THE ADVOCATE

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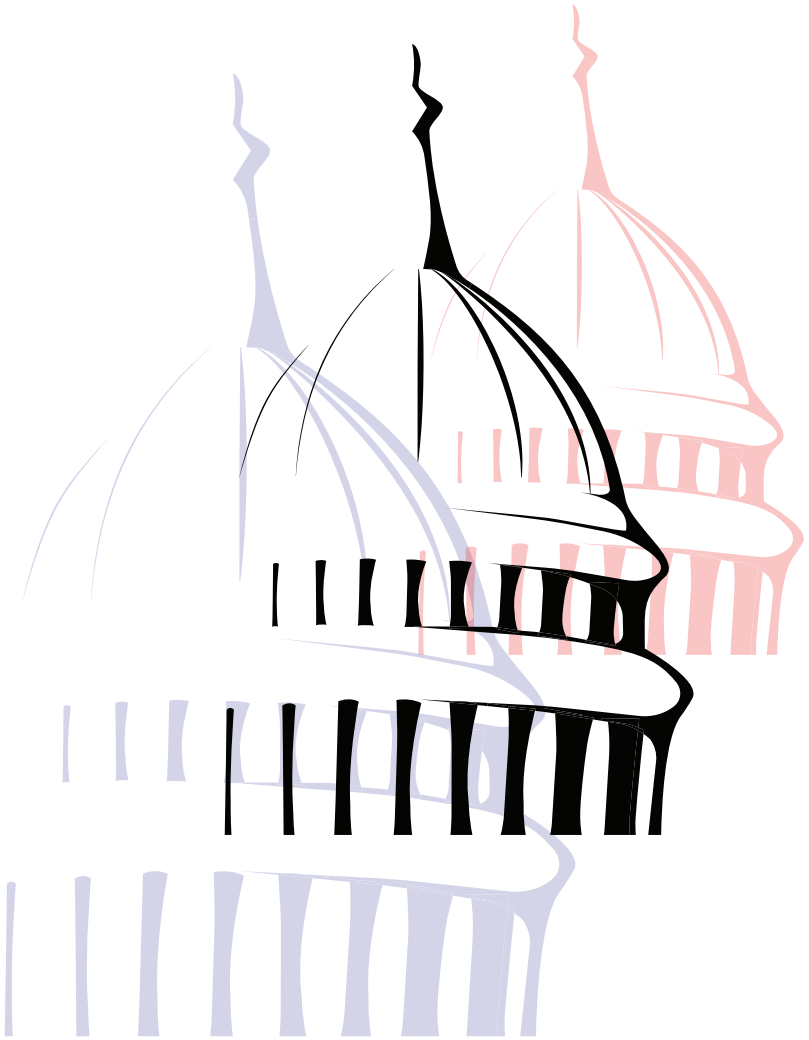

CSEA
Local 1000 AFSCME, AFL-CIO

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Counsel's Corner

By: Daren J. Rylewicz
General Counsel

The Legality of COVID-19 Vaccination Mandates

The Legal Department has received many inquiries about whether employers can impose COVID-19 vaccine mandates for their employees. With the first COVID-19 vaccines being granted authorization for emergency use by the Food and Drug Administration ("FDA") in December, 2020, many employers and employees have wondered if employers can mandate such a requirement.

Recently, the Equal Employment Opportunity Commission and the U.S. Department of Justice issued guidance and opinions answering some questions and concerns about COVID-19 vaccine mandates. Initially, employers seemed reluctant to impose such a requirement due to anti-discrimination laws protecting individuals with disability and certain religious beliefs. In addition to clarifying that federal workplace anti-discrimination laws do not prevent employers from requiring employees physically entering the workplace to be vaccinated for COVID-19, subject to reasonable accommodation provisions, the EEOC guidance addressed a number of new issues related to COVID-19 vaccination, including requesting documentation of vaccination and employer incentives for voluntary vaccinations.

The guidance from the EEOC reaffirmed that federal workplace anti-discrimination laws do not prevent employers from requiring all employees physically entering the workplace to be vaccinated for COVID-19. These laws include the Americans with Disabilities Act (the "ADA"), the Rehabilitation Act, Title VII of the Civil Rights Act ("Title VII"), the Age Discrimination in Employment Act (the "ADEA") and the Genetic Information Nondiscrimination Act (the "GINA"). Under Title VII and the ADA, employers are required to provide reasonable accommodations for employees who cannot be vaccinated due to a disability, pregnancy or pregnancy-related conditions that constitute a disability, or a sincerely held religious belief, practice or observance, absent an undue hardship on the operation of the employer's business. In addition, employers may not apply a vaccination requirement in a way that treats employees differently based on disability, race, color, religion, sex (including pregnancy, sexual orientation and gender identity), national origin, age or genetic information, unless there is a legitimate non-discriminatory reason. Furthermore, employers are advised to consider all options, including telework and reassignment, and whether other federal, state and local laws apply, before denying an accommodation request or taking adverse employment action against an unvaccinated employee.

This guidance also states that employers may request documentation or confirmation from employees that they have obtained a COVID-19 vaccine; however, this information must be treated as employee medical information, kept confidential and stored separately from the employees' personnel files.

While this guidance may seem to address the issue, there is still uncertainty about whether vaccine mandates are permissible. With only one of the three COVID-19 vaccines having recently received full authorization by the FDA, with the other two vaccines being only approved for emergency use, some lawsuits have challenged vaccine mandates stating that such vaccines are not fully approved and cannot be the subject of a mandate. Other arguments against

vaccine mandates focus on an individual's choice against having a foreign substance placed in their body.

With respect to the vaccine mandate, CSEA has sought and taken the position that some employers should offer COVID-19 testing for employees who do not wish to be vaccinated. For those employers who have implemented new rules on COVID-19 testing, CSEA has also sought to demand impact bargaining of a testing requirement and has specifically sought negotiation on such issues as: the type of test; the location of the testing site; whether employees need to wait for test results before reporting to duty; the costs of the testing; telework availability if an employee tests positive; disciplinary consequences of a failure to take a test; and, whether employees are on the clock while testing and waiting for results.

If an employer takes a unilateral action with respect to imposing a COVID-19 vaccine mandate and/or requirement for COVID-19 testing of its employees or any additional COVID-19 issues not addressed above, we recommend immediately contacting your Labor Relations Specialist.

The following websites are a useful resource for COVID-19 vaccine mandates:

https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws

https://www.governor.ny.gov/sites/default/files/2021-05/NYS_CDCGuidance_Summary.pdf

DISCIPLINARIES

State Disciplinaries:

OPWDD
(Arbitrator Simmelkjaer)
Matter No. 19-0806

The Grievant, a Direct Support Assistant with approximately three years of service, was charged with refusing to work mandatory overtime at another residence. Prior to receiving this charge, the Grievant was counseled for excessive absences and agreed to a 3-month suspension without pay for refusing other mandated overtime assignments. Considering the evidence in its entirety, the Arbitrator was not persuaded that the State had proven the charge and that the Grievant refused directives to work mandatory overtime. Although there was some evidence that the Grievant was untruthful about statements he made to his supervisor about working in another location, the Arbitrator found that the State failed to meet its burden of proof that the Grievant's "medical emergency" on the date in question was invalid or a pretext for avoiding overtime. Furthermore, it was found that the State did not have probable cause to suspend, as the Grievant's "continued presence at the residence posed no imminent threat to persons or property", and the State did not meet the standard set forth under Article 33.3(g)(1). Therefore, the Arbitrator ordered that the Grievant be reinstated to his position with full back pay and benefits.

SUNY Stony Brook
(Arbitrator Nadelbach)
Matter No. 21-0248

In this proceeding, the Grievant, an Administrative Assistant with 37 years of service, was served with a Notice of Discipline alleging 10 charges against her. SUNY suspended the Grievant and sought termination. The charges alleged that from July 2019 to January

2020 Grievant had been insubordinate by reporting to work at 1:15 PM instead of at 9:00 AM as repeatedly instructed by various supervisors. Beginning in 2011, the Grievant had been granted an FMLA accommodation, and was permitted to work part time to care for her ill mother in the mornings. In 2019, the employer directed her to return to full-time work, and she refused, insisting on maintaining her part-time hours so she could continue to care for her mother. There is no dispute that she refused direct instruction of her supervisors. Even though this was her first discipline in her 37-year career with SUNY, the Arbitrator upheld the termination emphasizing that management's rights are superior to her personal interest in caring for her mother.

OPWDD
(Arbitrator Hyland)
Matter No. 21-0248

In this proceeding, the State issued a notice of discipline alleging that the Grievant, a Direct Support Aide with four years of service, submitted falsified medical notes and attendance records, and was untruthful regarding such actions during an interrogation. The State sought termination. Regarding the falsified medical notes, the Arbitrator found that emails from the doctor's office sent to the State's investigator amounted to hearsay without an exception. Because this evidence goes to the heart of allegations of serious misconduct, the Arbitrator held that a reliance on bare hearsay is insufficient to meet the State's contractual burden, and the State failed to prove by a preponderance of the evidence that Grievant falsified two medical notes. However, regarding the falsified attendance records, the Arbitrator credited the State's witnesses who testified that the Grievant did not arrive at the time indicated on the sign-in sheet. The Arbitrator found Grievant guilty of those charges. The charge that Grievant was untruthful about how she obtained doctors' certifications was unsubstantiated because the State failed to show that Grievant did falsify records. Although the State only proved that Grievant falsified attendance records, the Arbitrator upheld the termination because the Grievant had a significant discipline history over the course of only four years with

OPWDD. Finally, the Arbitrator held that the State had probable cause to suspend Grievant without pay pending her termination because the State had sufficient evidence that Grievant tried to cover up her lateness, which creates a potential danger to residents' safety.

Unified Court System
(Hearing Officer Conley)
Matter No. 20-0799

In this proceeding Court Officer was charged with misconduct that reflects adversely upon his fitness to continue his employment with UCS. The specification alleged that the Court Officer applied pressure to the throat and neck of his wife with intent to impede her normal breathing and blood circulation. The Court Officer had previously been criminally convicted for these acts and was sentenced to three years of probation. The specification also alleged that the Court Officer placed a loaded firearm to the side of his wife's head and threatened to kill her. The Court Officer denied any recollection of the incident, but his wife testified in detail describing the assault. The Hearing Officer credited the wife's testimony and relied on documentary evidence reflecting her injuries, to determine that the Court Officer's conduct was a gross deviation from the standards of the OCA's demands of law enforcement officers. The Hearing Officer recommended that the Court Officer be removed from his position. The Chief Judge concurred with the recommendation and terminated the Court Officer.

Local Disciplinaries:

Mount Vernon Public Library
(Arbitrator Jay Siegel)
Matter No. 20-0083

In this disciplinary hearing, the Grievant, a Cleaner with 23 years of service and no prior disciplines, was subject to a Notice of Discipline alleging that the Grievant abandoned his position

when he refused to stay late on December 27, 2019, as directed by the President of the Library's Board of Trustees who wanted to continue using the facility that evening for a meeting and needed the Grievant to secure the facility when they were done. The Notice alleged that Grievant was insubordinate for not providing his security code to the trustees in the meeting at their request. It also alleged that the Grievant left the building unsecured with two members of the Board of Trustees inside, and his supervisor had to come in to secure the facility. The Arbitrator found the Grievant not guilty of all charges. First, the Grievant had discussed his need to leave on time with his supervisor who authorized him to leave at his scheduled time and informed the Grievant that he would come in to lock up. Next, the Grievant was under strict instructions to never divulge his personal alarm code to anyone – including the trustees. The Arbitrator also found that the Grievant could not be considered insubordinate for failing to abide by the directive of an individual trustee because such an individual trustee does not have authority over the workplace activities of Library employees. The Arbitrator also found that the Library was never left unsecured – all doors were locked from the outside, which would permit the Trustees to leave the facility but nobody could enter from outside. Ultimately, the Arbitrator found that the Grievant followed the established protocol and the Library incurred overtime costs through no fault of the Grievant. The Arbitrator ordered that the Grievant shall be made whole.

County of Nassau (Nassau Community College)
(Arbitrator McLaughlin)
Matter No. 20-0577

In this disciplinary hearing, the Grievant, a Public Safety Officer, was subject to a Notice of Discipline alleging that the Grievant engaged in misconduct escalating a conflict with a Subordinate Officer and violated the Workplace Violence Policy. The Union argued that the Grievant's actions were appropriate where the Subordinate Officer initiated the conflict. After reviewing the testimonial and video evidence entered into the record, the Arbitrator agreed with the Union, and found that the Subordinate

Officer did not have any cause to fear for his safety during the argument, so the Workplace Violence Policy was not violated. The Arbitrator granted the grievance in its entirety and restored 14 days of leave to the Grievant's leave bank.

White Plains Housing Authority
(Hearing Officer Siegel)
Matter No. 20-0652

The White Plains Housing Authority (the "Authority") served disciplinary charges pursuant to Section 75 of the New York Civil Service Law against a CSEA member ("Member") alleging six separate charges of misconduct. The charges sought the proposed penalty of termination. Most the charges were related to time and attendance, and the failure to perform operational duties. While the Hearing Officer did find the Member guilty of several charges, he found the Authority's proposed penalty of termination to be too harsh and excessive. Instead, he recommended that the Authority impose the 30-day suspension without pay it imposed at the time it filed charges, as well as an additional one-week suspension without pay. The Hearing Officer relied on the fact that the Member was honest throughout her testimony, and that her thoughtful and specific explanations during her testimony, demonstrated that she had the potential to learn from her transgressions. In making his recommendation, the Hearing Officer noted that this case is mostly about the Member's tardiness, which the Member showed she was willing to improve. Furthermore, the other charges the Member was found guilty of were isolated incidents and not so serious as to warrant termination.

Marion City School District
(Arbitrator Lewandowski)
Matter No. 20-0049

In this contract discipline, the Grievant, a Cleaner at Marion City School District ("District"), unsuccessfully challenged disciplinary charges alleging excessive absenteeism, failure to complete cleaning assignments, and unprofessional conduct towards a co-worker. The

parties collective bargaining agreement provides that an employee may file a grievance contesting proposed discipline within seven working days of the receipt of such notice. Grievant was served with the Notice of Discipline ("NOD") on October 15, 2019. The grievance challenging the NOD was dated October 30, 2019, which was beyond the prescribed time limits. The arbitrator dismissed the grievance because it was not timely filed at Step 1 of the grievance process.

City of Long Beach
(Arbitrator Tener)
Matter No. 20-0388

Disciplinary charges were brought against the Grievant, who worked for the City for approximately 11 years and held the title of Assistant Supervisor in the Street Maintenance Department. The charges involved acts of misconduct when the Grievant became involved in a verbal and physical altercation with another co-worker. Pursuant to Civil Service Law Section 75, the matter proceeded to a hearing, where the Hearing Officer found the Grievant guilty of one charge of misconduct and not guilty of the other misconduct charge. In terms of penalty, the Hearing Officer recommended that the Grievant be suspended for 20 working days, with a letter of reprimand placed in his personnel file for a period of time. After the City imposed a penalty of termination, the Union, in accordance with the collective bargaining agreement, filed for arbitration and the parties agreed for the Arbitrator to decide, based on the record at the grievance procedure, whether the Grievant was guilty of the two charges of misconduct, and whether the City was compelled to adopt the Hearing Officer's recommendation as to penalty. Looking at the two charges of misconduct, the Arbitrator found that the first charge should be sustained because the Grievant admitted thrusting a shovel at his co-worker's arm. However, the Arbitrator found that the second charge should be dismissed. In ruling that the City was not required to abide by the Hearing Officer's determination on penalty, the Arbitration found that there was no evidence in the collective bargaining agreement of any such agreement. The Arbitrator issued

a 30-day suspension, with a final warning that any future incidents of workplace violence will be grounds for termination.

CONTRACT GRIEVANCES

Local Grievances:

County of Nassau
(Arbitrator Siegel)
Matter No. 20-0803

In this contract grievance, CSEA successfully argued that the County of Nassau ("County") violated the parties' collective bargaining agreement ("CBA") when it failed to properly post the position of Pools and Rinks Maintenance Supervisor 1 at Cantiague Park. The County posted the job opening on a bulletin board in the Administrative Office at the park. The Grievant credibly testified that he only learned of the opportunity after it had already been filled. Furthermore, the Grievant testified that his office is in the basement of the building where the Administrative Office is located but he had no reason to ever go to the Administrative Office. The Arbitrator found that because not all employees have a reason to visit the Administrative Office, the County failed to give the Grievant a reasonable opportunity to apply for the position because he did not see the job posting. Ultimately the grievance was sustained and the County was directed to afford Grievant the opportunity to apply for the position and consider his application/ candidacy in accordance with the language set forth in the CBA.

Town of Ontario
(Arbitrator Lewandowski)
Matter No. 20-0445

In this class action grievance, CSEA argued the Town of Ontario ("Town") violated the collective bargaining agreements ("CBAs") of both CSEA's Clerical Unit and Blue Collar Unit. The provision

which was claimed to be violated contained almost identical language in both the Clerical and Blue Collar Unit's CBA. The provision provided a premium for time worked by employees while other Town employees are sent home with full pay. The grievance alleged that the Town failed to pay premium pay to both Clerical and Blue Collar Unit employees when they were forced to work during the COVID-19 pandemic, despite the Town's offices being closed to the public. The Arbitrator found that the Town did not violate the Clerical Unit's CBA because all the clerical employees were working, just from a different location. The Arbitrator noted that the inequity of receiving the same pay as an employee that did not work does not exist here because everyone was working. The Arbitrator did find the Town violated the Blue Collar Unit's CBA because during a period of the COVID shutdown the garage facility was closed just as it would be in a snow event. When some Highway Department workers were called back to work on a rotating basis, some employees got full pay to stay home and not work. This situation caused an inequitable situation that triggered the premium pay required by the Blue Collar CBA. The Town was directed to review its records, and to pay overtime premium to the Highway employees who worked while other Highway Department employees did not have to while receiving full pay.

Town of Hempstead
(Arbitrator Shriftman)
Matter No. 21-0117

In this contract grievance, CSEA claimed that the Town of Hempstead ("Town") breached the collective bargaining agreement when it failed to accurately pay Grievant for his earned compensatory time upon retirement. The Town conceded that it must pay the Grievant, because of his retirement, but disagreed with CSEA's calculation of seventy (70) days. The Town argued Grievant was only entitled to fifty-six (56) days of compensatory time. In reviewing each of the parties' submitted evidence, the Arbitrator found the Grievant earned sixty-two (62) days of compensatory time and ordered the Town to pay Grievant.

St. Lawrence County
(Arbitrator Gross)
Matter No. 21-0159

This grievance alleged that the County's decision to transfer a bargaining unit member to another office violated the CBA because the transfer was being used as a form of discipline and was fundamentally unfair based on a one-time incident with another employee. The employer asserted that under the CBA, it had the right to determine how to deploy its workforce. The Arbitrator found that although the CBA did establish the County's right to assign or transfer employees, it required the County to administer its right in a "fair and impartial" manner. The Arbitrator found that the transfer was unfair to the Grievant because it was initiated as a form of discipline based on unsubstantiated assertions of misconduct and broad-stroke recollections that lacked specific detail. Additionally, the assertions relied upon by the County were from years prior, and were never investigated or brought to the Grievant's attention for response. The Arbitrator found this to be a violation of due process and sustained the grievance.

Westchester County Health Care Corp.
(Arbitrator Drucker)
Matter No. 19-1005

This grievance alleged that the County failed to seek volunteers before mandating overtime in the Radiology Department, in violation of the CBA. A provision in the CBA required that the employer endeavor to achieve equalization of overtime, however, in early 2019, it was discovered that only a small number of bargaining unit members had been receiving a majority of overtime opportunities. In response to this realization, the employer changed the process in May and June of 2019 to attempt to equalize overtime usage. As part of this process, in July the employer mandated certain employees to overtime shifts instead of asking for volunteers. This continued for a short period of time (the precise length was not established by the record) before reverting back to the volunteer sign-up sheet. The Arbitrator found that the employer

violated the contract and issued a cease and desist order. However, because management quickly took steps to rectify the situation and the Union failed to submit sufficient proof establishing the scope of harm, the Arbitrator refused to award any monetary damages.

Yonkers City School District
(Arbitrator Douglas)
Matter No. 20-0524

This grievance alleged that the Yonkers City School District violated the CBA by failing to assign overtime to a school Custodian on five different occasions in 2019. At hearing, the evidence showed that eight overtime opportunities were unevenly distributed to only four out of eight school Custodians, and that none of these eight opportunities were offered to the Grievant. The Arbitrator found that the District failed to provide a reasonable justification for failing to offer Grievant overtime opportunities. While CSEA sought overtime compensation for each date cited in the grievance, the Arbitrator only awarded the Grievant two overtime opportunities in addition to his normal position on the seniority list. The Arbitrator noted that although the private sector may provide compensation for skipped overtime, it is rarely awarded in the public sector and there are frequent prohibitions against compensation for hours not worked.

Yonkers City School District
(Arbitrator Deinhardt)
Matter No. 20-0190

This grievance addressed whether the Yonkers City School District violated the CBA by unilaterally changing payroll practices to account for the 27 pay periods in 2020. Because of this anomaly, the District divided the annual salaries of unit members by 27 pay periods instead of 26. The Union alleged that this change underpaid employees who left before the end of the year, and that the District failed to bargain with the Union. The Arbitrator found that the District's payment method did not constitute a change in policy, where the policy has been to pay the annual salary divided over

the number of pay periods in the calendar year. Additionally, the Arbitrator found that the District did meet its duty to consult and confer with the union prior to implementing the alleged change. Evidence showed that the Union was notified approximately two weeks prior to the change taking effect, and that the parties engaged in some discussion, but the Union did not provide a counter-proposal to the Employer's 27 pay-period proposal. Accordingly, the grievance was denied.

East Williston Union Free School District
(Arbitrator Cacavas)
Matter No. 20-0974

This grievance addressed whether the East Williston Union Free School District violated the CBA by ceasing to authorize overtime. The District objected to the arbitrability of this grievance, arguing that it was not initiated within the 35 days required under the grievance procedure of the CBA. The Union argued that the CBA did not require that a Grievant submit a Step 1 grievance in writing, and that it may be made verbally. The Union further argued that in a conversation with management, the Grievant objected to the cessation of overtime opportunities for the bargaining unit. The Arbitrator found that although Step 1 grievances may be made verbally, there existed a practice by the union of memorializing the grievance in writing. Here there was nothing written objecting to the change in overtime practice until the Union submitted a Step 2 grievance, which was beyond the 35-day window. The Arbitrator found that Step 1 of the grievance process had been bypassed, and accordingly, the grievance was not arbitrable.

Williamsville Central School District
(Arbitrator Denson)
Matter No. 20-0327

In this contract grievance, the Grievant filed a promotional grievance when the District selected another internal candidate to the position of Motor Equipment Operator ("MEO"). The Grievant had been employed by the District for approximately

25 years and held the titles of Custodian and Grounds worker. The successful candidate was employed as a Grounds worker and worked for the District for nine years. The relevant contract language states that the District is obligated to consider each applicant which is "reasonable and consists of, but not limited to, good job performance, evaluations, relevant work experience, good attendance record." The District's right to select a candidate is limited if it determines that the qualifications of applicants are "substantially equal," in which case it is obligated to select the applicant with the longest continuous service. Based upon the review of the Grievant's job performance, which was noted as having several notices and written warnings concerning insubordination, the Arbitrator found that the successful candidate's unblemished work record was a relevant factor in the District's decision. While the successful candidate had a greater number of absences than the Grievant, the District's decision was found not to be arbitrary given that the successful candidate's absences were the result of an extended period of disability. Therefore, the grievance was denied.

City of North Tonawanda
(Arbitrator Randazzo)
Matter No. 19-1125

The Grievant, a Bus Driver with 32 years of employment, contested the District's denial of sick leave for her absence from work on two days. The District compensated the Grievant for her primary bus runs for each day, but not for her mid-day trip hours for such days. The language in the collective bargaining agreement states that "[s]ick leave will be credited based upon the length of the employee's regular workday. If an employee's regular workday changes, sick leave credit will be prorated to reflect the change in the regular workday. This adjustment will occur annually effective the first day of student attendance." The District argued that the mid-day trip hours were not a part of the "regular workday" and it was not obligated to credit the Grievant for sick leave during those hours. The Union claimed that mid-day runs constituted the Grievant's work schedule. In interpreting the contract language, the Arbitrator

looked to the definition of "regular" and found that it is defined as the "norm" or can be referred to as "frequent or regular repetition." Finding that the Grievant's mid-day trip did not consistently function on an established schedule or standard, the Arbitrator denied the grievance. In the decision, it was found that mid-day trips vary daily and do not function based on a consistent schedule.

Yonkers City School District
(Arbitrator Tillem)
Matter No. 20-0836

The instant grievance was filed when the District deducted a vacation day from the Grievant, who, on the day in question, was scheduled to work from home during the COVID-19 pandemic. The Grievant, a Clerk in the District's Transportation Department, was deemed an essential worker in March, 2020. On March 19, 2020, the Director of Transportation emailed a schedule for the department, scheduling the Grievant to work from home on the day in question. The Grievant advised her supervisor and others that she did not have a laptop or District cellphone and could not work from home without these devices. Since the Grievant had advised her supervisors that she did not have the means to work from home, the Grievant did not call in for the day in question and, as a result, the District deducted a day from her vacation accruals. In denying the grievance, the Arbitrator noted that the Grievant "owned a personal cell phone and as a staff member of the Transportation Department used it during her two years of employment to communicate with supervisors." While laptops were not issued to staff until March 24, 2020, the decision noted that other staff worked from home or used a day from his or her accruals. The Arbitrator further took exception with the Grievant failing to contact her supervisor on the day in question, even though the Grievant acknowledged the reporting/communications expectations for work. As a result, the grievance was denied.

Newburgh Enlarged City School District
(Arbitrator Stein)
Matter No. 20-0256

CSEA filed three class action grievances relating to the impact of an Executive Order ("Order") promulgated by the Governor of New York State, which, among other things, regulated municipalities, including school districts, on their manner of operation during the period March 18, 2020 through April 1, 2020. The Order was subsequently revised and extended through the end of the 2020-2021 school year. More specifically, the Order directed the cessation of in-person learning by students in school district buildings and ordered school districts to immediately develop remote learning. Although school district buildings were closed to students during the period governed by the shutdown, the Order instructed school districts to develop a plan for alternative instructional options, for distribution and availability of meals, and childcare. Because of the Order, the Newburgh Enlarged City School District ("District") called certain bargaining unit employees to perform tasks covered by the Order's mandate, while many others remained at home at full pay. In the first two grievances CSEA argued the District violated the collective bargaining agreement ("CBA") when it failed to pay employees who were mandated to physically return to work at the time and a half rate. The third grievance concerned a dispute as to the arbitrability of whether the District violated a past practice when it failed to pay cafeteria and security unit members additional straight time above and beyond their regular rate of pay for hours in which they were mandated to physically report to work. The Arbitrator denied both the first and second grievance because the CBA unambiguously stated in order to get premium pay, an emergency must be declared by the District. Here the emergency was declared by the Governor, so the contract language did not apply. The Arbitrator relied on the bargaining history which showed CSEA had proposed broad language regarding emergencies, but the District countered that language to only include emergencies declared by the District, which CSEA accepted. The third grievance was found to be not arbitrable because the CBA did not have a provision incorporating past

practices, and therefore there was no specific clause in the CBA that the District violated.

Jefferson County
(Arbitrator Siegel)
Matter No. 18-0434

In this contract grievance, CSEA filed eight (8) identical contract grievances claiming that Jefferson County ("County") breached the collective bargaining agreement when it had DMV Clerks work an 11:15 a.m. to 7:15 p.m. shift. CSEA's theory was that the collective bargaining agreement ("CBA") unequivocally states that work hours shall be from 8:00 a.m. to 5:00 p.m. The County denied all eight grievances on the basis that CSEA and the County had entered a memorandum of agreement ("MOA") in 1995 that allowed the County to schedule DMV clerical employees to a shift on Thursdays that began and ended later than their normal workday. CSEA filed a Demand for Arbitration for all the grievances. The County filed an Order to Show Cause and Petition, asking the Jefferson County Supreme Court to permanently stay arbitration on the basis that the grievances were not arbitrable. CSEA prevailed in opposing that order to show cause and the Court denied the County's request and ordered the matter to proceed to arbitration. The matter proceeded to arbitration after the Supreme Court Order was affirmed by the Appellate Division, Fourth Department, and after the County's motion for leave to appeal was denied by the Court of Appeals. At arbitration, CSEA argued the County's reliance on the 1995 MOA was misplaced because it was not intended to be precedent setting, and that it was subject to negotiation at the conclusion of the CBA in effect at the time. The County argued that the grievances were untimely and that there was no clear sunset language in the MOA to provide for the terms to expire. Ultimately the Arbitrator found the grievances to be timely, however, he dismissed the grievances on the merits. The Arbitrator decided that the MOA was a sophisticated arms-length agreement that provided an exception to the regular workday set forth in the CBA. Furthermore, the Arbitrator held that not only was there no explicit sunset clause in the MOA, but there was also evidence of a past practice that

shows that the policy established by the MOA was accepted by both parties for over twenty years. Besides minor changes, both parties operated with a recognition that Thursday evening work could, and was, assigned.

Arlington Central School District
(Arbitrator Lobel)
Matter No. 20-0343

In this contract grievance, CSEA argued that the Arlington Central School District ("District") breached the parties' collective bargaining agreement ("CBA") when it relied only on experience as a factor in deciding who to hire for a vacant Bus Driver-Dispatcher position. CSEA argued that the CBA provides that the District must rely on attendance, work performance, training, and job-related knowledge and experience when making hiring decisions. The District argued that they chose one candidate over another for the position because the selected candidate was familiar with dispatch responsibilities, due to her previous experience, and because of her familiarity with a computer program the District uses for dispatching. The Arbitrator denied the grievance concluding that the plain language of the CBA makes performance the first factor to analyze when filling vacancies. The Arbitrator relied on the fact that the selected candidate had more experience in the primary functions of the Dispatcher position than the other candidate. Also, the Arbitrator noted that the CBA provides no preference to an employee of the District when filling a promotion or vacancy, and therefore, the District properly relied on the selected candidate's prior work experience, her references, and the recommendations of the interview committee.

Bedford Central School District
(Arbitrator Lobel)
Matter No. 20-0822

In this contract grievance, CSEA argued that the Bedford Central School District ("District") violated the collective bargaining agreement ("CBA") when it failed to pay union members incentive

pay when they were required to continue working at home while school buildings were closed due to a hurricane. During the period between August 4 and 7, 2020, the District closed its buildings due to the threat of a severe hurricane. At the same time, the District was gradually having employees return to work in the schools after the lengthy closure due to the COVID-19 pandemic. Because of the hurricane, employees working in school buildings were sent home and were paid for the days; where possible, these employees were instructed to do their work at home, as they had done throughout the pandemic. CSEA's position relied on the unambiguous language of the CBA which provides that when schools are closed due to snow and storm related conditions, employees shall not be required to report to work. Therefore, those required to work when the building was closed due to the hurricane are doing so in violation of the CBA. The Arbitrator disagreed with CSEA's position, and denied the grievance, citing to the fact that many of these employees were already working from home for many months because of the pandemic and therefore they were treated no differently than they had been during the COVID period. The Arbitrator emphasized the fact that because of the pandemic, school schedules had changed, and the people who drafted the language in the contract did not contemplate an August hurricane-related closure to affect all employees. Furthermore, he noted that during the COVID period, if there was a severe snowstorm, most employees continued their work in the same manner as when there was no snowstorm, which is what occurred in this matter.

JUSTICE CENTER

OPWDD
(ALJ Parr)
Matter No. 20-0587

This matter involved two employees ("Subjects") who worked at an Individualized Residential Alternative ("IRA"). Subject 1 had been employed by OPWDD as a Direct Support Professional ("DSP") for approximately 18 years and had been working at this IRA for

seven years. Subject 2 had been employed by OPWDD as a DSP for approximately 32 years and had been working at this IRA for 17 years. The Subjects sought the amendment of a substantiated report which contained a Category 2 and Category 3 Neglect allegation, and one Category 3 Obstruction allegation. The allegations stemmed from an incident where a Service Recipient living at the IRA fell and suffered bruising on her back and arm. The ALJ found that the Justice Center failed to establish by a preponderance of the evidence that the Subjects committed any act of neglect or obstruction. At the hearing, it was shown that the Service Recipient had a history of making unsubstantiated somatic complaints, and that the Service Recipient was unable to provide a coherent and cohesive explanation of how she sustained the bruising on her back and arm. The Service Recipient's inability to consistently explain how or where she fell, together with the Subjects' credible testimony, led the ALJ to conclude there was insufficient evidence to establish that the Service Recipient fell in the presence of the Subjects. Because it was not established that the Service Recipient fell while in the care of the Subjects, it could not be established that an incident report should have been made; therefore the Subjects could not have committed obstruction. Ultimately the ALJ recommended the substantiated reports be amended and sealed.

OCFS
(ALJ Walsh)
Matter No. 21-0373

The Subject sought amendment of a New York State Central Register of Child Abuse and Maltreatment report indicting her for child maltreatment. The Subject, who has operated a licensed daycare since 2002, admitted to leaving a child within her care alone and unsupervised for an extended period of time. Given the age of the child, he was not mature enough or capable of being left home alone. The Subject admitted violations of daycare regulations and acknowledged this incident to have been a terrible mistake. The Subject surrendered her daycare license and acknowledged that she would not be permitted to apply for a license for two (2) years; OCFS Daycare enforcement agreed that this report/incident would

not be the sole basis upon which to deny a subsequent application. The issue at hearing was whether the Subject committed maltreatment, and if so, was it reasonably related to employment by a childcare agency, to the adoption of a child, or to the provision of foster care. The ALJ held that the Agency established that the Subject committed the maltreatment alleged but found that such maltreatment is not relevant and reasonable related to childcare issues. The ALJ cited to the fact that there was no evidence that the child suffered serious harm, and that this appeared to have been an accident. Also, the ALJ relied on the fact that the Subject immediately took responsibility, and testified that she intends to implement changes, should she operate a daycare again, to ensure children are never without supervision. The ALJ denied the request to amend and seal the report, however ruled that because the maltreatment was not currently relevant and reasonably related to childcare employment, the existence of the indicated report may not be disclosed to provider and licensing agencies making inquiries regarding the Subject.

COURT ACTIONS

Herbst v. NYS Office of General Services, et al. (Supreme Court, Albany County, J. Platkin) Matter No. 20-0571

Petitioner brought this CPLR Article 78 proceeding challenging the termination of her probationary employment by the State. Petitioner started employment with the State in September 2019 as an Office Assistant 1 and was subject to a 52-week probationary term. In December of 2019, Petitioner received her first probationary evaluation, whereby she was rated as either "very good" or "satisfactory." Petitioner alleged that she lost childcare due to the COVID-19 pandemic and when her office reopened in May 2020, she sought a modification of her work schedule due to on-going issues with daycare. After sending such request, a few weeks later Petitioner received another interim probationary report which rated her work performance as unsatisfactory or in

need of improvement, and recommended the termination of her probationary employment. In support of her claim, Petitioner stated that she made numerous requests for supervision and training in her job, which were not addressed. After reviewing the submissions, the Court dismissed the petition, finding that the State did provide Petitioner with periodic feedback, advising of her specific performance inadequacies and providing corrective instruction and counseling. As excessive absences during a probationary period are a proper basis for termination, the Court further ruled that Petitioner's absences were significant and created an undue hardship on her colleagues.