STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of the Improper Practice Proceeding

- between -

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 JUDICIAL 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 -

STATE OF NEW YORK - UNIFIED COURT SYSTEM,

Respondent.

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PERB Case Nos. U-38081, U-38084, U-38087, U-38090, U-38091, U-38093, U-38096, U-38099, U-38104, U-38107 & U-38129

CHARGING PARTIES' RESPONSE IN OPPOSITION TO RESPONDENT'S EXCEPTIONS

Pursuant to § 213.3 of the Rules of the State of New York Public Employment Relations Board ("PERB" or "Board"), the New York State Supreme Court Officers Association, ILA, Local 2013, AFL-CIO ("SCOA"); 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"); Association of Supreme Court Reporters ("ASSCR"); Ninth Judicial District Court Employees Association ("NJDCEA"); District Council 37, Local 1070, AFSCME, AFL-CIO ("DC 37"); Court Attorneys Association of the City of New York ("CAA"); and New York State Court Clerks Association, Inc. ("CCA") (collectively, "Charging Parties" or "Unions"),[1] respectfully respond, oppose, and object to Exceptions (each an "Exception" and collectively, "Exceptions") filed by the State of New York – Unified Court System ("UCS" or "Respondent") to the February 24, 2023 Decision ("Decision") of Administrative Law Judge Mariam Manichaikul (the "ALJ"). For the following reasons, Respondent's exceptions should be denied in full.

BACKGROUND

1. The Charging Parties are 9 employee organizations representing thousands of non-judicial employees State-wide who hold positions in more than sixty different civil service titles and are/were employed by Respondent.

2. In August and September 2021, Charging Parties filed improper practice charges challenging the unilateral implementation of Respondent's mandatory COVID-19 testing and vaccination policies and procedures as violations of § 209-a.1(d) of the Public Employees' Fair Employment Act ("Act"). The charges also alleged that Respondent's refusal to bargain with

[1] The Suffolk County Court Employees Association, Inc. ("SCCEA"), has not chosen to be part of this Joint Response.

certain of the Unions over the impact or effects of those mandates were likewise violations of § 209-a.1(d) of the Act.

3. After answers were filed by Respondent to all charges, the ALJ consolidated the matters.

4. Hearings were held before the ALJ on April 5, 12, 13, and 14, 2022, during which all parties were present and represented by counsel. Each party had the opportunity to present documentary and testimonial evidence, and to cross-examine witnesses. In total, separate from the 28 ALJ exhibits, more than five dozen exhibits were presented by the parties and accepted into the record. Six witnesses also testified. Post-hearing briefs were submitted on November 4, 2022.

5. In a Decision dated February 24, 2023, the ALJ found Respondent violated § 209-a.1(d) of the Act and ordered UCS to forthwith: (a) cease and desist from unilaterally imposing procedures that employees must follow in order to be tested or vaccinated for COVID-19; (b) make whole bargaining unit employees who lost accrued leave, compensation or employment as a result of the implementation of the testing and vaccination policies (collectively, "Policies"); (c) expunge all records of disciplinary action taken against any bargaining unit employee for failing to comply with the procedures used to implement the policies; (d) bargain with certain of the Charging Parties regarding the impacts, if any, of the policies;[2] and (e) sign and post a notice (attached to the ALJ's Decision) at all physical and electronic locations customarily used to post communications for the Unions' bargaining unit employees.

6. On or about April 17, 2023, Respondent filed the Exceptions with the Board. In total, Respondent identifies four Exceptions.

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[2] The Decision explicitly directs the Respondent to engage in impact bargaining with Charging Parties DC 37, CAA, NJDCEA, and CCA. Certain other Charging Parties have indicated their intentions to file cross-exceptions, contemporaneous with the filing of this Response, in order for them to also be included in the ALJ's order on this point.

AS AND FOR A RESPONSE TO THE FIRST EXCEPTION

7. Charging Parties oppose and object to the Respondent's First Exception and the bases for that exception that the ALJ erred by *sua sponte* finding, at pages 22 and 26-28 of the Decision, that UCS's decisions to create testing and vaccination requirements were separate from the decisions over the procedures necessary to implement those requirements. (UCS Exceptions, ¶ 1.)

8. Charging Parties also oppose and object to Respondent's First Exception wherein it argues that since the Charging Parties did not challenge the procedures separate and apart from the requirements of the policies, the ALJ "could not" grant the Charging Parties relief over UCS' failure to engage in bargaining over the procedures and policies to implement its initial decisions to require testing and vaccination.

9. Charging Parties respond that the ALJ did not err in finding that UCS was required to bargain over the procedures and policies necessary to implement Respondent's decisions.

10. Respondent incorrectly asserts that the Charging Parties did not challenge the Respondent's failure to bargain over the procedures required for UCS's decisions here, thereby mischaracterizing this element of the ALJ's Decision as *sua sponte*. The record is replete with documentary and testimonial evidence that the Charging Parties challenged the decisions over the Policies' requirement of testing and vaccination and procedures attendant to those Policies. (*See, e.g.,* CCA Improper Practice Charge, ALJ Exs. 21, 22)

11. Even assuming, however, the ALJ had adopted this argument *sua sponte*, there is no prohibition for an ALJ to raise a well-settled legal theory not specifically argued by the parties and to apply that theory in accordance with established law. After all, the ALJ's role, consistent

with the Board's powers and functions set forth in § 205.5(d) of the Act, is to prevent improper employer practices and to fully remedy employer violations in effectuating the policies of the Act.

AS AND FOR A RESPONSE TO THE SECOND EXCEPTION

12. Charging Parties oppose and object to Respondent's Second Exception and the bases for that Exception that the ALJ erred by holding, at pages 26-27 of the Decision, 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." (UCS Exceptions, ¶ 2.)

13. Charging Parties respond that the ALJ's Decision simply applies well-settled jurisprudence to the facts and circumstances presented during the hearings; therefore, the ALJ did not err when she found that Respondent was required to bargain over the Policies' procedures.

14. The ALJ appropriately concluded that the Policies were "work rules" (Decision at 20), before applying the Act's long-standing balancing test for determining whether the Policies address mandatory subjects of bargaining. (Decision at 22-28)

15. The ALJ also properly noted "that [Respondent's testing and vaccination] 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." (Decision at 22)

16. The ALJ then determined those two distinct issues. As to the first issue, the ALJ found that employee interests did not outweigh the Respondent's need to mandate testing and vaccination, in furtherance of UCS' core mission. (Decision at 26) The ALJ then properly concluded, as to the second issue, that the extensive procedures that were unilaterally implemented

(e.g., leave time, compensation, discipline, job security, and medical privacy) were the result of many "other decisions" that were "not themselves a necessary consequence of UCS's decisions to require vaccination or testing." *Id.* The Decision delineates those "other decisions" and explains how the procedures implicated terms and conditions of employment. Therefore, the ALJ properly concluded that Respondent had a duty to negotiate "over the chosen procedures used to implement the Policies." *Id.*

AS AND FOR A RESPONSE TO THE THIRD EXCEPTION

17. Charging Parties oppose and object to Respondent's Third Exception and the bases for that exception that the ALJ erred by holding, at pages 26-27 and 30 of the Decision, 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' [them] for failing to comply with the procedures used to implement the Policies.'" (UCS Exceptions, ¶ 3 (quoting Decision, pp. 26-27 and 30)) Simply put, Respondent's Third Exception improperly attacks the ALJ's "make whole" remedy awarded to all Charging Parties.

18. Charging Parties respond that the ALJ properly found Respondent was required to bargain over the procedures necessary to implement the testing and vaccination requirements and that, once so deciding, the ALJ's "make whole" remedy was both appropriate and necessary to effectuate the purposes of the Act, enforce the law, and address and remedy improper employer practices.

19. The ALJ properly found the Policies' procedures to be mandatorily negotiable. This is consistent with the Board's decision in *County of Nassau,* 27 PERB ¶ 3054 (1994), wherein

the procedures implementing an initial decision to screen employees for drugs, including the consequences for non-compliant employees and those found in violation, were held to be mandatory subjects of bargaining. Here, as in *County of Nassau*, negotiability determinations are based on the subject matter of the procedures and consequences, not on the reason(s) supporting the employer's decisions to create policies. Once a failure to negotiate is determined to be a violation of the Act, as here, the ALJ and the Board are empowered to remedy such improper practice and to "make whole" those who suffered adverse employment consequences.

20. Respondent's Third Exception essentially asks the Board to ignore decades of precedent. The Policies' procedures implementing the Policies' requirements were the result of "other decisions [ ] which [were] not themselves a necessary consequence of UCS's decisions to require vaccinating or testing." (Decision at 26) Respondent failed to prove otherwise. Choice of testing locations, type of test (at home versus issued by a health care provider) and proof of same, cost, vaccine methodology, format, submission of proof, alternatives, and the exemption process and procedures, as well as disciplinary consequences for each of the foregoing – all implicate various terms and conditions of employment. Thus, the ALJ correctly found that a "make whole" remedy is the only way to "fix" Respondent's violations and restore the *status quo*.

AS AND FOR A RESPONSE TO THE FOURTH EXCEPTION

21. Charging Parties oppose and object to Respondent's Fourth Exception and the bases for that Exception that the ALJ erred by ordering, at page 30 of the Decision, that all affected UCS employees be made whole for all lost accrued leave, compensation, or employment as a result of the Policies' implementation, despite the fact that six of the Charging Parties had only challenged the unilateral decisions to require COVID testing and then vaccination and had not alleged that UCS failed to negotiate over either the impact of its two decisions or "the procedures

necessary to implement the testing and vaccination requirements, as separate from the requirements themselves." (UCS Exceptions, ¶ 4)

22. Respondent's Fourth Exception essentially asks the Board to find that when a union is challenging an employer's unilateral decision to take an action, the union must separately challenge both that decision *and* its implementation, or demand impact bargaining over the decision, in order to be entitled to make whole relief should the unilateral decision be subsequently found to be permissive rather than mandatorily negotiable. In arguing for such a pleading requirement, however, UCS does not cite any PERB precedent in support.

23. Charging Parties respond that the ALJ did not err in her Decision in its entirety, including the "make whole" remedy and impact bargaining orders. Charging Parties can find no PERB precedent holding that a charging party must separately challenge both a unilateral decision and its implementation, or separately demand impact bargaining as well, in order to be eligible for the make whole relief ordered by the ALJ in this consolidated case.

24. In any event, the Charging Parties' charges did not challenge just the Policies at issue; the charges alleged that the attendant procedures were never negotiated as well and challenged the Respondent's refusal to bargain impact upon demand. (*See, e.g.,* Improper Practice Charges, ALJ Ex's 9, 17 & 21)

25. Charging Parties also oppose and object to Respondent's exception to the ALJ's make whole order on the basis that none of the affected unions requested make whole relief. (UCS Exceptions, ¶ 4)

26. Charging Parties respond that PERB has routinely held that a charging party is not required to plead or even identify the relief alleged to be appropriate in the event that a violation of the Act is found.

27. Moreover, since at least 1977, PERB has possessed broad, statutory relief powers that include make whole, monetary relief, when justified, as is warranted here.

WHEREFORE, based on the foregoing Responses and the accompanying Memorandum of Law, the Board should deny the Exceptions in entirety.

Dated: New York, New York
June 14, 2023

Respectfully Submitted,

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