STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SUFFOLK COUNTY COURT EMPLOYEES ASSOCIATION, INC.; NEW YORK STATE SUPREME COURT OFFICERS ASSOCIATION, ILA, LOCAL 2013, AFL-CIO; NEW YORK STATE COURT OFFICERS ASSOCIATION; CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO; COURT OFFICERS BENEVOLENT ASSOCIATION OF NASSAU COUNTY; ASSOCIATION OF SUPREME COURT REPORTERS; NINTH JUDICAL DISTRICT COURT EMPLOYEES ASSOCIATION; DISTRICT COUNCIL 37, LOCAL 1070, AFSCME, AFL-CIO; COURT ATTORNEYS ASSOCIATION OF THE CITY OF NEW YORK; NEW YORK STATE COURT CLERKS ASSOCIATION, INC.

Charging Parties,

- and -

NEW YORK STATE UNIFIED COURT SYSTEM,

Respondent.

CASE NOS. U-38081, U-38084, U-38087, U-38090, U-38091, U-38093, U-38096, U-38099, U-38104, U-38107, U-38129

ARCHER, BYINGTON, GLENNON, & LEVINE (MARTY GLENNON & PAUL K. BROWN of counsel), for SUFFOLK COUNTY COURT EMPLOYEES ASSOCIATION, INC.

RICHARD E. MULVANEY (MARIA B. MORRIS & STEPHEN G. DeNIGRIS of counsel), for NEW YORK STATE SUPREME COURT REPORTERS, ILA, LOCAL 2013, AFL-CIO

PAT BONANNO & ASSOCIATES, P.C. (PAT BONANNO of counsel), for NEW YORK STATE COURT OFFICERS ASSOCIATION

DAREN J. RYLEWICZ, GENERAL COUNSEL (STEVEN M. KLEIN of counsel), for CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO

DAVIS & FERBER, LLP (ALEX KAMINSKI of counsel), for COURT OFFICERS BENEVOLENT ASSOCIATION OF NASSAU COUNTY

CLIFTON BUDD & DEMARIA, LLP (DOUGLAS CATALANO & STEFANIE R. TOREN of counsel), for ASSOCIATION OF SUPREME COURT REPORTERS

GREENBERG BURZICHELLI GREENBERG P.C. (SETH H. GREENBERG of counsel), for NINTH JUDIICAL DISTRICT COURT EMPLOYEES ASSOCIATION and COURT ATTORNEYS ASSOCIATION OF THE CITY OF NEW YORK

ROBIN ROACH, GENERAL COUNSEL (MICHAEL COVIELLO of counsel), for DISTRICT COUNCIL 37, LOCAL 1070, AFSCME, AFL-CIO

PITTA LLP (JOSEPH BONOMO & STEPHEN McQUADE of counsel), for NEW YORK STATE COURT CLERKS ASSOCIATION, INC.

PAUL WEISS RIFKIND WHARTON & GARRISON LLP (BRUCE BIRENBOIM, LINA DAGNEW, GREGORY F. LAUFER, ELIZA P. STRONG & LISA M. VELAZQUEZ of counsel), for NEW YORK STATE UNIFIED COURT SYSTEM

DECISION OF ADMINISTRATIVE LAW JUDGE

On August 27, 2021, the Suffolk County Court Employees Association, Inc. (SCCEA) filed an improper practice charge (U-38081) alleging that the New York State Unified Court System (UCS) violated § 209-a.1(a) and (d) of the Public Employees' Fair Employment Act (Act) when, without bargaining, it announced the implementation of a mandatory COVID-19 testing requirement for unvaccinated non-judicial employees (Testing Policy), and the implementation of a mandatory COVID-19 vaccination program for non-judicial employees (Vaccination Policy), together, the Policies.

On August 30, 2021, the New York State Supreme Court Officers Association, ILA, Local 2013, AFL-CIO (SCOA) filed an improper practice charge (U-38084) alleging that UCS violated § 209-a.1(d) of the Act by implementing the Policies.

On August 31, 2021, the New York State Court Officers Association (NYSCOA) filed an improper practice charge (U-38087) alleging, as amended, that UCS violated § 209-a.1(d) of the Act by implementing the Vaccination Policy without bargaining.

On September 1, 2021, the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) filed two improper practice charges; the first (U-38090) alleging that UCS violated § 209-a.1(d) of the Act by implementing the Testing Policy without bargaining; the second (U-38091) alleging that UCS violated § 209-a.1(d) of the Public Employees' Fair Employment Act (Act) by implementing the Vaccination Policy without bargaining.

On September 2, 2021, the Court Officers Benevolent Association of Nassau County (COBANC) filed an improper practice charge (U-38093) alleging that UCS violated §§ 209-a.1(a) and (d) of the Act by implementing the Policies without bargaining.

On September 2, 2021, the Association of Supreme Court Reporters (ASSCR) filed an improper practice charge (U-38096) alleging, as amended, that UCS violated § 209-a.1(d) of the Act by implementing the Policies without bargaining.

On September 7, 2021, the Ninth Judicial District Court Employees Association (NJDCEA) filed an improper practice charge (U-38099) alleging that UCS violated § 209-a.1(d) of the Act by implementing the Policies without bargaining and also alleged that UCS refused to engage in impact bargaining.

On September 13, 2021, District Council 37, AFSCME, AFL-CIO, and its affiliated Local 1070 (DC 37) filed an improper practice charge (U-38104) alleging that UCS violated § 209-a.1(d) of the Act by implementing the Policies without bargaining and also alleged that UCS refused to engage in impact bargaining.

On September 13, 2021, the Court Attorneys Association of the City of New York (CAA) filed an improper practice charge (U-38107) alleging that UCS violated § 209-a.1(d) of the Act by implementing the Policies without bargaining and also alleged that UCS refused to engage in impact bargaining.

On September 29, 2021, New York State Court Clerks Association, Inc. (CCA) filed an improper practice charge (U-38129) alleging, as amended, that UCS violated §§ 209-a.1(a) and (d) of the Act by implementing the Policies without bargaining and also alleged that UCS refused to engage in impact bargaining.

UCS filed answers to all of the charges, in which it both admitted and denied material facts and raised several affirmative defenses, including that public policy and constitutional mandates are prohibited subjects of bargaining; the Policies are not mandatory subjects of bargaining, as they relate to UCS' core mission that outweighs the employees' asserted interests; in an emergency situation such as this, UCS had managerial discretion to enact the Policies to safeguard public health; and any asserted constitutional and privacy rights are beyond PERB's jurisdiction.

By letter dated October 22, 2021, I advised all parties that the charges would be consolidated. A hearing was held on April 5, 12, 13, and 14, 2022, during which all parties were present and represented by counsel. Thereafter, the parties filed post-hearing briefs on November 4, 2022.

FACTS

The New York State Unified Court System operates all levels of state courts in the State of New York, which hear and decide legal cases and controversies, as

prescribed by the New York State Constitution.[1] Historically, UCS has conducted its operations in-person. The charging parties each represent different bargaining units of non-judicial employees of UCS. UCS has around 1200 paid judges and around 14,000 non-judicial employees. Non-judicial employees have a variety of duties and titles, including but not limited to court officers, court clerks, reporters, interpreters, clerical staff, and technological staff.

As a result of the emergence of COVID-19 and in accordance with guidance from state and federal public health officials,[2] beginning in or around March of 2020, UCS began instituting substantial changes to its operations.[3] As a result, proceedings in many non-essential matters were halted or postponed, and many proceedings were conducted virtually. A return to larger in-person operations began in May of 2020 and expanded over that year. As part of the effort to return to in-person operations, UCS implemented various policies aimed at protecting health, including use of personal protective equipment, social distancing, increased sanitization and hygiene protocols, and reconfiguring physical spaces.[4]

During the summer of 2021, UCS communicated to its employees its intention to implement a policy, which would require employees, if not vaccinated, to provide proof of a COVID-19 test result, issuing memoranda explaining the new policy. On August

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[1] Tr, at 487, 490-91; *see also* Respondent's Ex 45.
[2] The record contains studies and operational guidance produced contemporaneously during the COVID-19 pandemic by various public health agencies, such as the U.S. Centers for Disease Control, the U.S. Occupational Safety and Health Administration, and the New York State Department of Health, *see generally* Respondent Exs.12, 15, 16, 17, 20, 22, 36.
[3] *See generally* Respondent's Exs 1-10, 13.
[4] Respondent's Ex 13.

18, 2021, UCS issued a memorandum to All Non-Judicial Staff,[5] regarding the new mandatory COVID-19 testing program. Under the Testing Policy, non-judicial staff who were not vaccinated against COVID-19 would be required to test weekly for COVID-19 at a "licensed medical facility" and provide proof of such test to UCS no later than the next business day; those who were vaccinated against COVID-19 would not be required to test. Staff subject to the Testing Policy were directed to coordinate with their supervisor to take their test during their regularly scheduled work time and would be granted one hour of excused leave to get tested. They could also choose to test outside of work hours, but they would not be granted leave or compensatory time under this option. The Testing Policy also states that employees who were not compliant would be designated as "unfit for service;" they would be charged annual or compensatory leave, and those without leave would have their "pay docked."[6] The Testing Policy also allowed staff to request from UCS a medical exception by providing a letter from a medical health provider, and if approved, an employee would "not be required to submit proof of testing for the period of time prescribed by the medical health provider."[7] On September 7, 2021, the Testing Policy became effective.

On August 25, 2021, by email to its employees, UCS announced that all employees would be required to be vaccinated for COVID-19, effective September 27,

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[5] Joint Ex 2. UCS expressed "supplemental information" regarding the mandatory testing in a memorandum dated September 1, 2021, which is included in the record as Joint Ex 4. A policy pertaining to judicial staff was outlined in a separate document issued the same day, which is contained in the record as Joint Ex 1.
[6] Joint Ex 2.
[7] *Id.*

2021.[8] The email set forth that, "absent a valid medical or religious exemption, judges and non-judicial personnel will be required to provide proof of full vaccination [and those] who receive a medical or religious exemption will have to submit proof of a weekly COVID test."[9]

In a memorandum dated September 10, 2021, UCS set forth the terms of its new mandatory COVID-19 vaccine requirement for all non-judicial personnel (Vaccination Policy).[10] The Vaccination Policy required that staff provide proof of either full COVID-19 vaccination or a first vaccine dose with the second within about three weeks, by September 27, 2021. Staff who had not yet received their second dose of vaccine or who were waiting for a response from UCS regarding an exemption request would be required to continue testing pursuant to the Testing Policy. The Vaccination Policy provided a process for staff to apply for medical and religious exemptions. Employees would also be eligible for excused leave and/or compensatory time for vaccination, but only up to 3.5 hours for each vaccination appointment, for which proof is provided. Further, the Vaccination Policy states that those are non-compliant may be "absent without authorization," that approval to charge leave could be denied until an employee has "taken steps to remedy their non-compliance," and "[c]ontinued failure to comply may result in disciplinary action, up to and including termination."[11]

From August through December of 2021, Charging Party representatives met and communicated with UCS on various occasions to discuss the implementation,

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[8] Joint Ex 3.
[9] *Id.*
[10] Joint Ex 5.
[11] *Id.*

effects, and impact of the Policies; they also communicated by telephone, email and letter. Each of the Charging Parties submitted correspondence to UCS requesting bargaining over the Policies and other related topics including the effects and impacts thereof; Respondent submitted exhibits that show UCS engaging in discussions with various parties regarding ramifications of the Policies.[12]

Throughout the fall of 2021 and into the winter of 2022, however, UCS changed its position on its willingness to meet with the Charging Parties to discuss the Policies. On September 15, 2021, UCS Director of Human Resources and Deputy Director for Labor Relations, Carolyn Grimaldi, sent an email to representatives of all charging parties, which stated:

> Unfortunately, given the litigation that's recently been filed by several of the bargaining units challenging the Testing and/or Vaccination Policies, I am unable to meet or further discuss these matters with the group at this time.
>
> Should anyone have specific questions or issues that they would like to bring to our attention, I am happy to accept them via email and to the extent a response is requested and available, I will certainly provide one.[13]

On October 21, 2022, by electronic mail to various Charging Party representatives, Grimaldi stated the following:

> In light of the discussions that have taken place in conferences w/the ALJ on the underlying PERB matters, I wanted to confirm our commitment to engage in impact bargaining as to either/both of these policies. We obviously understand that there are pending challenges on the decisional bargaining aspect. However, in an effort to try to move these cases along as expeditiously as possible and

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[12] *See generally* Respondent's Exs 46-51.
[13] Joint Ex 6.

> narrow the issues as to the ultimate determination(s) to be reached by PERB, we are ready, willing and able to set dates to meet for purposes of bargaining over the impact of these policies on the terms and conditions of employment of your bargaining unit members.[14]

Thereafter on January 19, 2022, Grimaldi, by electronic mail to counsel for NJDCEA and CAA stated the following:

> As far as the impact bargaining, we have unfortunately had to shift gears to litigation prep given that the hearing dates are next week so further meetings on these issues will have to be put on hold [at least] until the hearing is concluded – I will need to reassess with my principals on where we are with this process once we get past the hearing.[15]

Four charging party representatives testified in support of the improper practice charges: Susan Radosh, CSEA's Deputy Director of State Operations; Patrick Cullen, President of the New York State Supreme Court Officers Association, Inc.; Dennis Quirk, President of the New York State Court Officers Association; and Eric Allen, President of the Association of the Supreme Court Reporters in the City of New York. At the second day of hearing, the remaining Charging Parties asserted they would adopt the testimony of the witnesses called by other Charging Parties, as in this consolidated hearing, "[w]itnesses who have...testified or will testify as [part] of the Charging Parties' cases in chief did so and will do on the record for all Charging Parties."[16] UCS called two witnesses to testify, its Chief of Administration Justin Barry and Director of Human Resources and Deputy Director for Labor Relations Carolyn Grimaldi.

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[14] NJDCEA Ex 2 and CAA Ex 2.
[15] NJDCEA Ex 4 and CAA Ex 4.
[16] Tr, at 290.

The four witnesses called by the charging parties testified similarly and consistently on various topics. When asked on cross-examination, they generally acknowledged that COVID-19 posed a global health crisis, had an unprecedented impact on society, and that it disrupted UCS normal operations, affirming multiple ways in which UCS operations had changed because of COVID-19. When asked, they did not deny that given the nature of the work of employees in their bargaining units, some of their duties and functions must be performed in-person, and there were concerns about the safety of employees as the courts resumed more in-person operations. They testified that UCS did not negotiate over the Policies, and that they demanded UCS negotiate regarding the Policies.

Justin Barry, UCS Chief of Administration, testified regarding the onset of the COVID-19 pandemic in March of 2020 and its impact on UCS operations, stating that based upon the guidance from the executive branch, public health agencies, and UCS administrative orders aimed at protecting public health, UCS "significantly altered" its operations by moving to a situation where court appearances were predominantly in-person to one where most appearances were by video with very few in-person appearances in the courthouses.[17] Barry also described various efforts UCS undertook at that time "in an effort to mitigate the spread of COVID-19 in the court system including limiting functions of the UCS to only central matters, limiting jury proceedings and postponing any future jury proceedings, limiting motion practice and generally defining what the essential functions were for each type of trial court [and limiting

[17] Tr, at 494.

accordingly]."[18] Barry also noted that UCS then limited foot traffic and implemented social distancing. He explained that, initially, the courts were only hearing cases at the courthouses that were deemed "essential matters," certain criminal matters, evictions, mental health or commitment orders,[19] however, by the end of March, UCS began moving to virtual proceedings. Barry explained that virtual proceedings proved challenging, particularly in dealing with compelled witnesses or compelled litigants, *pro se* litigants; noting that certain types of proceedings are "constitutionally barred from participating by video such as criminal injury practice."[20] Barry explained that beginning in May of 2020, UCS started to bring operations back in person, implementing new protocol as part of this effort, such as the use of personal protective equipment and enhanced cleaning. Barry noted that the return to in-person operations was challenging; individuals who used the courthouses, including judges and employees, were reluctant to return, defendant organizations sued to try to stop the return to the courthouses.

Barry testified that UCS considered whether other safety protocols could have been used as an alternative to mandating vaccination, but ultimately concluded that the Vaccination Policy was the best way to ensure the courts could maintain full in-person operations as safely as possible, stating:

> [F]ollowing the [science.] The [science] said ["]vaccinate, vaccinate, vaccinate.["] The only way that you are going to, the best way to ensure the safety of everybody involved was getting as many people vaccinated in a location as possible. That is why we went in that direction.... We are an in-person

[18] Tr, at 504-05.
[19] Tr, at 518.
[20] Tr, at 526.

> operation. Yes, we did pivot and yes, we did change over to remote operations. It became apparent very quickly, however, that there were significant disadvantages with remote operations...[W]e had complaints non-stop about the ability of judges and lawyers to actually see and hear defendants who were in custody in a loud jail cell. We had complaints non-stop from lawyers about access to their clients. There were constant glitches and problems with our platforms and the location of evidence when we were required to [do] hearings pursuant to emergency orders from the governor.... [I]f you just got three people talking to each other in a normal conference, yeah, remote has its place. But when you are talking about the true business of the court, when you are talking about proceedings on the record, there is no substitution to in-person appearances.[21]

Barry testified that UCS did not engage in collective bargaining before implementing the Policies, explaining that UCS "felt that time was of the essence...this was so critical and such a critical condition of employment to further [our] mission."[22]

Concerning why UCS does not mandate vaccines for certain individuals using the courts, such as jurors, litigants, lawyers, and other members of the public, Barry stated:

> The legal protection under the law keeps us from doing so, we cannot limit members of the public and litigants from accessing our facilities and our resources, nor can we prevent those who are unvaccinated. We are prevented we think by our reading of the constitutional and case law on this from doing so. [Given that unvaccinated people use the courts,] we maintain other strategies for mitigating COVID infection and transmission....The science tells us that despite breakthrough infections of what we are told is that the vaccine continues to be safe and effective and prevents infection and prevents serious illness and death....When we limit the infection of our employees and our judges they remain healthy, they remain able to work and it is a safer

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[21] Tr, at 631-32.
[22] Tr, at 639.

environment for everybody.[23]

Barry stated that UCS has not required vaccination as a precondition to using the courts, as based upon its interpretation of constitutional case law, UCS "cannot limit members of the public and litigants from accessing our facilities and our resources [including those] who are unvaccinated."[24] On cross-examination, Barry also stated that there were judges within the UCS system who had not been vaccinated for COVID-19 and had not been granted a medical or religious exemption, but who were permitted to preside remotely.

Barry also discussed the increased COVID positivity rates in the summer of 2021, including an increase in COVID-19 cases reported at UCS facilities. He noted that when COVID-19 was reported within the courts, it meant employees who may have come into contact with an infected individual would be required to quarantine, and as a result, they were unavailable to work for a period of time, which would then have consequences on the court's ability to function.[25] He explained how this increase in COVID-19 influenced UCS' decision to move from encouraging vaccines to mandating them, stating:

> I like many other individuals...thought that the vaccines were having an enormous impact on COVID-19 positivity rates. That we were finally getting a handle on the pandemic. That it was very quickly going into the rear-view mirror, but I distinctly remember in and around the July 4th holiday, the Delta variant started to be recorded throughout the United States and New York State positivity rate started going up in the general population and positivity rate pursuant to the Delta variant of the virus started going up in the UCS, right

[23] Tr, at 633-35.
[24] Tr, at 633.
[25] Tr, at 615-17.

> around July 4th, thereafter through the summer, through the end of the summer. [At that point], we were strongly encouraging individuals to get vaccinated. We weren't mandating a vaccination like other [entities] in government and like the guidance that we were getting. We thought that if we strongly encouraged the individuals and watched the vaccination rate go up the COVID-19 rates would go down. It becomes clear, however, and by the way, we thought that our courthouses would be able to open up and particularly get to a place where we could start conducting trials, a critical piece of our court operations.... It became clearer after July 4th that we still have COVID-19 to deal with. We were still going to have to deal with litigants very reluctant to come into our courthouses and access the [forum] for cases in controversy, decisions on cases [in] controversy, and we had to do something.[26]

Finally, Barry addressed the compulsory conditions under which some individuals must report to the court houses and how this impacted the decision to implement the mandatory testing and vaccination policies, stating:

> [P]eople are compelled to come into our courthouse. You don't necessarily come into one of our facilities voluntarily when you are a litigant. You are subpoenaed, you are arrested and you can be compelled to come into the courthouse. You may or may not be vaccinated and we want to make sure that our operations continue to be safe and we want to make sure that our operations continue to have as minimal impact as possible so that we don't....go [back to] a place where we don't have full capacity of our operations.[27]

Carolyn Grimaldi, UCS Director of Human Resources and Deputy Director for Labor Relations, gave substantial testimony on her discussions with the charging parties regarding the Policies. Concerning the meetings that took place in August of 2021, Grimaldi stated that the meeting on August 5, 2021 was meant for her to explain

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[26] Tr, at 587-89.
[27] Tr, at 638-39.

and discuss the new Testing Policy. She noted that the charging parties had many questions, and "I distinctly remember saying [during the meeting] that I would be treating this as a demand from all of them to engage in impact bargaining....I wanted them all to send me letters demanding impact bargaining [given] the urgency of the situation and how quickly we kind of needed to get the policy rolled out...that meeting really it involved me explaining the policy."[28] She stated that, when the parties met, the Policy had required that employees who were not vaccinated would get tested on their own time and at their own expense, and the Charging Party representatives asked about ways of covering the expense of testing as well as paid leave time to test. Grimaldi noted that she met again with the charging parties on August 10, 2021, and at this meeting, she responded to the "various questions, concerns, demands that the unions had raised at the prior meeting."[29] In particular, Grimaldi noted the following:

> We had agreed that we would provide one hour of paid leave to employees for purposes of going to get tested. Again, those that did not elect to become vaccinated. We were going to provide an hour of paid leave for individuals to go get tested each week. They would arrange that with their supervisor in terms of what worked best for their schedule and in terms of court operations and that we would provide some resources for testing sites that would provide testing at no cost. I also indicated that we were continuing to explore the possibility of whether the on-site testing or working with state or local agencies to partner with us and try to make testing more accessible, so I indicated during that meeting that was something that was ongoing. The unions of course had more questions and more demands. I'm not sure that they were totally satisfied with the one hour of paid leave, but that's what we ended up with as a result of that first meeting, speaking with my principals and at that time that

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[28] Tr, at 681.
[29] Tr, at 684.

policy ended up being rolled out.[30]

Grimaldi stated that after the meetings in August, she initially planned to meet with the charging parties again in mid-September regarding impact and issues with implementation of the Testing Policy, however, she cancelled the meeting in September because "there were at least one if not more applications for injunctions filed by the unions with regard to the vaccine mandate policy. So...I indicated to the unions I couldn't meet with them at this time because of the pending TROs that were in the various forums...I believe at that point they were all filed with PERB."[31] Grimaldi stated that, thereafter, in November and December of 2021, she contacted the charging parties again, stating, "all of our contracts are expired so we had an opportunity within our fiscal means and that fiscal year to reach an agreement to extend the contract out for two more years and with that I reached out to the unions to also indicate let's try to get back on track with impact and start talking about the impact of...the vaccine mandate."[32]

Regarding whether UCS engaged in impact bargaining with the charging parties regarding the Policies, Grimaldi stated:

> [T]he vaccine testing policy...we met initially for those two meetings. Shortly thereafter, that policy became replaced by the vaccine mandate, so impact bargaining really turned to that policy. And so in the context of sitting down in our meetings in November and December, the items that were on the table and up for discussion and discussed by the parties across the table were the impact of the vaccine mandate including paid leaves, use of leave time, separation from service, coverage of health benefits while people were

[30] Tr, at 684-85.
[31] Tr, at 694-95.
[32] Tr, at 696.

on leaves, an appeals process for exemptions.[33]

Grimaldi also discussed proposals that she sent to various charging parties regarding the impact of the Policies, noting that she "sent pretty much the same email [with a proposal attached] to all of the unions that are part of this proceeding," except CSEA because they were already discussing these issues as part of their negotiations for a collective bargaining agreement.[34]

When asked whether, since January of 2022, UCS had refused to schedule a time to meet with the Charging Parties due to the hearing in these charges, Grimaldi testified that "right now we don't have availability to meet with impact bargaining because I'm sitting in a hearing. Yes, I can't do two things at once, unfortunately."[35] When it was noted that hearing had not been scheduled for all the dates since UCS stopped scheduling or meeting with the Charging Parties, Grimaldi testified:

> I'm also the Director of Human Resources and the Deputy Director of Labor and I think all of the unions are very well aware of how many other [improper practice charges], grievances, arbitrations, other court proceedings going on so I made very clear that I would be meeting with the unions for contract negotiations after the budget had been passed and since have set up dates with many unions starting in May to do that and with impact bargaining I indicated very clearly right now I must turn my attention to these proceedings. Yes, there have been no dates scheduled in between for impact bargaining.[36]

Grimaldi stated that when UCS created drafts of its form to request a religious or medical exemption from the Vaccination Policy, she shared it with the unions, as UCS

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[33] Tr, at 697-98.
[34] Tr, at 700.
[35] Tr, at 718.
[36] Tr, at 718-19.

"wanted to get the information out to the unions as quickly as possible and for them to obviously review the form and if they had questions, concerns, feedback, to let us know."[37] Grimaldi noted that none of the unions had filed for impasse regarding the negotiations over the policies or their impact.

DISCUSSION

The main questions presented here are whether UCS was required to bargain with the charging parties regarding its decisions to require employees in the bargaining units to test and vaccinate for COVID-19, whether it was required to bargain regarding the Policies it used to implement its decisions to mandate testing and vaccine, and whether UCS failed to bargain regarding the impact of the Policies on terms and conditions of employment of the employees in the bargaining units of DC 37, CAA, NJDCEA, and CCA, who so alleged. It is not in dispute that the Policies are newly implemented, and, clearly, prior to their implementation, bargaining unit employees were not subject to COVID-19 testing or vaccination requirements. Further, it is not in dispute that UCS did not bargain with the charging parties regarding the implementation of the Policies; the question is whether it had a duty to bargain.

As a preliminary matter, I address UCS' contention that the charging parties did not meet their burden of showing a violation of the Act because, according to UCS, "none of them presented any direct witness testimony and/or documentary evidence to support its allegations."[38] This is simply not true; the Charging Parties each put into evidence multiple joint exhibits as well as individual exhibits sufficient to make out a

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[37] Tr, at 693.
[38] Respondent's Brief, at 23.

prima facie case. The UCS asserts that the Charging Parties should not have been permitted to adopt the testimony of other Charging Party witnesses in support of their case, particularly, only electing to do so after those witnesses had completed their testimony. However, even if I were to find the testimony given by the Charging Party representatives applied only to their respective unions, I still would find that the each and every charging party presented sufficient documentary evidence to meet their burden of proof setting forth a *prima facie* case that UCS newly created and implemented the Policies and that it did so unilaterally. Contrary to UCS' implication otherwise, a party is not required to put on witness testimony to make out a charge at PERB where documentary evidence will suffice.[39] Further, where facts such as UCS' decisions to mandate vaccines and testing are undisputed, no purpose would be served by allowing repetitive testimony to that effect.

The next question is whether UCS was required to bargain with the charging parties regarding its decision to create the Policies or if it was privileged to do so unilaterally, without bargaining. Generally, an employer is required to bargain with a certified employee representative before implementing a new work rule constituting a change in bargaining unit employees' terms and conditions of employment. However, an employer may be privileged to implement a new work rule without bargaining in

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[39] In support of its contention, UCS cites to two decisions where witness testimony was not given and where the ALJ or the Board noted that such testimony could have been helpful in establishing the elements of the charges. *See State of New York*, 33 PERB ¶ 3024 (2000); *State of New York (Div of State Police)*, 35 PERB ¶ 4546 (2002). However, such testimony is not required here where I find that the documentary evidence presented by the Charging Parties is sufficient, standing alone and without testimonial evidence.

circumstances where the subject matter is either a prohibited or permissive subject of bargaining.[40] PERB has held that a work rule is "a determination or pronouncement made by an employer...which affects the employees' delivery of employment services and carries with it the explicit or implicit threat of discipline or other employment consequence for noncompliance."[41] Both Policies, on their face, are clear that they are newly created and implemented policies, and they each state that employees who are not in compliance could be subject to potential loss of pay or leave accruals, disciplinary action and loss of employment. Therefore, I find that both Policies constitute work rules.

UCS has asserted two bases under which its unilateral implementation of the Policies was permitted. First, UCS argues that negotiation regarding the Policies is prohibited by the constitutions of the State of New York and the United States. In the alternative, UCS contends that bargaining regarding the Policies would have been nonmandatory under PERB's balancing test, which weight the extent to which an employer's actions were taken in furtherance of its "core mission" against the impact or intrusion upon the affected employees' protected interests.

As to its argument that bargaining regarding the Policies is prohibited, UCS argues that it "is obligated under Articles I and VI of the New York State Constitutions and the First, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution to 'guarantee' access to the courts of this State,"[42] and because "the New York State Constitution expressly authorizes it to 'establish standards and administrative policies

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[40] *Bd of Educ of the City Sch Dist of the City of New York v NYS Pub Empl Relations Bd*, 75 NY2d 660, 23 PERB ¶ 7012 (1990).
[41] *State of New York (Div for Youth)*, 31 PERB ¶ 3052, 3109 (1998).
[42] Respondent's Brief, at 30, quoting NY Const. Art. VI § 18.

for general application throughout the state.'"[43] As such, UCS argues that policies it "enacts related to its constitutional obligation to provide the public with access to the courts and its express authority to administer the courts in this State" are public policy that do not allow for negotiation.[44]

I find that a prohibition against bargaining here has not been established. The courts "have long recognized the 'strong and sweeping policy of the State to support collective bargaining under the Taylor Law,' and therefore, barring certain specific exclusions, it is generally presumed that "all terms and conditions of employment are subject to mandatory bargaining.'"[45] Although "some subjects are excluded from collective bargaining as a matter of policy, even where no statute explicitly says so," this is rare and requires the "express[ion of] a policy so important that the policy favoring collective bargaining should give way."[46] Indeed, "the bargaining mandate may be circumscribed by "plain" and "clear" legislative intent or by statutory provisions indicating the Legislature's "inescapably implicit" design to do so."[47] Although UCS' mission may derive from constitutional duties, UCS has not shown any provision of either state or federal constitutions that explicitly prohibit collective bargaining of the subject matter at

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[43] Respondent's Brief, at 30, quoting NY Const. art. VI § 28.
[44] Respondent's Brief, at 30.
[45] *City of Watertown v. NYS Pub Empl Relations Bd,* 95 NY2d 73, 79, 33 PERB ¶ 7007, 7008 (2000). In outlining the State of New York's law in support of collective bargaining discussed herein, I underscore that the State's Court of Appeals fully recited and reaffirmed this precedent as recently as a few months ago. *See City of Long Beach v NYS Pub Empl Relations Bd*, 39 NY3d 17, 55 PERB ¶ 7014 (2022).
[46] *City of New York v Patrolmen's Benev Assn of the City of New York*, 14 NY3d 46, 58, 42 PERB ¶ 7511, 7546 (2009) (internal quotations omitted).
[47] *Schenectady Police Benev Assn v NYS Pub Empl Relations Bd*, 75 NY2d 619, 627, 28 PERB ¶ 7005, 7012 (1995) (internal citations omitted).

issue here, nor an "inescapably implicit" expectation that bargaining be prohibited. Therefore, I find that neither the New York Constitution nor the United States Constitution put forth a prohibition, either explicit or implicit, on bargaining terms such as the Policies at issue here.

I now turn to the question of whether the Policies address mandatory or nonmandatory subjects of bargaining, noting that the Policies present two distinct issues: 1) whether or not UCS was required to bargain regarding its *decisions* to require COVID-19 testing and vaccination; and 2) whether or not UCS was required to bargain over the *procedures* inherent within the Policies, which were used to implement the decisions to require testing and vaccination.

The Board has set forth as follows the balancing test for determining whether a particular subject is mandatorily negotiable under the Act:

> [W]e examine the record to determine whether there is preponderance of credible evidence to demonstrate that the employer's need for a particular mission-related work rule outweighs the effect that the rule has on the employees' terms and conditions of employment. The mere fact that a work rule has a relationship to an employer' s mission does not permit an employer to act unilaterally in any manner it deems appropriate. Rather, an employer can unilaterally impose a work rule only to the extent that the unilateral action does not significantly or unnecessarily intrude on the protected interests of bargaining unit employees under the Act. Therefore, under the balancing test the burden rests with the employer to demonstrate that the new work rule does not go beyond what is necessary to further its mission.[48]

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[48] *City of Albany*, 42 PERB ¶ 3005, 3007 (2009).

As explained by the Third Department, "the defining mission of UCS is to provide an accessible forum to every litigant seeking redress of grievances."[49] The record evidence demonstrates that the Policies were implemented in response to the COVID-19 pandemic. UCS followed guidance from state and federal public health officials as to how to best respond to COVID-19, with a goal of controlling the spread of the virus and reducing the incidence of serious illness for users of UCS facilities, both employees and members of the public. Throughout the period when COVID-19 first emerged as a concern in New York, in early 2020, up until the time the Policies were implemented, UCS used various safety protocols to meet these goals, such as the use of personal protective equipment, social distancing, increased sanitization and reconfigured physical spaces

UCS witnesses testified that the Policies were implemented after following the guidance from public health authorities regarding how to best respond to COVID-19. As Barry testified, UCS was concerned about litigants who were reluctant to enter the court houses and how to address these concerns. Barry also underscored the fact that many people come into the courthouses involuntarily as they are compelled by litigation brought against them, or they are there as criminal defendants, and given the reasons why such individuals are in the courts, UCS had a real need to keep their facilities safe. Barry explained that the decision to implement the Policies was made against the backdrop of the Delta variant's emergence and during a period when the courts were experiencing increases in reported COVID cases at its facilities, which hindered the

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[49] *Lippman v NYS Pub Empl Relations Bd,* 746 NYS2d 77, 85, 35 PERB ¶ 7014, 7026 (3d Dept 2002) *lv to appeal den* 99 NY2d 503 (2002).

courts' ability to operate in-person because personnel who encountered infected individuals were required to quarantine and not be at work. While it is undisputed that the courts operated for a time with very little in-person operations, Barry credibly testified about the reasons virtual operations were not ideal or sufficient, such as the challenges posed by using virtual technology, difficulties posed to communicating clearly and presenting evidence necessary to perform court proceedings. He noted that if COVID-19 infections were more active within the courts, they would have to cease "full capacity" operations, and vaccination of UCS employees helped to ensure full capacity operations continued.[50] As such, I find that the record supports UCS' position that the Policies were implemented in response to COVID-19 and in furtherance of its "defining mission...to provide an accessible forum to every litigant seeking redress of grievances."[51]

To the extent the charging parties argue that because the courts performed some of its operations virtually at the onset of COVID-19, it cannot establish that "access to the courts" requires physical access, I disagree. It is undisputed that throughout its existence, the courts in New York State have otherwise operated overwhelmingly in-person; UCS demonstrated that the courts moved to virtual and hybrid for a short period in response to the risks associated with the COVID-19 pandemic, at the advice and directives of state and federal public health authorities. However, as discussed above, UCS found the virtual proceedings less than ideal, and it swiftly took steps to reintegrate

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[50] Tr, at 639.
[51] *Lippman,* 746 NYS2d 77, at 81, 35 PERB ¶ 7014, at 7026.

in-person operations. Further, UCS established that the Policies are more effective than, for example, social distancing and use of personal protective equipment, at keeping the courts safer from a public health standpoint, and therefore, more accessible.

As to the charging parties' argument that UCS does not require everyone accessing its courts and facilities to be vaccinated and has not required vaccination of employees in the past, Barry explained that based upon UCS' understanding of constitutional protections, it is not permitted to bar the public from accessing the courts, and, therefore, it may not require vaccination to enter the courts. I defer here to UCS' interpretation of its constitutional obligation to allow access to the courts, and based thereupon, I find that its explanations present rational bases for not requiring all individuals entering the courts to face the same mandatory COVID testing and vaccines as do the employees at issue here. As to the judges who are not vaccinated and have been permitted to work remotely, UCS asserts that the Charging Parties have not established that UCS has the authority to discipline judges who fail to comply with a parallel vaccination policy applicable to them.[52] While UCS could have affirmatively presented its own evidence that it is unable or unauthorized to discipline judges for failure to vaccinate, I do not find this evidence necessary as the disciplinary consequences to judges is not an issue before me. Moreover, the fact that unvaccinated judges were presiding remotely, not in person, is consistent with UCS' stated desire of safeguarding the court facilities.

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[52] Respondent's Brief, at 15.

The charging parties contend that the Policies touch on various employee interests, including freedom from "unwanted medical intrusions,"[53] and that it affects terms and conditions of employment, such as use of leave accruals, potential discipline and job loss for failing to comply with the Policies. However, none of these important employee interests outweigh UCS' need to mandate COVID-19 testing and vaccinations, in furtherance of its core mission of providing an "accessible" forum for the public to redress grievances, one that is safe and open to the public. Further, in deciding to mandate employees to be vaccinated and tested for COVID-19, I find that UCS did not unnecessarily intrude on protected interests of the employees in the bargaining units, nor did the Policies go beyond what is necessary to further UCS' effort to ensure an accessible forum.

However, while I find that UCS was not required to bargain over its decisions to require employees in the bargaining units to vaccinate or test for COVID-19, the Policies were implemented using procedures which were the result of many other decisions, decisions which are not themselves a necessary consequence of UCS' decisions to require vaccination or testing.[54] In adopting the Policies, UCS unilaterally implemented extensive procedures that implicate various terms and conditions of employment, including leave time, compensation, discipline, job security, and medical privacy, all of which must be bargained. For example, both policies include processes through which employees may apply to be considered for religious and medical exemptions, with the selection criteria and process for application and consideration determined entirely by

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[53] Charging Parties' Brief, at 10.
[54] *See County of Nassau,* 27 PERB ¶ 3054 (1994).

UCS. Both Policies also include grants of specific amounts of compensatory time and/or excused leave for time spent testing or receiving a vaccination. Further, each Policy sets forth its own consequences for employee non-compliance. The Testing Policy states that employees who are non-compliant would be "unfit for service;" they would not be permitted to report to work and would have their leave charged or pay docked.[55] The Vaccination Policy states that those are non-compliant may be "absent without authorization," and that approval to charge leave could be denied until an employee has "taken steps to remedy their non-compliance," and "[c]ontinued failure to comply may result in disciplinary action, up to and including termination."[56] Further, both Policies unilaterally set forth effective dates without having also met PERB's criteria for doing so in the circumstance of a compelling need or emergency, as discussed below. Therefore, I find that UCS had a duty to negotiate with the charging parties over the chosen procedures used to implement the Policies, to the extent that they implicate terms and conditions of employment.

As PERB has long held, there may be a "distinction between an employer's decision [concerning a non-mandatory subject of bargaining] and the procedures used to implement that decision, including the consequences [thereof]."[57] Indeed, "[a]s a general rule, procedures to be followed by represented employees, even those attendant to nonmandatory subjects of bargaining, must be negotiated."[58] Although

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[55] Joint Ex 2.
[56] Joint Ex 5.
[57] *County of Nassau,* 27 PERB ¶ 3054, at 3119.
[58] *City of Cohoes*, 25 PERB ¶ 4506, at 4514 (1992), *affd* 25 PERB ¶ 3042 (1992); *see also City of Utica,* 25 PERB ¶ 4641 (1992); *Schalmont Cent Sch Dist*, 25 PERB ¶ 4504 (1992).

UCS met with the charging parties to inform them of the Policies and to hear their concerns, the record is clear that UCS unilaterally determined the procedures for implementation of the Policies.

To the extent that UCS argues bargaining over the Policies' procedures would have caused "inevitable delay that would...have been highly detrimental to the UCS' ability to keep its courthouses safe and open,"[59] it appears to take the position that its actions were driven by an emergency. However, UCS has not met the criteria under which an employer is permitted to take unilateral action in an emergency situation, specifically, in certain circumstances where time is of the essence, an employer may take unilateral action so long as, before implementation, it first attempts to bargain to impasse and, thereafter, indicates its willingness to subsequently continue negotiations.[60] Here, UCS did not bargain with the Charging Parties before implementation of the Policies, and it showed no genuine desire to negotiate thereafter.

Finally, I turn to the question of whether UCS failed to engage in impact bargaining regarding the Policies, as was alleged by some of the Charging Parties, specifically, DC 37, CAA, NJDCEA, and CCA, all of whom demanded that UCS bargain impact. In *County of Nassau,* a case bearing similarity to this one, the Board explained impact bargaining as follows:

> A demand for impact bargaining permits negotiation about those mandatorily negotiable effects which are inevitably or necessarily caused by an employer's exercise of a managerial prerogative.... As relevant here, the focus in an

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[59] Respondent's Brief, at 14.
[60] *See Wappingers Cent Sch Dist*, 19 PERB ¶ 3037 (1986); *see also New York City Transit Auth,* 19 PERB ¶ 4521 (1986), *affd* 19 PERB ¶ 3043 (1986); *City of Cohoes,* 25 PERB ¶ 4506 (1992); *City of Utica,* 25 PERB ¶ 4641 (1992).

> impact bargaining case is upon the degree of causation between the managerial right being exercised and the effects occasioned thereby. Our impact bargaining cases have all involved circumstances in which an employer has made a managerial decision but has not taken any further action. The effects of the managerial decision were directly and necessarily caused by the employer's managerial decision without any intervening cause or decisional implementation.... In an impact bargaining situation, the effects which are sought to be bargained simply flow from the exercise of managerial prerogative without benefit of or need for any separate decisional implementation.[61]

As discussed above, I find that the implementation of the Policies were decisions that did not flow directly from UCS' decision to mandate COVID-19 testing and vaccine; therefore, they were subject to independent decisional bargaining, and not impact bargaining. Based upon my review of the record, it is not clear which, if any, consequences are a direct result of UCS' managerial decision to test and vaccinate, and would thus require impact bargaining as distinct from the decisional bargaining over the procedures inherent in the Policies.

Even so, I note that UCS acknowledges a duty to engage in impact bargaining, as it asserts that "[e]ven though the Vaccination and Testing Policies are exempt from any mandatory collective bargaining requirement, it is appropriate to engage in impact bargaining with respect to the Policies," and that "UCS has initiated and agreed to continue engaging in impact bargaining."[62] The record illustrates that, initially, the parties had conversations regarding potential effects of the Policies in August of 2021, around the time when they were first to be implemented, and continued to have

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[61] 27 PERB ¶ 3054, 3120-21 (1994)(footnotes omitted).
[62] Respondent Brief, at 47.

discussions into the fall of 2021. However, there was a period during September and October of 2021 when Grimaldi's refused to meet because of the filing of these charges and related applications for temporary restraining orders. Discussions between UCS and various parties resumed in November and continued into December of 2021. It is undisputed, however, that as of January of 2022, no negotiations between the parties have taken place regarding the Policies. As discussed above, UCS' decision to unilaterally cease bargaining over the Policies when no agreements had been reached nor impasse declared, constitutes a violation of the Act. While the areas the parties discussed during the fall of 2021 appear to be of a nature requiring decisional bargaining regarding the procedures used to implement the Policies, to the extent that there are impacts flowing from the Policies, UCS is ordered to bargain with DC 37, CAA, NJDCEA, and CCA.

Based upon the foregoing, I find that UCS violated § 209-a.1(d) of the Act.

IT IS, THEREFORE, ORDERED that UCS will forthwith:

1. Cease and desist from unilaterally imposing procedures that employees must follow in order to be tested or vaccinated for COVID-19;

2. Make whole bargaining unit employees who lost accrued leave, compensation or employment as a result of the implementation of the Policies, with interest at the maximum legal rate;

3. Expunge all records of disciplinary action taken against any bargaining unit employee for failing to comply with the procedures used to implement the Policies;

4. Bargain with DC 37, CAA, NJDCEA, and CCA regarding the impacts, if any, of the Policies;

5. Sign and post the attached notice at all physical and electronic locations customarily used to post communications for bargaining unit employees.

Dated at Brooklyn, New York
this 24th day of February, 2023

Mariam Manichaikul
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE DECISION AND ORDER OF THE

NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

We hereby notify all employees of the New York State Unified Court System (UCS) in the bargaining units represented by the Suffolk County Court Employees Association, Inc.; the New York State Supreme Court Officers Association, ILA, Local 2013, AFL-CIO; New York State Court Officers Association; Civil Service Employees Association, Inc; Local 1000, AFSCME, AFL-CIO; Court Officers Benevolent Association of Nassau County; Association of Supreme Court Reporters; Ninth Judicial District Court Employees Association; District Council 37, Local 1070, AFSCME, AFL-CIO; Court Attorneys Association of the City of New York; and New York State Court Clerks Association, Inc., that UCS will forthwith:

1. Cease and desist from unilaterally imposing procedures that employees must follow in order to be tested or vaccinated for COVID-19;
2. Make whole bargaining unit employees who lost accrued leave, compensation or employment as a result of the implementation of the Policies, with interest at the maximum legal rate;
3. Expunge all records of disciplinary action taken against any bargaining unit employee for failing to comply with the procedures used to implement the Policies;
4. Bargain with DC 37, CAA, NJDCEA, and CCA regarding the impacts, if any, of the Policies.

Dated . . . . . .

By . . . . . .
on behalf of New York State Unified Court System

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.