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A employee may be faced with a personal or family related disability. A decision to take time-off to care for oneself or a family member may be a difficult decision when balancing personal wishes with work or job or occupational responsibilities. That decision may be complicated if an employer acts in a manner that discourages an employee from taking leave. Therefore, it is important to recognize the rights afforded under the Family and Medical Leave Act ("FMLA").

Since being signed into law in 1993, the FMLA has served as promoting work-life balance. The FMLA is a federal law which entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons. The FMLA also prohibits employers from interfering with an employee’s right to take leave or discriminating against an employee for taking leave.

Specifically, the FMLA requires employers with 50 employees or more to provide up to 12 weeks of unpaid, job protected leave a year to eligible employees to care for a newborn, newly adopted or foster child, a child, spouse or parent with a serious health condition, or for the serious health condition of the employee, including maternity related disability. Employees are eligible to take leave if they have worked for a covered employer for at least one year, and for 1,250 hours over the previous 12 months, and if there are at least 50
employees working for their employer within a 75 mile radius of their worksite.

A recent decision by a federal judge in Ohio addressed the issue of whether an employer interfered with an employee’s right to take FMLA leave and retaliated against such employee for taking FMLA leave. In Lankford v. Reladyne, LLC, 2015 WL 7295370 (S.D. Ohio, Dec. 19, 2015), the court determined that a sales representative for a motor oil supplier raised a triable issue about whether he was fired for taking FMLA leave to undergo a 35-day in-patient treatment program for alcohol dependency.

The employee worked for six years with the company and had positive performance reviews. He denied using alcohol during work or having any performance issues related to intoxication. After the employee was on FMLA leave, the company launched an investigation into his work duties and concluded that he had misappropriated products by providing free oil changes to some of his family members. Management decided to terminate the employee while he was on FMLA leave but waited until he returned to work to actually discharge him.

The court stated that the employer’s investigation into the employee’s alleged improprieties was part of a cover-up to make his termination appear legitimate. It found that the company’s decision to terminate the employee was at least partially because he took FMLA leave. Amongst other evidence, electronic communications between the company’s managers indicated that after finding alleged improprieties in the employee’s conduct, a manager stated it now had “a nice Plan B.” The Court stated that a “Plan B” could be interpreted as an alternative strategy for terminating his employment. Accordingly, a reasonable juror could believe that “the original strategy, Plan A, was to terminate Plaintiff because he was an alcoholic who needed medical leave to obtain treatment for his condition.”

While claims of discrimination under the FMLA are not readily found by courts, it is important to follow the policies and
procedures of your employer for requesting and remaining out of work on FMLA leave. Once granted FMLA leave, it is critical to keep track of timeliness and documentation in order to remain FMLA eligible. Questions regarding FMLA leave may be answered by your CSEA representatives. The U.S. Department of Labor’s website also provides very useful information and is found at: http://www.dol.gov/general/topic/benefits-leave/fmla. complainant pending the investigation. Subsequently, the employer filed disciplinary charges against the employee for the alleged sexual harassment and terminated his employment.

The grievance filed by the Union asserted that a “safe-haven” was created, protecting this employee from discipline while he was placed on union-paid release time. The matter proceeded through the parties’ grievance procedure under the collective bargaining agreement and culminated in final and binding arbitration. The arbitrator found in favor of the Union and held that the employer violated the collective bargaining agreement by taking disciplinary action against the employee while he was on approved union paid leave time. The decision reinstated the employee to his position.

The appeals court found that the arbitrator’s decision to reinstate the employee undermined the employer’s “ability to discipline employees such as [the employee] in order to both punish the offender and to deter other employees from engaging in such behavior.” Furthermore, the appeals court found that the arbitrator’s determination violated the strong public policy against sexual harassment in the workplace and that if left to stand, the determination would have sent a message that certain employees, mainly those who also performed union-related activities, may be free to create a sexually-charged atmosphere.

It is certainly not common when an arbitration decision is vacated, but it is a reminder that public policy concerns may outweigh the interpretation of a provision in a collective bargaining agreement.
DISCIPLINARIES

State Disciplinaries:

OCFS (Finger Lakes Residential Center)  
(Arbitrator Rinaldo)  
Matter No. 14-1217

This Article 33 termination case addressed the alleged misconduct of Grievant, an eight-year Youth Division Aide (YDA) who faced four charges arising out of the failure to intervene when a resident made a suicidal gesture, and then a fifth charge alleging she lied that she called for assistance when she had not done so. Grievant had been assigned to watch over the resident in a one-on-one suicide watch capacity. During Grievant’s assignment, the resident pulled an object off the wall and began a “slashing” motion with the object on his left wrist. Grievant stated that she “pushed the pin” on the radio and, at the same time, saw the Facility’s Assistant Director come into view. The Arbitrator found Grievant guilty of the four charges relating to her failure to immediately intervene and that “whatever steps she may have taken to summon assistance cannot be equated to her duty to intervene.” The Arbitrator did not find Grievant guilty of the fifth charge, noting that he did not find persuasive the State’s evidence that she lied about calling for assistance. In consideration of a penalty, the Arbitrator noted that Grievant was not suspended and has worked without facing further disciplinary action for two years since the incident. As a result, the Arbitrator found a 60-working day suspension without pay or accumulation of seniority as the appropriate penalty.

OPWDD (Brooklyn DDSO)  
(Arbitrator Bass)  
Matter No. 14-1198

This Article 33 disciplinary case charged Grievant, a 12-year Direct Support Assistant (DSA), with placing his hands down the pants of an underage child and inserting a finger into her vagina,
The State sought termination of the Grievant, an 11-year employee who worked as a Maintenance Assistant (Mechanic), after his arrest for Grand Larceny, a Class D Felony, and alleged theft of approximately $20,000-$30,000 belonging to a local fire department. At the hearing, the Grievant accepted responsibility for his off-duty actions and indicated his intention to enter a guilty plea for the pending criminal charges. In challenging his termination, the Grievant argued that the admitted misconduct occurred while off-duty and had no nexus to his work at the Sunmount maintenance garage. Citing to this offense and the Grievant’s previous disciplines for leaving work without authorization and using a State truck to plow his driveway, the Arbitrator found him to be a “thief” and a “dishonest and untrustworthy person.” Furthermore, the State established a “hard nexus” between the Grievant’s misconduct and his employment. As a public employee, the Grievant betrayed the trust (“good faith and fair dealing”) of the Facility by the very nature of his egregious misconduct. According to the Arbitrator, the nexus was sufficient to warrant a disciplinary penalty but not enough to sustain termination. It was found that the State did have probable cause to suspend the Grievant given the nature of the criminal charges, as well as his previous discipline. Given the fact that the Grievant’s criminal case was still pending and that he could be
sentenced to a period of incarceration, the Arbitrator determined it was not possible to render a decision on penalty until the final disposition of the criminal charges. Therefore, the Arbitrator retained jurisdiction of the matter to issue a penalty. In the interim, the Grievant was ordered back to work, without back pay or benefits.

OPWDD (Sunmount DDSO)  
(Arbitrator Drucker)  
Matter No. 14-1156

In this Article 33 proceeding, the Grievant was charged with seven allegations, all of which related to events occurring on one overnight shift. The allegations included charges that the Grievant failed to administer medications, fell asleep and was untruthful in responding to investigation inquiries regarding the allegations. Grievant, employed since 2012 as a Direct Support Assistant, was assigned to an Individual Residential Alternative (“IRA”). On the night in question, the Grievant was one of three staff members on-duty at the IRA. The Union argued it was clear that the residence does not have formal staff assignments, including administering medications, which is assumed by various staff based upon informal methods and who volunteers for each task. Given the testimony of various witnesses, the Arbitrator concluded that the Grievant was guilty of failing to govern medications and the other charges related to this omission as the Grievant testified falsely about his responsibilities that evening. The Arbitrator noted that administering medications is “critical,” and, therefore, such a task should be performed with “reliability and trustworthiness.” With respect to the charges relating to sleeping while on-duty, the Grievant was found not guilty as the State failed to establish by a preponderance of the evidence that he was, in fact, sleeping. The alleged eye-witness testimony could not determine whether the Grievant was sitting comfortably in a chair or sleeping, and the Grievant’s failure to hear an alarm or lack of awareness of noises and lights from a vehicle approaching the residence, did not establish that the Grievant was sleeping while on-duty. In
sustaining the penalty of termination, the Arbitrator stated the misconduct was significant and the Grievant’s untruthfulness regarding these actions established a significant rift in the employer-employee relationship. Probable cause for suspension was also warranted due to the risk presented by inattention and unreliability regarding responsibilities for medications.

SUNY Potsdam  
(Arbitrator Lawson)  
Matter No. 15-0072

The Grievant challenged this Article 33 disciplinary proceeding after the Agency sought termination for violating the Agency’s sexual harassment policy when it was alleged that he grabbed or touched the buttocks of a fellow female staff member on at least five different occasions. Prior to his suspension on these charges, the Grievant was employed for 23 years with the State and had only a letter of reprimand in his personnel file. The State presented evidence that it received other complaints regarding sexually abusive behavior by the Grievant. Under the legal doctrine of res judicata, the Grievant argued that the pending charges should be dismissed because such issues were previously adjudicated and found in the Grievant’s favor by the Unemployment Insurance Appeal Board (“UI”). The Arbitrator rejected this res judicata argument, stating that there were several specific procedural limitations under Article 33 which may or may not have applied in the UI proceeding. Furthermore, any claim that the Grievant lacked notice of such prohibited conduct was summarily rejected as the Grievant is “expected to know that conduct of the nature charged against [him] is prohibited.” Even though one witness could not specify the precise dates when the alleged incidents occurred, credibility was still afforded to such testimony and the Grievant was found guilty of the majority of the charges. Rather than imposing a penalty of termination, however, the Grievant was reinstated to his previous position without any back pay or benefits. Given the repeated nature of the Grievant’s misconduct, the State was found to have probable cause to suspend the Grievant.
Local Disciplinaries:

Nassau Health Care Corporation  
(Arbitrator Kennedy)  
Matter No. 15-0264

The Grievant, a Pharmacy Assistant I, challenged his termination for job abandonment after he suffered an injury in a hospital elevator which crushed his right foot. Following the accident, the Grievant was placed on workers’ compensation leave. When a medical examination deemed him fit for duty, the Employer sent the Grievant written and verbal notifications advising him to return to work on a date certain. The Grievant, however, disregarded the notifications and subsequently the Employer terminated his employment when he failed to comply with their directives. Although four letters were mailed to the Grievant advising of his employment status, at least one mailing was returned to the Employer as undeliverable and the Employer did not present proof of the certified mailing receipts. Therefore, the Arbitrator concluded that the Grievant most likely did not receive a copy of the required formal written notices pertaining to his employment status and possible termination from employment. Furthermore, it was noted that the record revealed the Grievant was more than willing to return to his job. The Arbitrator found that the Employer failed to sustain its burden of proof and ordered that the Employer reinstate the Grievant’s employment, with all accrued and related benefits from the date of his termination.

Syracuse City School District  
(Arbitrator Rabin)  
Matter No. 15-0379

The Grievant, an 11-year custodial worker at the District, challenged a 20-day suspension without pay for allegedly failing to secure certain doors in the building at the end of his shift shortly after he received a counseling memo following a break-in to the building, and after it was discovered that a pool access door had been left open. Grievant’s disciplinary record was not unblemished,
as he had also served a 12-day suspension without pay in the year before the incident for an unrelated matter. The counseling memo issued to Grievant stated that he was to “ensure all windows and doors are secured nightly for the safety and security of building and staff… [and to] work with [the] Assistant Custodian to make your area more safe and secure.” A new policy for custodial workers was also implemented, requiring that “all windows are shut and secured in the areas you are responsible for…[and] make sure all classrooms on your floor are shut and secured.” At hearing it was established that with regard to the break-in, one of the principals had worked over the weekend on the first floor and could have opened a window and forgotten to close and lock it. With respect to the pool access door, the Arbitrator found that the District “has not explored and ruled out the possibility that somebody else who had a key to the areas in question came into the building…and unlocked the door.” Considering the facts presented, the Arbitrator held that the “District can accomplish its goal [of student safety] without imposing discipline upon [Grievant].” Thus, the Arbitrator decided that no suspension was appropriate, but the District may place a counseling memo in Grievant’s personnel file.

CONTRACT GRIEVANCES

State Contract Grievances:

SUNY Fredonia
(Master Arbitrator Selchick)
Matter No. 15-0123

This contract grievance arbitration addressed a grievance filed against SUNY Fredonia alleging that it violated the contract when it passed over Grievant for an overtime assignment as required by the criteria set forth in the overtime provision. CSEA argued that SUNY had instead improperly assigned the overtime to an employee who had left the required classification necessary to be eligible for such overtime assignments. Under the contract, there
are two different types of overtime: “absent work” and “extra work.” SUNY argued that the work assigned was not “absent work” as defined by the contract, but the Arbitrator found that no employee was “absent” – the position was vacant because the employee who received the overtime assignment had left the position three days prior. Thus, the Arbitrator found, the selected employee was essentially filling in for himself, which would lead to “an absurd result.” The Arbitrator therefore found that SUNY Fredonia violated the CBA when it passed over Grievant for overtime work and awarded him 7.5 hours of lost overtime pay.

OPWDD (Broome DDSO) (Master Arbitrator Selchick) Matter No. 15-0612

This grievance alleged that the State violated the CBA when it terminated the Grievant’s employment after she was out of work and placed on Workers’ Compensation leave for a period of one year. The Grievant, employed as a Direct Support Assistant, was placed on leave when she sustained a broken finger and a leg bite while assisting in an intervention with a resident of the Facility. The language of Article 11.5 of the CBA states that an employee receiving Workers’ Compensation benefits for a disability caused by an assault will remain on the payroll for a period not to exceed 24 months. When the State terminated her employment after one year, the Grievant filed this grievance alleging that she should have remained on the payroll for an additional year since her injuries were caused by an assault. On a procedural defect and without addressing whether this underlying incident involved an assault, the Master Arbitrator dismissed the grievance. According to the Master Arbitrator, the grievance was not timely filed pursuant to the CBA grievance procedure which states that grievances must be filed within 30 calendar days of the alleged act or omission. Here, the Grievant failed to file the grievance within 30 calendar days from receiving notification that her employment was being terminated. Even if the grievance procedure was given a more liberal interpretation and the 30 days commenced from the date of
the Grievant’s actual termination, the Arbitrator still noted that the grievance was untimely.

Local Contract Grievances:

Town of Riverhead
(Arbitrator Weinstock)
Matter No. 14-1338

This local contract grievance alleged that the Town violated the contract when it refused to extend Grievant’s Workers’ Compensation benefits beyond one year. The Arbitrator granted the Town’s motion to bifurcate the case and therefore only addressed a question raised regarding the arbitrability of the grievance. The Arbitrator considered the grievance procedure contract language requiring that the first step is a presentation of the grievance by the Grievant to his department head, and the second step is an appeal from an unsatisfactory response from the department head to the Town Board. The Arbitrator found that the grievance was never presented by the Grievant to his department head, and that there was no appeal to the Town Board. The Arbitrator further noted that even if she were to invent a filing by Grievant before the Town Board, the demand for arbitration was filed more than six months late “by any conceivable measure.” In addition to the timeliness issues, the Arbitrator also noted that the two demands for arbitration were not properly filed, as they were sent to PERB rather than filed with the Town as required by the contract. The Arbitrator denied the grievance as not properly filed and the demands for arbitration were dismissed as untimely.

Town of Cicero
(Arbitrator Weinstock)
Matter No. 14-1338

This local contract grievance was filed when the Town failed to pay the meal allowance of employees who worked on weekends. The contract language at-issue stated the following: “A meal allowance of $10.00 for all employees who get called in to work
before or after their regular work shift and/or work beyond their normal work shift, and will be paid by separate check.” It was stipulated that the Town highway employees have regular work schedules that do not require them to work on weekends. CSEA argued the plain language of the contract required the Town to pay the meal allowance for working on the weekend, as it was during a period employees are not normally scheduled to work. The Town argued that the language did not apply to employees called in to work outside a normal shift for less than the duration of a full shift. The Arbitrator agreed with the Town’s position and denied the grievance, finding that the language of the provision “would be meaningless if [it] were read as a meal allowance entitlement to employees who work on a weekend regardless of the number of hours worked.”

Hudson City School District
(Arbitrator Patack)
Matter No. 15-0263

This contract grievance alleged the District violated a newly negotiated provision of the CBA when it refused to pay premium pay of time and one-half to maintenance and custodial bargaining unit members when they were the only employees required to report to work during a school delay due to inclement weather. The relevant contract language stated the following: “Custodial and maintenance staff who are required to report to work when school is closed due to inclement weather and all staff other than custodial and maintenance employees are excused from reporting to work, shall be paid at the rate of time and one-half for all hours of work for the period of time that the other staff are excused from reporting to work.” CSEA had agreed to this language in the form of a counteroffer from the District after originally proposing a provision that specifically stated “Employees shall also be paid at time and one-half (1 ½) for the hours school is delayed in opening and when school closes early.” The first instance of the relevant provision being implemented was during an early dismissal at which time maintenance and custodial bargaining unit
members were the only employees required to continue working. The District also paid the time and one-half premium pay to bargaining unit members when there was a full-day closure for inclement weather, but then refused to pay the premium pay during a morning delay. Although the District offered no explanation as to why it provided premium pay to unit members during the early dismissal, the Arbitrator found “that it did so on one occasion… does not establish a past practice that demonstrates that the parties intended…” for the provision to require anything other than the requirement of premium pay only for closings. The Arbitrator found that “the Union is attempting to attain a benefit through this grievance that it was unable to during negotiations” and denied the grievance accordingly.

**Town of Riverhead**  
(Arbitrator Riegel)  
*Matter No. 15-0399*

The Union filed this grievance when the Town failed to pay employees at a rate of time and one-half for two snow emergency days during which the Town Hall was closed. The Town credited those employees who did work with compensatory time at straight time for the hours worked. Although the Union argued that the unit members referred to in this grievance were entitled to be paid at a time and one-half rate of pay, based on the fact that previously employees had been paid at that rate on snow emergency days, the Arbitrator found that the contract’s past practice clause was previously removed in negotiations between the parties and could not be relied upon. In addition, the issue was not arbitrable since the term “grievance” in the contract specifically excluded the relevant overtime contract article from its definition. Even if the issue was arbitrable, it was held that the contract language precluded a violation since the affected unit members were working regularly scheduled hours, not overtime. Therefore, the grievance was denied.
The Grievant filed this promotional grievance when the Village selected another less-senior candidate for the vacant and posted position of Assistant Foreman in the Water Department. The grievance also alleged that the CBA was violated when the Grievant was not temporarily appointed to the position prior to filling the position on a permanent basis. The language of the CBA provides a modified seniority clause where the vacancy will be awarded to the individual with the “best qualifications” and if more than one candidate is equally qualified, seniority will then take precedent. In arguing its position, the Village cited to two previous arbitration awards where it had successfully defended promotional grievances by longer tenured employees who sought to overturn hiring decisions. While the Arbitrator noted that it is beneficial to avoid inconsistent decisions to maintain stable relations between the parties, the decisions, although credible, were decided upon a completely different set of facts and were not relied upon when deciding this grievance. After reviewing the resumes, interview notes and experience of the Grievant and the successful candidate, the Arbitrator found that the Village violated the CBA as it could not be determined whether the successful candidate was better qualified than the Grievant. According to the Arbitrator, neither candidate fulfilled the requirements of the minimum qualifications for the posted position, but it was held that the successful candidate had one year of experience as an employee in the Water Department, compared to the Grievant’s 12 years in the Department. Therefore, the Grievant was awarded the position with retroactive pay and benefits. The second part of the grievance alleging that the Grievant should have been temporarily assigned to the position was denied because the Village had the sole discretion to offer such work.
This contract grievance alleged a violation of the CBA when the Town failed to promote Grievant, the more senior applicant, to the competitive class position of Maintenance Supervisor (Automotive). The promotion contract language at-issue included a modified seniority clause that provided seniority as the basis for selection in instances where “all candidates have equal ability.” The Arbitrator found compelling the reasons provided by the Town that the selected candidate was the superior one considering his training and experience working as a mechanic as compared to Grievant, who testified that he submitted an incomplete application because he was “being lazy.” The Arbitrator thus denied the grievance, noting the Town’s authority under the contract to make the determination that a competitive class applicant had greater ability than another.

COURT DECISIONS

Matter of Hirshfeld v. City of Long Beach (Nassau County Supreme Court- J. Winslow) Matter No. 15-0276

CSEA brought this special proceeding seeking to vacate an arbitration decision which denied the Petitioner’s promotional grievance. The underlying grievance was filed after the City awarded the position of Assistant Supervisor in the Waste Water Treatment Plant to an employee with 24 years less seniority than the Petitioner. The CBA provided that promotions and job assignments were determined by considering “ability, adaptability and seniority.” Finding that the subject award was not irrational, arbitrary or capricious, the Court dismissed the petition as the arbitration decision did not impose a new standard, add terms to or change the standard imposed by the parties’ CBA.
Matter of Idolor v. BOCES of Nassau County  
(Appellate Division, 2nd Department)  
Matter No. 14-1127

This Article 78 proceeding was brought against BOCES of Nassau County when it adopted the findings of a Section 75 Hearing Officer which terminated the employment of the Petitioner for misconduct and insubordination. This appellate court affirmed the trial court’s decision dismissing the petition based upon the Petitioner’s failure to serve a Notice of Claim upon BOCES of Nassau County after it rendered its Section 75 decision. Therefore, Notices of Claim must be served within three months when appealing Section 75 decisions of school districts and cooperative boards.

Matter of Baker v. Clinton County  
(Appellate Division, Third Department)  
Matter No. 15-0006

The County appealed a decision of the trial court which granted Petitioner’s application to receive benefits under General Municipal Law §207-c. Section 207-c allows corrections officers to receive their full salary during the pendency of a disability sustained while on-duty. Petitioner, a corrections officer with the County’s Sheriff’s office, was injured at work and placed on leave. After being cleared to return to work from his injury, the County served the Petitioner with disciplinary charges alleging, amongst other things, that he falsely reported his injuries. This proceeding was brought challenging the County’s determination to terminate his §207-c benefits during the pendency of his disciplinary hearing. Petitioner argued that §207-c benefits are a property interest and may not be withheld without a pre-termination evidentiary hearing. The appellate court agreed and found that the Petitioner was denied due process when the County terminated the Petitioner’s §207-c benefits without affording him a hearing. Finally, the Court affirmed the determination that the Petitioner should be reimbursed the improperly withheld §207-c benefits.
This case involved an allegation of Category 3 abuse made against Subject, a three-year Youth Division Aide IV (YDA IV). Subject was alleged to have used an unauthorized restraint technique on a Service Recipient that resulted in the Service Recipient being thrown outside an office and pushed against a wall. The ALJ found that Subject failed to use de-escalation techniques to avoid the use of force, and that – despite lacking clear video evidence of inside the office – it was reasonable to deduce that Subject used excessive force to eject the uncooperative Service Recipient out of an office. The ALJ noted that there was no emergency situation and that the Subject knowingly employed a prohibited technique. As a result, the Subject’s request to have the report of Category 3 abuse be unsubstantiated was denied.

Subject, a 15-year YDA 3, was alleged to have committed Category 2 abuse when he threw a Service Recipient on the floor and kneed him in the ribs. At the time of the incident in question, Subject was under a written facility order to refrain from performing or attempting to perform any type of restraint upon any of the Service Recipients in the facility, an order which was issued at his own request. Subject was required to summon assistance from other staff in the event any physical restraint of a Service Recipient became necessary. At hearing, Subject admitted that during the incident he used a manual restraint that immobilized or limited the Service Recipient’s ability to move his body freely. The videotape of the incident showed Subject intentionally grabbing...
Service Recipient’s upper arms or torso, lifting him off the floor, turning to his left and forcefully slamming the Service Recipient on a plastic chair and then the floor with the Subject initially lying on top of him. In consideration of the evidence presented at hearing, the ALJ denied Subject’s request to amend the report of Category 2 abuse.

OPWDD (Central NY DDSO)  
(ALJ Renzi)  
Matter No. 14-0596

The Subject appealed the Justice Center’s substantiated report finding that she engaged in abuse (more specifically “physical abuse” and “deliberate inappropriate use of restraints”) involving two Category 2 offenses when she allegedly dragged and pulled a Service Recipient off the bus. At the time of the alleged incident, the Subject worked as a Direct Support Assistant for OPWDD for almost 30 years. The Subject was familiar with the Service Recipient who is blind, non-verbal and has other developmental challenges. During the process of unbuckling and assisting the Service Recipient from the bus, the Service Recipient became seated on the floor of the bus and would not move or get up. The Subject was accused of carrying the Service Recipient down the steps and out the door of the bus, with the Service Recipient’s upper back and head against the Subject’s chest and her feet dragging along. The Service Recipient sustained no physical injury as a result of the incident. According to the ALJ, the Justice Center proved both charges and such allegations were properly identified as Category 2 offenses. The ALJ dismissed the Subject’s assertion that her actions were justified as a “reasonable emergency intervention,” finding that other staff members were present to assist and formulate a less intrusive and less dangerous plan for the Service Recipient’s removal from the bus.

OPWDD (Central NY DDSO)  
(ALJ Serlin)  
Matter No. 15-0673
This Justice Center matter involved allegations of Category 3 abuse against the Subject, a 24-year Direct Support Assistant, when she was accused of dragging a Service Recipient across a floor for a distance of four or five feet. The incident occurred after the Service Recipient agitated another Service Recipient in the house and the Subject attempted to remove the two individuals from each other. The Justice Center presented testimony that the Subject did not utilize any deescalating strategies when addressing this situation. While the Subject indicated that she acted in this manner because she believed the Service Recipient was going to harm another staff member, the ALJ found such testimony incredible and held that the Subject performed an improper restraint which was contrary to any prescribed training and the Service Recipient’s Behavior Support Plan. Therefore, the ALJ concluded the Justice Center proved by a preponderance of the evidence that the Subject committed both physical abuse and the deliberate inappropriate use of restraints.

OPWDD (Capital District DDSO)
Matter No. 14-0996

In this Justice Center proceeding, the Subject was charged with one allegation of Category 2 abuse when she was accused of restraining the Service Recipient by placing her forearm on the back of the Service Recipient’s neck and pushing his face into a bus window. The Subject elected to waive her right to an evidentiary hearing on the issues and, instead, chose to resolve the matter through a stipulation of facts submitted to the Executive Director of the Justice Center for final approval. In the stipulation of facts, the Justice Center agreed that the offense would be lowered from a Category 2 offense to a Category 3 and would be classified as a deliberate inappropriate use of restraint and not physical abuse. The Executive Director of the Justice Center approved the stipulation and found that such an agreement could be entered between the parties as it was not inconsistent with public policy. Specifically, the Subject acknowledged that she used an improper technique even under the attenuating circumstances.