotiating over wages
10 context?

11 MS. KING: Well, I think that the - - - the
12 side letter, raised as a point in my brief, what's
13 the purpose of the side letter? You know, when
14 you're interpreting whether it's reasonably clear
15 that the parties agreed through this side letter to
16 allow the State to unilaterally reduce wages, you
17 look at the purpose of the side letter. The purpose
18 of that side letter was merely to take these more
19 unique employees and explain how all the other
20 benefits that apply to permanent employees apply to
21 those employees.

22 You know, there was no negotiations, and
23 there is nothing in the side letter, in my opinion,
24 that shows that there is any negotiations regarding
25 their wages. The parties let that past practice - -

1 -

2 JUDGE GARCIA: But the side letter is
3 negotiated.

4 MS. KING: - - - the parties let that past
5 practice stand, and merely, we're saying, okay, we
6 have these seasonal employees, how do they get all
7 these benefits. How did they get their - - -

8 JUDGE PIGOTT: But isn't that for PERB to
9 decide?

10 MS. KING: - - - how do they get their
11 raises, how do they get their, you know, holiday pay,
12 so that's the purpose of it - - -

13 JUDGE GARCIA: So only good things are
14 negotiated in there.

15 MS. KING: Yeah. And it's a lot like that
16 - - - and I'm going to run out of time here - - -
17 that water-bottle case that I call, where, you know,
18 the employee said, you know, we were entitled to get,
19 you know, water bottles, and the state said, no,
20 under the health and safety provision, there is, you
21 know - - - negotiated to conclusion, there is nothing
22 in that that requires water bottles.

23 And what PERB said was, health and safety
24 provision deals with health and safety. You know,
25 water bottles aren't health and safety; they are

1 economic and they're employee comfort. And that is
2 the same thing here; this side letter is not wages.
3 It is how the rights of - - - that are under - - - in
4 the contract apply to seasonal employees.

5 JUDGE PIGOTT: But didn't you make that
6 argument to PERB?

7 MS. KING: That specific argument? You
8 know, it's interesting because remember, initially
9 there was a waiver defense by the State. So a lot of
10 these arguments were fleshed out before PERB.

11 JUDGE GARCIA: But could we go back to,
12 okay, the side letter is giving ~~me~~these certain
13 things to the seasonal employees that are otherwise
14 applicable to civil service employees. Now, civil
15 service employees, I assume the budget director can't
16 unilaterally lower their salaries, right?

17 MS. KING: Right.

18 JUDGE GARCIA: So that would be something
19 that would be in their side letter that you would
20 want to make equal to civil service employees.

21 MS. KING: That's why I want to go back to
22 the very first point I started with. There was a
23 longstanding past practice that was - - - PERB agreed
24 that it existed, that it had been established, the
25 Appellate Division majority in dissent - - - that

1 there was no reduction in the wages of seasonal
2 employees from year to year. That was a practice - -
3 - that was, if you will, "the law" with respect to
4 the seasonal employees.

5 JUDGE GARCIA: But wasn't 1991, was the
6 decrease?

7 MS. KING: So - - - so that was what we
8 were negotiating with that past practice.

9 JUDGE GARCIA: But 1991, there was a
10 decrease or there was not a decrease?

11 MS. KING: That - - - that was not relevant
12 to this - - - to this issue. The PERB found there
13 was a past practice of no reduction in the salary of
14 seasonal employees. That was the law, so to speak,
15 with respect to seasonal employees. So if the state
16 wanted to reduce those wages, they had to negotiate.
17 And the question is, was that negotiated in the side
18 letter. And my response is a resounding no, it was
19 not.

20 CHIEF JUDGE DIFIORE: Thank you, counsel.

21 MS. KING: Thank you.

22 CHIEF JUDGE DIFIORE: Mr. Quinn.

23 MR. QUINN: Yes, thank you.

24 And just very, very briefly. Because they are
25 nonstatutory employees, their wages are set by the budget

1 director pursuing to a statutory authority, whether higher
2 than, the same as, or lower than. So that when the budget
3 director reduced the wages, the budget director was acting
4 in accordance with his statutory authority.

5 JUDGE GARCIA: What about the - - -

6 JUDGE ABDUS-SALAAM: What about the past
7 practice, counsel?

8 JUDGE GARCIA: Yeah - - -

9 MR. QUINN: Now, the past practice
10 analysis, which was just raised, this entire case was
11 decided on the affirmative defense of duty
12 satisfaction. PERB has not yet addressed the past-
13 practice analysis. So the notion of whether there is
14 a past practice that somehow or another affects the
15 budget director's discretion, is not relevant at this
16 time in this proceeding. The question is whether the
17 - - -

18 JUDGE ABDUS-SALAAM: But if we agree with
19 you, then we'll never get to that issue, will we?

20 MR. QUINN: That's correct.

21 JUDGE RIVERA: Did the ALJ get to the
22 issue?

23 MR. QUINN: The ALJ's decision was reversed
24 - - - let me rephrase that. The ALJ's decision was
25 reversed insofar as the Board found that the past-

1 practice analysis that she relied on was not the
2 dispositive analysis applicable - - - the not - - -
3 dispositive analysis was the affirmative defense.

4 JUDGE RIVERA: But was the ALJ's analysis
5 of the past practice in accord with - - -

6 MR. QUINN: No. Well - - -

7 JUDGE RIVERA: Go ahead.

8 MR. QUINN: In my brief - - -

9 JUDGE RIVERA: Yeah.

10 MR. QUINN: - - - I have cited a decision
11 that involves a picnic case. And for many, many
12 years, the Department of Health would host a picnic
13 at the discretion of the commissioner of the
14 Department of Health. And they would go to the
15 Department of Health and say, can we have the picnic?
16 That Department of Health would say, okay, okay. And
17 for twenty years, the Department of Health hosted a
18 picnic until the year in issue. And the Department
19 of Health said, no.

20 It was the exercise of discretion that gave
21 rise to the practice, not the benefit. And that goes
22 to Mr. - - - Judge Fahey's point about the twenty-
23 five percent reduction. It's the discretion that's
24 at issue here.

25 Thank you very much, Your Honors.

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CHIEF JUDGE DIFIORE: Thank you.

MR. QUINN: Unless you have more questions,
I'm sorry.

CHIEF JUDGE DIFIORE: No, thank you.

JUDGE FAHEY: No, you want to end there, I
think; that's a good spot for you.

(Court is adjourned)

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C E R T I F I C A T I O N

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Kent v. Lefkowitz, No. 63 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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