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

Respondent, New York Unified Court System ("UCS"), hereby files the following Exceptions to the Decision ("Decision") of the Administrative Law Judge ("ALJ"), dated February 24, 2023, pursuant to Section 213 of the Rules of Procedure ("Rules") of the Public Employment Relations Board ("PERB"). These exceptions are taken as to: (1) the ALJ's *sua sponte* ruling that decisional bargaining was required with respect to the procedures necessary to implement the testing and vaccination requirements, as separate from the challenged decision to institute those requirements; (2) the ALJ's order finding that the decision to require vaccination and testing is not inextricably intertwined with the procedures necessary to effectuate those requirements, such that

bargaining is required as to the latter but not the former; (3) the ALJ's "make whole" remedy to all charging parties, despite the ALJ's finding that the UCS was not required to bargain over its decision to require employees to vaccinate or test for COVID-19 and disciplinary actions including termination were a direct result of non-compliance with those requirements; and (4) the ALJ's "make whole" remedy to all members of the charging parties, despite the fact that most of them did not request that remedy or allege that the UCS failed to bargain over the Policies' procedures or impact.

AS AND FOR A FIRST EXCEPTION

1. Exception is taken to the ALJ's interpretation of the facts and application of the law, to each and every part, where the ALJ *sua sponte* addressed whether decisional bargaining was required over the UCS's decision to include in the Policies procedures (such as effective dates, exemption procedures, and non-compliance consequences) necessary to implement the testing and vaccination requirements.

Specifically, at pages 22 and 26-28 of the Decision, the ALJ erred by *sua sponte* finding that, although the charging parties expressly challenged the UCS's decision to require employees to be vaccinated or tested for COVID-19, the UCS was nonetheless required to bargain over the procedures set out in the Policies to effectuate those requirements. No charging party argued that the decision to require testing and vaccination was separate from the decision over the procedures necessary to implement those requirements. Because no charging party challenged the procedures separate and apart from the requirements, the ALJ could not grant all charging parties relief over the UCS's purported failure to engage in decision bargaining over the Policies' procedures.

AS AND FOR A SECOND EXCEPTION

2. Exception is taken to the ALJ's interpretation of the facts and application of the law, to each and every part, where the ALJ granted a remedy to all charging parties based on the

finding that the UCS failed to bargain over the procedures used to implement the vaccination and testing requirement in the Policies, to the extent those procedures implicate the terms and conditions of employment, but concurrently held that the UCS was *not* required to bargain over its decision to require employees to vaccinate or test for COVID-19.

Specifically, at pages 26-27 of the Decision, the ALJ erred by holding that, although the UCS was *not* required to bargain over its decision to require employees to be vaccinated or tested for COVID-19, it was nonetheless required to bargain over the procedures set out in the Policies to effectuate those requirements. The ALJ correctly found that the UCS did not have to bargain over the decision to require employees to be vaccinated or tested. But the ALJ erroneously extricated that issue from the procedures necessary to implement those requirements. Those two issues are inextricably intertwined. Because the UCS was not required to bargain over the vaccination and testing requirements in the Policies, it was also entitled to implement procedures necessary to effectuate those requirements without bargaining over them.

AS AND FOR A THIRD EXCEPTION

3. Exception is taken to the ALJ's interpretation of the facts and application of the law, to each and every part, where the ALJ granted a "make whole" remedy to all charging parties based on the finding that the UCS was required to bargain over the procedures necessary to implement the testing and vaccination requirements, even though disciplinary actions including terminations were direct consequences of failure to comply with the requirements themselves, over which decisional bargaining was not required.

Specifically, at pages 26-27 and 30 of the Decision, the ALJ erred by holding that, although the UCS was *not* required to bargain over its decision to require employees to be vaccinated or tested for COVID-19, it must nonetheless "[m]ake 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" and "[e]xpunge all records of disciplinary action taken against any bargaining unit employee for failing to comply with the procedures used to implement the Policies." The ALJ correctly found that the UCS did not have to bargain over the decision to require employees to be vaccinated or tested. But the ALJ erroneously failed to account for that holding in the relief awarded to the charging parties. Disciplinary actions, including termination, were direct results of failure to comply with the testing and vaccination requirements. Because the UCS was not required to bargain over the vaccination and testing requirements, it cannot be ordered to make whole those who faced consequences due to their failure to comply with those requirements.

AS AND FOR A FOURTH EXCEPTION

4. Exception is taken to the ALJ's interpretation of the facts and application of the law, to each and every part, where the ALJ granted a remedy to all charging parties based on the finding that the UCS failed to bargain over the procedures and impact of either or both Policies, even though six charging parties—New York State Supreme Court Officers Association, ILA Local 2013, AFL-CIO (SCOA); Suffolk County Court Employees Association, Inc. (SCCEA); New York State Court Officers Association (NYSCOA); Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA); Court Officers Benevolent Association of Nassau County (COBANC); and Association of Supreme Court Reporters (ASSCR)—never alleged such a failure to engage in impact bargaining.

Specifically, at page 30 of the Decision, the ALJ erred by ordering the UCS to "[m]ake 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." Out of the ten charging parties, however, only four—District Council 37, AFSCME, AFL-CIO and Local 1070 (DC37); Court Attorneys Association of the City of New York (CAA); Ninth Judicial District

Court Employees Association (NJDCEA); and New York State Court Clerks Association (NYSCCA)—alleged harm based on the UCS's failure to bargain over the impact of the Policies. The remaining six charging parties only alleged the UCS failed to bargain over the decision to institute testing and vaccination requirements. And none alleged that the UCS failed to bargain over the procedures necessary to implement the testing and vaccination requirements, as separate from the requirements themselves. Because the ALJ found the UCS did not have a duty to bargain over the testing and vaccination requirements, members of SCOA, SCCEA, NYSCOA, CSEA, COBANC, and ASSCR are not entitled to be made whole.

* * * * *

Wherefore, Respondent respectfully submits that, based upon the foregoing and for the reasons set forth in Respondent's Memorandum of Law, Respondent's Exceptions to the Decision should be granted.

Dated: April 17, 2023
New York, New York

Respectfully submitted,

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PRELIMINARY STATEMENT

The Administrative Law Judge in this case endorsed an illogical conclusion: the Unified Court System is *not* required to engage in collective bargaining with its unions whenever it imposes a workplace rule, yet it is categorically required to engage in collective bargaining if it wishes to set up *any* procedures to effectuate a workplace rule—no matter the circumstances. In this case, the ALJ correctly concluded that the UCS was not required to engage in decisional bargaining over testing and vaccination requirements in response to the COVID-19 pandemic. But the ALJ incorrectly concluded that the UCS was nonetheless required to engage in bargaining over the

procedures used to effectuate those requirements, such as effective dates and non-compliance consequences. Under that worldview, the UCS would have to sit down with union representatives in bargaining sessions that could take months—and possibly result in no agreement at all—all the while a deadly and highly infectious virus, with serious long-term health consequences, is coursing through the court system and society at large. That contorted and intractable view of New York labor law is as extreme as it is illogical. It is also, unsurprisingly, unsupported by law and facts.

Because of that fundamental misstep, the ALJ erred as a matter of law and abused her discretion in at least four respects, over which the UCS takes these exceptions. *First*, the ALJ *sua sponte* ruled that the UCS was required to bargain over the decision to implement procedures necessary to effectuate the testing and vaccination requirements, even though the charging parties did not challenge those procedures separate and apart from the underlying requirements. *Second*, the ALJ found that the vaccination and testing requirements (not subject to decisional bargaining) are not inextricably intertwined with the procedures necessary to effectuate them, making bargaining over those procedures such as effective dates mandatory. *Third*, the ALJ granted a "make whole" remedy to all charging parties despite finding that the UCS was not required to bargain over its decision to require employees to vaccinate or test for COVID-19—a requirement which could, independently and directly, trigger disciplinary actions including termination. *Fourth*, the ALJ ordered the UCS to "make whole" all bargaining unit members, even though only a subset of them alleged that the UCS failed to engage in bargaining over the impact of the Policies or even requested "make whole" remedy, and none of them separately alleged that the UCS needed to bargain over the procedures necessary to implement the testing and vaccination requirements.

For those reasons, this Board should sustain the UCS's exceptions and hold that the UCS was not required to bargain over either the Testing Policy or the Vaccination Policy.

STATEMENT OF FACTS

The UCS, which comprises all levels of state courts in New York, hears over four million cases each year and operates 300 facilities in all 62 counties across New York State. Hr'g Tr. 487:9–25; 488:8–15 (Day 3). The UCS employs more than 14,000 non-judicial employees who are essential to its operations, including court officers, court clerks, reporters, interpreters, clerical staff, and technology support staff. *Id.* at 488:2–489:20. The UCS's core mission under the New York State Constitution is to hear and decide cases and controversies and to provide the public with access to the courts. *Id.* at 490:25–491:15; UCS Ex. 45. *See also* Decision 4-5.

The COVID-19 pandemic is an unprecedented global health crisis that has caused millions of people to suffer negative health consequences, including death. Hr'g Tr. 99:4–100:6 (Day 1) (Radosh), 200:14–16 (Cullen); Hr'g Tr. 364:9–20 (Day 2) (Quirk), 381:10–15 (Quirk). In furtherance of its core mission, the UCS had an obligation to institute precautions to ensure the health and safety of its employees and the public in the face of the unprecedented circumstances occasioned by the pandemic. Hr'g Tr. 119:17–120:9 (Day 1) (Radosh); Hr'g Tr. 377:22–378:5 (Day 2) (Quirk); UCS Ex. 52. In an effort to mitigate the rapid spread of the virus, and consistent with guidance from public health officials, the UCS implemented various measures. Hr'g Tr. 504:2–505:6, 510:4–513:25 (Day 3); UCS Exs. 2–4. *See also* Decision 5-6.

To enable continued operation during the unprecedented public health crisis, the UCS implemented policies requiring all UCS employees to submit negative test results for COVID-19 and subsequently to be vaccinated against COVID-19. UCS Exs. 33, 35.

Between late July through August 2021, the UCS announced that it planned to issue the Testing Policy, and released several memoranda to all employees explaining the Policy, including its exemption process and compliance procedures. Hr'g Tr. 576:11–578:8; 578:9–580:20, 582:12–583:21 (Day 3); Hr'g Tr. 671:12–674:13 (Day 4). The Testing Policy required UCS employees to

provide proof of a COVID-19 test each week or otherwise provide proof of vaccination. Hr'g Tr. 576:14–577:10 (Day 3). *See also* Decision 6.

Before the Testing Policy went into effect, the UCS conducted meetings with the unions on August 5 and 10, 2021, concerning the implementation of the Testing Policy, paid time off for testing, and information and resources regarding free testing sites. Hr'g Tr. 676:5–686:3 (Day 4). Those meetings were initiated by the UCS, which reached out to the leaders of each union to facilitate discussions about the Testing Policy and to begin the impact bargaining process. UCS Exs. 27, 29. At the first meeting, on August 5, 2021, the UCS explained the reasoning for the Testing Policy, while the unions were provided the opportunity to ask questions and make suggestions about its implementation, including about time off for testing. Hr'g Tr. 680:8–682:7 (Day 4). At the second meeting, on August 10, 2021, the UCS responded to various questions from the unions. *Id.* at 684:8–685:20. As a result of those meetings, the UCS provided one hour of paid time off for testing as well as resources for employees to locate free testing sites. *Id.*

The Testing Policy became effective on September 7, 2021. Hr'g Tr. 576:11–577:10 (Day 3). It provided that "[t]hose employees who do not submit proof of . . . will be designated as unfit for service and will not be permitted to report to work." UCS Ex. 33 at 2. *See also* Decision 7-8.

During the summer of 2021, in response to COVID-19 cases rising throughout the country and the State due to the then-new Delta variant, the UCS announced the Vaccination Policy. Hr'g Tr. 587:3–596:12; UCS Exs. 22, 36. Because of the serious impact the rise in infection rates had on the UCS's operations, and in view of guidance from the CDC and the NYDOH, the UCS determined that it was necessary to implement the Vaccination Policy. Hr'g Tr. 586:11–596:12, 621:15–622:10 (Day 3); UCS Ex. 36. The UCS announced the Vaccination Policy in late August

2021, explaining that all employees were required to be fully vaccinated by September 27, 2021, and that the Vaccination Policy would include a process for seeking medical and religious exemptions. Hr'g Tr. 619:16–621:14, 622:11–21 (Day 3); Hr'g Tr. 689:24–690:7 (Day 4). *See also* Decision 6-7.

The UCS also held a series of meetings and engaged in email and letter correspondence with the unions regarding the Vaccination Policy. Hr'g Tr. 695:20–707:15 (Day 4). During those negotiations, the UCS sent each of the charging parties proposals to discuss the "various impact items" in relation to the Vaccination Policy. *Id.*; UCS Exs. 46–49. Each of the unions responded with counteroffers to the UCS's proposals, some in writing and others over the phone. Hr'g Tr. 695:20–707:15 (Day 4); UCS Exs. 50, 51. Bargaining items included leave, exemption appeals, potential compliance payments, separation from service and more. Hr'g Tr. 697:19–698:18 (Day 4); UCS Exs. 46–51. The parties paused negotiations related to the impact of the Vaccination Policy to focus on contract renegotiations, but as of April 2022 (the date of the ALJ hearing) the UCS planned to resume impact bargaining. Hr'g Tr. 722:11–25 (Day 4). *See also* Decision 7-8.

The Vaccination Policy became effective on September 27, 2021. UCS Ex. 39 at 1. It made clear that "[c]ontinued failure to comply may result in disciplinary action, up to and including termination." UCS Ex. 39 at 3.

On February 15, 2023, the UCS rescinded the Policies. *See Brignall* v. *N.Y. State Unified Ct. Sys.*, No. E2022-0241CV, NYSCEF 65. That decision was made consistent with CDC guidance, based on high levels of immunity among the general population and the availability of effective treatments. *Id.* The UCS encourages employees to follow public health authority guidance on vaccination and testing, and continues to monitor that guidance to update its policies as necessary. *Id.*

PROCEDURAL HISTORY

Between August 27 and September 29, 2021, ten unions filed improper practice charges on behalf of a small group of UCS employees that they represent, alleging that the UCS was required to bargain with union representatives before implementing the Testing Policy and the Vaccination Policy. *See* Decision 2-4. Six of those unions (SCCEA, SCOA, NYSCOA, CSEA, COBANC and ASSCR) only challenged the UCS's failure to engage in decisional bargaining over the vaccination and testing requirements. *See* Decision 2-3. The remaining four unions (DC37, CAA, NJDCEA, and NYSCCA) also challenged the UCS's failure to engage in impact bargaining. *See* Decision 3-4.

On October 22, 2021, the Administrative Law Judge Mariam Manichaikul advised that the charges were consolidated. *See* Decision 4. A four-day evidentiary hearing for the consolidated charges was held on April 5, 12, 13, and 14, 2022. *See* Decision 4. On November 4, 2022, the parties filed post-hearing briefs. *See* Decision 4.

On February 24, 2023, the ALJ issued an order making, as relevant here, three findings. Those findings largely hinged on a dichotomy that neither party argued before the ALJ: the distinction between (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." Decision 22 (emphases in original).

First, the ALJ found that the "UCS was not required to bargain over its decisions to require employees in the bargaining units to vaccinate or test for COVID-19," Decision 26, because "the Policies were implemented in response to COVID-19 and in furtherance of [the UCS's] defining mission . . . to provide an accessible forum to every litigant seeking redress of grievances." Decision 24 (quotation marks and citation omitted). According to the ALJ, the fact that the Policies

affect "terms and conditions of employment, such as use of leave accruals [and] potential discipline and job loss for failing to comply," does not "outweigh USC'[s] need to mandate COVID-19 testing and vaccinations." Decision 26. The ALJ also concluded that, "in deciding to mandate employees to be vaccinated and tested for COVID-19," the 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'[s] effort to ensure an accessible forum." *Id.*

Second, the ALJ also found that "the UCS ha[d] 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." Decision 27. According to the ALJ, those procedures "were the result of many other decisions . . . which are not themselves a necessary consequence of UCS'[s] decisions to require vaccination or testing," and which "implicate various terms and conditions of employment" such as (1) "processes through which employees may apply to be considered for religious and medical exemptions"; (2) "grants of specific amounts of compensatory time and/or excused leave for time spent testing or receiving a vaccination"; (3) "consequences for employee non-compliance"; and (4) "effective dates." Decision 26-27.

Third, the ALJ found that, "to the extent that there are impacts flowing from the Policies, UCS is ordered to bargain with DC 37, CAA, NJDEA, and CCA." Decision 30. The ALJ noted that "it is not clear which, if any, consequences are a direct result of UCS'[s] 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." Decision 29. Nonetheless, the ALJ grounded her finding on the fact that the UCS stated 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." Decision 29.

The ALJ ordered UCS to (1) "[c]ease and desist from unilaterally imposing procedures that employees must follow in order to be tested or vaccinated for COVID-19;" (2) "[m]ake 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) "[e]xpunge all records of disciplinary action taken against any bargaining unit employee for failing to comply with the procedures used to implement the Policies;" (4) "[b]argain with DC 37, CAA, NJDCEA, and CCA regarding the impacts, if any, of the Policies;" and (5) post a notice. *Id.* at 30-31.

ARGUMENT

I. EXCEPTION 1: THE ALJ ERRED AS A MATTER OF LAW AND ABUSED HER DISCRETION BY *SUA SPONTE* FINDING THAT THE UCS WAS REQUIRED TO BARGAIN OVER THE PROCEDURES NECESSARY TO EFFECTUATE THE TESTING AND VACCINATION REQUIREMENTS.

The ALJ *sua sponte* resolved an issue concerning the UCS's purported failure to engage in decisional bargaining that was not raised by any charging party. When it comes to decisional bargaining, the charging parties only challenged the testing and vaccination requirements in the Policies, and the ALJ correctly found no violation of the Taylor Law. *See* Decision 26. The ALJ, however, went on to address a separate decisional bargaining challenge, never raised by the charging parties, to the *procedures* necessary to implement the testing and vaccination requirements. According to the ALJ, the "procedures" used to "implement[]" the Policies, which purportedly "were the result of many other decisions . . . which are not themselves a necessary consequence of UCS'[s] decisions to require vaccination or testing," and which purportedly are subject to decisional bargaining. Decision 26. The UCS takes exception over the ALJ's *sua sponte* determination. Regardless of the merits of the ALJ's hair-splitting exercise, none of the charging parties drew any distinction between the *decision* to impose testing and vaccination requirements

as separate and apart from the *procedures* necessary to implement those requirements. By making a finding on an issue never raised by the charging parties, the ALJ erred.

The charging parties challenged the Policies insofar as they required testing and vaccination. The charging parties only argued that the UCS "violated" the Taylor Law "by unilaterally implementing mandatory testing and vaccination programs and refusing to negotiate with [c]harging [p]arties over the *decision* and its *impact* on the [m]embers." Unions Br. 2 (emphases added); *see also* Unions Br. 6, 8. Accordingly, the only issues before the ALJ were (1) whether the UCS "unilaterally imposed mandatory COVID-19 testing and vaccine requirements in violation of the Civil Service Law," Unions Br. 4, and (2) whether the UCS's "failure to bargain over the impact of those decisions violates the Act," Unions Br. 16.

The third issue identified by the ALJ—that the UCS "was required to bargain over the *procedures* inherent within the Policies, which were used to implement the decisions to require testing and vaccination," Decision 22—was not raised by the charging parties before the ALJ. Where, for example, an improper practice charge fails "to allege a refusal to bargain impact or claim that an impact bargaining demand had been made," the issue of impact bargaining is not properly before the ALJ. *In the Matter of Rochester Police Locust Club, Inc.*, 49 PERB ¶ 4528 (ALJ 2016). Similarly, this Board's review is "limited to matters included in the original charge or developed at the formal hearing," and reliance on any other argument would "render[] its determination arbitrary and capricious." *New York State Corrections Officers & Police Benevolent Association, Inc.* v. *P.E.R.B.*, 309 A.D.2d 1118, 1120 (3d Dept. 2003). Because the charging parties did not include any allegations of failure to bargain over the *procedures* necessary to implement the testing and vaccination requirements, as a separate decision from the *requirements* to test and vaccinate, that could not be a ground for relief and the ALJ erred in holding otherwise.

II. EXCEPTION 2: THE ALJ ERRED AS A MATTER OF LAW AND ABUSED HER DISCRETION BY FINDING THAT THE VACCINATION AND TESTING REQUIREMENTS ARE NOT INEXTRICABLY INTERTWINED WITH THE PROCEDURES NECESSARY TO EFFECTUATE THOSE REQUIREMENTS.

The ALJ correctly held that the "UCS was not required to bargain over its decisions to require employees in the bargaining units to vaccinate or test for COVID-19." Decision 26. But the ALJ went on to create an unworkable, categorical distinction for decisional bargaining purposes between the testing and vaccination requirements in the Policies and the "procedures" used to "implement[]" the Policies, which purportedly are subject to decisional bargaining. Decisions. 26. The Board's precedents on which the ALJ relied in support of categorically splitting the decision to enact the Policies and the procedures used to implement the Policies are distinguishable from the facts of this case. They have also been rejected by intervening decisions of the New York Court of Appeals, and they are out of line with recent decisions from other jurisdictions involving collective bargaining over COVID-19 vaccination policies. The UCS takes exception over the ALJ's erroneous factual and legal conclusions.

1. The ALJ's dichotomy was based on a series of distinguishable decisions of this Board from the 1990s. For instance, the ALJ relied on this Board's decision in *Matter of Uniform Firefighters of Cohoes, Local 2526, IAFF, AFL-CIO*, 25 PERB ¶ 4506 (ALJ 1992), *aff'd*, 25 PERB ¶ 3042 (1992), where the ALJ held that "procedures to be followed by represented employees, even those attendant to nonmandatory subjects of bargaining, must be negotiated." In that case, the City had gone "beyond simply requiring that fire fighters be tested for tuberculosis," a decision not subject to mandatory bargaining, and had instead "unilaterally instituted, as the sole procedure employees could follow, one of several testing procedures acceptable to the Health Department." *Id.* The ALJ also relied on *Matter of Nassau County Police Benevolent Association*, 27 PERB ¶ 3054 (1994), where the Board opined that there was a "clear distinction between an employer's

decision to drug test employees and the procedures used to implement that decision, including the consequences of the testing." As a result of that "clear distinction," the Board held that, even where an employer's decision to conduct drug testing is not a mandatory subject of bargaining, the "procedures" to implement that decision—such as the particular scientific methodology to be utilized for drug testing and testing triggers—were "mandatorily negotiable." *Id.* Here, however, the record is undisputed that the UCS did *not* require employees to use any specific testing procedure or any specific vaccine; it merely required testing and vaccination generally. UCS. Ex. 39.

Since those decisions from the early 1990s, moreover, the New York Court of Appeals has rejected any categorical dichotomy between a testing requirement and procedures to implement it. In *City of New York* v. *Patrolmen's Benevolent Association of City of New York, Inc*., 14 N.Y.3d 46 (2009), the Court of Appeals was asked "to endorse" the dichotomy embraced in *County of Nassau* and "to opine generally that the Police Commissioner's decision to drug test uniformed officers is a managerial prerogative, but the 'procedures' to implement his decision are mandatorily negotiable." *Id.* at 58. Starting from the premise that "the Commissioner may unilaterally institute drug testing of uniformed officers," *id.* at 59, the Court of Appeals identified two reasons to reject the *County of Nassau* dichotomy. The same analysis applies here.

First, the Court of Appeals rejected *County of Nassau* because "[t]he Police Commissioner's disciplinary authority under [city and state law] is not limited to the formal disciplinary process," but extends to "the detection and deterrence of wrongdoing within the NYPD—particularly crimes, such as illegal drug use—[which] is a crucial component of the Police Commissioner's responsibility to maintain discipline within the force." *Patrolmen's Benevolent*, 14 N.Y.3d at 59. Similarly, the UCS has the authority—indeed, the obligation—under Articles I

and VI of the New York State Constitution and the First, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution to "guarantee[]" access to the courts of this State. *See* N.Y. Const. Art. VI § 18; *see also* N.Y. Const. Art. I §§ 2, 6, 7, 8. To ensure that the UCS can fulfill those obligations, the New York State Constitution expressly authorizes the UCS to "establish standards and administrative policies for general application throughout the state." N.Y. Const. art. VI § 28. Policies in furtherance of that constitutional mandate of public access to the courts are "excluded from collective bargaining as a matter of policy, even where no statute explicitly says so," and regardless of "whether explicit or implicit in statute or decisional law, or in neither." *Patrolmen's Benevolent Association of City of New York, Inc*. v. *P.E.R.B.*, 6 N.Y.3d 563, 572, 573 (2006) (quotation marks, citations, alterations omitted). If, as the Court of Appeals held, a local board of education's decision on teacher tenure and a police department's decision to impose drug testing requirements are examples of policies that "overcome" the Taylor Law's "presumption . . . that all terms and conditions of employment are subject to mandatory bargaining," *id*. at 572-573 (collecting cases; citations omitted), so too is the UCS's ability to issue testing and vaccination requirements in the midst of a global pandemic to fulfil its constitutional mandate to guarantee open courts.

Second, the Court of Appeals rejected *County of Nassau* because "requiring collective bargaining over testing methodology and testing triggers" involves "subjects [that] are inextricably intertwined with the Commissioner's authority to conduct drug testing in the first place," given that they "have an obvious bearing on how effective efforts to detect drug use will ultimately be," and those procedures "therefore are excluded from collective bargaining as a matter of policy." *Patrolmen's Benevolent*, 14 N.Y.3d at 59 (alteration and citation omitted). In reaching that conclusion, the Court of Appeals adopted the test announced by the Supreme Court in that case—

whether "requiring that drug screening methodologies and practices be submitted to collective bargaining [would] seriously limit[] the Commissioner's ability to effectively enforce discipline within the New York City Police Department," No. 400007/07, 2007 WL 7593810 (N.Y. Sup. Ct. Dec. 05, 2007). That approach leads to the same conclusion here. Requiring collective bargaining over the procedures necessary to implement the Policies—such as effective dates; non-compliance consequences; and constitutionally mandated exemption procedures—would necessarily involve matters inextricably intertwined with the UCS's authority to issue the testing and vaccination requirements in the first place. What is more, the charging parties readily admitted that the collective bargaining process would have taken several months. *See* Hr'g Tr. at 176:10–25 (Day 1) (Radosh); Hr'g Tr. at 473:1–22 (Day 3) (Allen). Delaying the implementation of the Policies amid a global health pandemic, and specifically, the rapidly spreading Delta variant, for the months-long duration of the negotiations process would have severely limited the UCS's authority and hindered the effectiveness of the Policies.

When it comes to COVID-19 in particular, a recent decision under New Jersey law is instructive. *Cf. Matter of Nassau County Police Benevolent Association*, 27 PERB ¶ 3054 (1994) (tracing the origin of the relevant dichotomy back to *Fraternal Order of Police* v. *City of Newark*, 216 N.J. Super. 461 (1987), and looking at "other jurisdictions which have considered this issue," including New Jersey). In *Matter of City of Newark*, 264 A.3d 318 (N.J. App. Div. 2021), the New Jersey Appellate Division reviewed a decision by the New Jersey Public Employment Relations Commission over a challenge for failure to engage in decisional bargaining brought by unions against the City of Newark's vaccination requirement for city employees. The unions in that case effectively adopted the ALJ's approach here: although nothing "prohibit[s] the City from issuing a vaccination mandate under these extraordinary circumstances," "public employers have a duty

to negotiate procedures for implementing prerogatives." *Id.* at 328. The New Jersey Appellate Division rejected that view. It concluded that, "[i]n the context of a public health emergency, negotiating procedures for the implementation of a COVID-19 vaccination mandate, or the enforcement or timing of the mandate, would interfere with the managerial prerogative," because "[d]elaying, even on a temporary basis, the timelines for implementing the vaccination mandate undercuts the effectiveness of the mandate." *Id.* at 329. That approach, which is entirely consistent with the reasoning of *Patrolmen's Benevolent* in the New York Court of Appeals, controls the outcome of this case.

2. The ALJ did not grapple with any of those authorities, let alone with whether the UCS's vaccination and testing requirements—which, as the ALJ correctly concluded, were not subject to mandatory decisional bargaining—are inextricably intertwined with the procedures necessary to implement those requirements. They are.

Without offering any reasoning, and solely citing on the categorical dichotomy embraced in *County of Nassau*, the ALJ concluded the procedures enshrined in the Policies to effectuate the testing and vaccination requirements "were the result of many other decisions . . . which are not themselves a necessary consequence of UCS'[s] decisions to require vaccination or testing." Decision 26 & n.54. But if "testing methodology and testing triggers" are "inextricably intertwined with the [Police] Commissioner's authority to conduct drug testing in the first place," *Patrolmen's Benevolent*, 14 N.Y.3d at 59, most obviously so are any "consequences for employee non-compliance" and the "effective dates" of the Policies. *See* Decision 26-27. There can be no requirement without an effective date or some consequence for non-compliance. Similarly, the UCS's "processes through which employees may apply to be considered of religious and medical exemptions" were inextricably intertwined with the vaccination requirement, given the obvious

constitutional deficiencies of a policy that did not incorporate any tailored exemption process. Decision 26. And the UCS's "grants of specific amounts of compensatory time and/or excused leave for time spent testing or receiving a vaccination," Decision 27, were the direct result of bargaining with the unions, *see* Hr'g Tr. 684:8–685:20 (Day 4).

In any event, the UCS's need for testing and vaccination requirements, and for procedures necessary to effectively implement those requirements, outweighs any effect that those requirements might have on terms and conditions of employment. Indeed "the defining mission of the UCS is to provide an accessible forum to every litigant seeking redress of grievances," *Lippman* v. *P.E.R.B.*, 746 N.Y.S.2d 77, 85 (3d Dept. 2002), and the Policies were promulgated "[i]n furtherance of [the UCS's] mission providing a safe forum for the decisions of cases in controversy, Hr'g Tr. 584:5–17 (Day 3); *see also id.* at 617:17–618:16; Hr'g Tr. 678:5–14 (Day 4). By controlling the risk of COVID-19 transmission, which was drastically increasing even within the UCS by four- to five-folds in the fall 2021 due to the Delta variant of COVID-19, *see* Hr'g Tr. 587:3–596:12 (Day 3); UCS Exs. 22, 36, the UCS had to ensure that the courts could remain open to the public and that members of the public, including those who do not enter the court system voluntarily, could safely access the courts without being exposed unnecessarily to a potentially fatal disease, *see* Hr'g Tr. at 631:11–632:22, 638:11–639:5 (Day 3). The procedures necessary to implement the testing and vaccination requirements are inextricably intertwined with the requirements themselves: there could be no testing or vaccination requirement without, for example, an effective date; a mechanism of ensuring compliance; or constitutionally mandated exemption procedures. Because testing and vaccination requirements were mission-related rules *not* mandatorily subject to bargaining, as the ALJ concluded, *see* Decision 23-24, so too were the procedures necessary to implement them.

Any artificial dichotomy, separating those procedures from the underlying testing and vaccination requirements, would be entirely unworkable. It would mean that, under the New York State Constitution, the UCS is mandated to guarantee public access to the courts for the resolution of grievances; that it has the authority, consistent with the Taylor Law, to implement testing and vaccination requirements in the midst of a deadly pandemic to fulfill that constitutional mission, without first engaging in months-long decisional bargaining; and yet it has no ability to set an effective date for those requirements, or any consequences for failure to abide by those requirements, without first engaging in the months-long process of decisional bargaining. That interpretation of the law is not only incorrect, as discussed above, but it would also effectively nullify the UCS's ability to issue any mission-related rules not subject to mandatory bargaining. For those reasons, this Board should reverse the ALJ's decision.

III. EXCEPTION 3: THE ALJ ERRED AS A MATTER OF LAW AND ABUSED HER DISCRETION BY ORDERING "MAKE WHOLE" RELIEF DESPITE FINDING NO VIOLATION OVER AN INDEPENDENT CAUSE OF DISCIPLINE.

While correctly holding that the UCS was not required to bargain over its decision to institute the policies, *see* Decision 26, the ALJ illogically separated the Policies into "decisions" and "procedures," *see* Decision 22. And the ALJ granted a "make whole" remedy based on a purported failure to engage in decisional bargaining over those procedures, despite also finding that the "UCS was not required to bargain over its decisions to require employees in the bargaining units to vaccinate or test for COVID-19," Decision 26, and that "it is not clear which . . . consequences are a direct result of UCS'[s] 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," Decision 29-30. Because the record is undisputed that termination is a direct result of the testing and vaccination requirements, over which no decisional bargaining was

required, employees terminated for choosing not to comply with those requirements cannot be granted "make whole" relief as a matter of law.

The ALJ erred in granting "make whole" relief based on the UCS's purported failure to engage in decisional bargaining over the procedures necessary to implement the testing and vaccination requirements in the Policies, because disciplinary actions (including termination) were a direct result of an employee's failure to comply with the testing and vaccination requirements themselves. Admittedly, under the Taylor Law, the ALJ had broad authority to remedy an improper labor practice. *See* Civil Service Law §205(5)(D). Yet the text of the Taylor Law notably does not authorize sweeping, open-ended "make whole" relief. And even if such relief was nonetheless available, the ALJ here correctly held that UCS had no duty to bargain over its decisions to require employees to "vaccinate or test for COVID-19." Decision at 26. Contrary to the ALJ's conclusion that "it is not clear which . . . consequences are a direct result of UCS'[s] managerial decision to test and vaccinate," Decision 29, it is undisputed that a direct result of failure to comply with the Policies was termination. The Vaccination Policy made clear that "[c]ontinued failure to comply may result in disciplinary action, up to and including termination," UCS Ex. 39 at 3, and the Testing Policy provided that "[t]hose employees who do not submit proof of . . . will be designated as unfit for service and will not be permitted to report to work," UCS Ex. 33 at 2. Because those adverse consequences stem directly from the employees' decision not to comply with the testing and vaccination requirements, members of the charging parties are not entitled to "make whole" relief.

IV. EXCEPTION 4: THE ALJ ERRED AS A MATTER OF LAW AND ABUSED HER DISCRETION IN ORDERING THE UCS TO "MAKE WHOLE" MEMBERS OF BARGAINING UNITS THAT DID NOT REQUEST THAT REMEDY OR SHOW AN IMPROPER PRACTICE.

The ALJ also erred by ordering the UCS to "make whole" all members of the charging parties to this proceeding, even though the ALJ did not find that each charging party successfully established an improper practice. Even assuming that the ALJ's decision should otherwise be affirmed (and it should not), the "make whole" remedy that it awarded should be limited to members of those charging parties that actually requested that remedy and that, according to the ALJ, successfully alleged an improper practice. The UCS takes exception over the ALJ's erroneous factual and legal conclusions.

The UCS's failure to engage in decisional bargaining over the testing and vaccination requirements was the sole basis for several of the charging parties' improper practice charges—specifically, SCCEA, SCOA, NYSCOA, CSEA, COBANC, and ASSCR. *See* Decision 1-2. But the ALJ rejected that charge, finding that the "UCS was not required to bargain over its decisions to require employees in the bargaining units to vaccinate or test for COVID-19." Decision 26. Those six charging parties did not allege that the UCS failed to engage in bargaining over the procedures used to implement the Policies—for no union drew that distinction, *see supra* at pp. 8-10—nor did they allege that the UCS failed to engage in impact bargaining, *see* Decision 29. Yet those are the only two grounds on which the ALJ made improper practices findings. *See* Decision 26, 29-30. And "a make-whole order is effective only if and to the extent employees have been harmed as a result of the improper practice." *Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Erie County Local 815, Erie County White Collar Employees Unit*, 30 PERB ¶ 3017 (1997). Thus, SCCEA, SCOA, NYSCOA, CSEA, COBANC and ASSCR have failed to allege and establish any improper practice and are not entitled to a "make whole"

remedy—nor, in fact, did they request any "make whole" remedy—based on a finding of a failure to engage in decisional bargaining over the implementation procedures contained in the policies, or a failure to engage in impact bargaining.

Just as the ALJ ordered the UCS to engage in impact bargaining only with the charging parties that alleged a failure to do so, *see* Decision 30, the ALJ should have—subject to the UCS's exceptions regarding the propriety of the "make whole" remedy generally, *see supra* at pp. 16-17, ordered a "make whole" remedy only for charging parties which requested such a remedy and which alleged the UCS failed to bargain over the procedures used to implement, or the impact of, the Policies. Consistent with this Board's "expect[ation] there to be [no] litigation on remedy in the context of a hearing on the merits of a charge," the UCS respectfully requests that, if this Board does not reverse the ALJ's order in full, the UCS be given the opportunity to raise "fact questions regarding remedy" with respect to those employees covered by the "make whole" remedy "in a post-hearing investigation during a compliance/enforcement review, which may include a hearing as necessary." *CSEA*, 30 PERB ¶ 3017; *see also Seneca County Deputy Sheriff Police Benevolent Association*, 47 PERB ¶ 3005 ("Who is owed and how much, if anything, under a 'make whole' order are questions properly addressed in proceedings concerning compliance with the order.").

CONCLUSION

For those reasons, the Board should reverse the ALJ's order granting the charging parties relief and dismiss the charging parties' improper practices charges.

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Respectfully submitted,

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