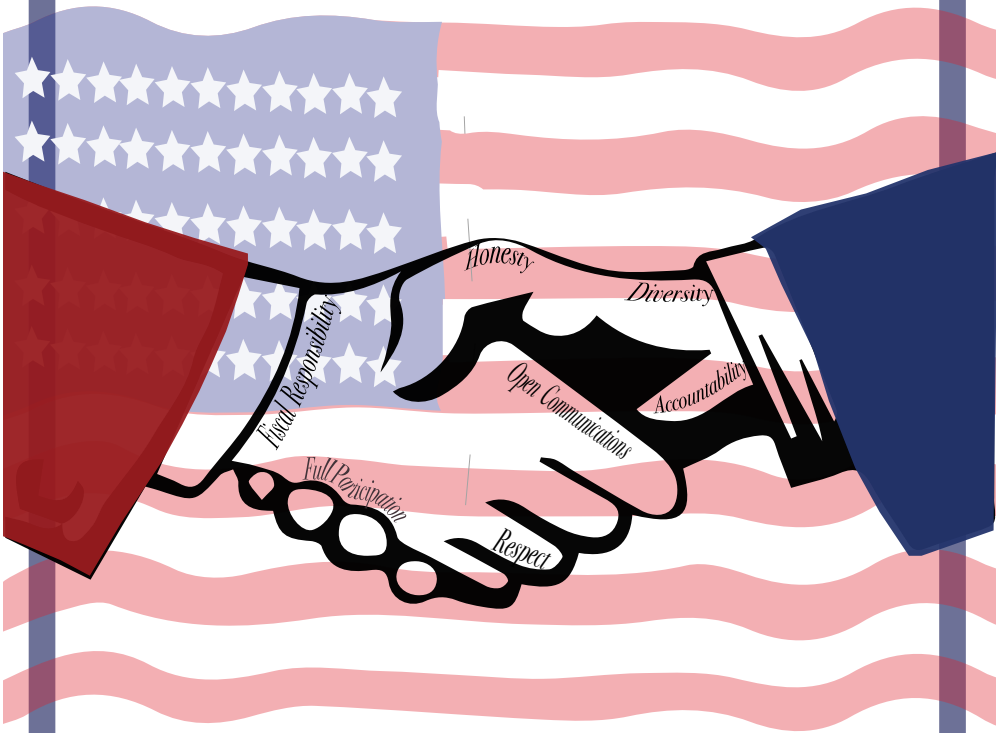
# THE ADVOCATE

*March 2023*

A PUBLICATION OF CSEA LEGAL DEPARTMENT




CSEA
Local 1000 AFSCME, AFL-CIO

## TABLE OF CONTENTS:



*Cover designed by Cecelia Haarer, Niskayuna High School.*

## CSEA LEGAL DEPARTMENT STAFF

Daren J. Rylewicz, *General Counsel*
Leslie C. Perrin, *Deputy Counsel*
Steven M. Klein, *Deputy Counsel*
Eric E. Wilke, *Senior Counsel*
Aaron E. Kaplan, *Senior Counsel*
Jennifer C. Zegarelli, *Senior Counsel*
Scott Lieberman, *Senior Counsel*
Thomas Morelli, *Associate Counsel*
Mary Slattery, *Associate Counsel*
Alexandra Menge, *Associate Counsel*
Dara Hebert, *Associate Counsel*
Julie A. Collyer, *Legal Systems Administrator and Legal Office Manager*
Kathy Smail, *Senior Legal Assistant*
Amee Camp, *Senior Legal Assistant*
Marie Anderson, *Legal Assistant*
Jasmine Vanterpool, *Legal Assistant*
Alicia Brown, *Legal Assistant*
Kimberly Salamida, *Legal Assistance Program Administrator*
Michelle VanKampen, *Legal Assistance Program Administrator*
Bonnie VanAlphen, *Internal Elections Assistant*

# Counsel's Corner

*By: Daren J. Rylewicz*
*General Counsel*

## Current Legal Challenges to COVID-19 Vaccine Mandates in NYS

While COVID-19 workplace safety measures may be loosening to the point of pre-pandemic times, legal challenges to various vaccine mandates and testing requirements are still being pursued. Vaccine mandates for employees have been challenged in the form of state court proceedings, improper practices charges with the Public Employment Relations Board ("PERB") and through arbitration. This article provides a brief summary of the status of some of these legal objections to the vaccine mandate and testing requirements that were implemented during the pandemic, some of which CSEA is a party to.

A large part of the litigation surrounding the vaccine mandate has stemmed from the New York State Department of Health's ("NYSDOH") emergency regulation that requires covered health care entities to ensure that their "personnel" are "fully vaccinated" against COVID-19. This regulation was implemented in August, 2021 and was permanently adopted by the NYSDOH Commissioner in June, 2022. In October, 2022, certain medical professionals and advocacy groups brought an Article 78 proceeding and sought a declaratory judgment finding that the NYSDOH exceeded its jurisdiction by

enacting the regulation. The petitioners sought to invalidate the mandate by claiming that the regulation was preempted by the New York State Human Rights law, which requires reasonable religious accommodations absent a finding by the employer that the individual in question cannot be safely accommodated without posing a direct threat.

On January 13, 2023, Onondaga County Supreme Court Justice, Honorable Gerard J. Neri, struck down the NYSDOH's regulation, finding that the agency and Governor Hochul acted beyond the scope of their authority in enacting the regulation. Judge Neri indicated that although the Legislature has authorized certain immunization programs in the past, such as for measles, mumps and rubella for children, the public health law does not speak about, nor reference, COVID-19. Furthermore, the regulation was deemed invalid as its stated purpose of preventing the transmission of COVID-19 was found to be inconsistent with the NYSDOH's public acknowledgment that "COVID-19 shots do not prevent transmission."

The Respondents, including Governor Hochul and the NYSDOH, filed an appeal of Judge Neri's decision, while also seeking to stay the enforcement of such decision. On February 28, 2023, the Appellate Division for the Fourth Department, granted the Respondents' motion for a stay, on the condition that the appeal be perfected on or before March 20, 2023. Due to the stay being granted, and assuming the appeal will be timely perfected, the regulation requiring the vaccine for certain healthcare providers will remain in effect as the appeal is pending.

It should be noted that another Supreme Court Justice, Rensselaer County, Judge Roger D. McDonough, issued a decision on January 9, 2023, on this same issue. Contrary to Judge Neri's finding, Judge McDonough found that the public health law provided sufficient statutory authority for the promulgation of the regulation. These opposing decisions demonstrate that the law is in a state of flux and appeals of these decisions will likely settle the issue.

Besides the NYSDOH regulation, other employers have also implemented similar vaccine mandates and testing requirements for its employees. The Unified Court System ("UCS") is one such employer that implemented a COVID-19 vaccine policy and testing policy. Various unions, including CSEA, filed improper practice charges against UCS with PERB, alleging, inter alia, that these policies were mandatory subjects of negotiation, to which UCS was obligated to bargain. In the Administrative Law Judge's very recent decision, dated February 24, 2023, PERB held that UCS did not need to negotiate over requiring employees to vaccinate or test for COVID-19, but does need to negotiate the impact of those polices and the "extensive procedures that implicate various terms and conditions of employment, including leave time, compensation, discipline, job security and medical privacy." UCS will be appealing this decision to the Board.

Besides the PERB proceeding, CSEA also filed an Article 78 proceeding in New York State Supreme Court, Albany County against UCS for denying approximately 29 employees' requests for religious exemptions from its mandatory COVID-19 vaccination policy. The Court determined that UCS may have improperly denied a sincerely held religious belief to 19 of the 29 named petitioners and, as such, remitted the proceeding concerning these petitioners for further evaluation. With respect to the remaining 10 petitioners, the Court upheld UCS's determination that their objections to the vaccine mandate were either not timely made or not based on a sincere religious belief. CSEA and UCS have pending appeals with the Appellate Division, Third Department, concerning this decision.

In addition, CSEA has also filed a class action grievance for UCS employees who were not vaccinated against COVID-19 and were summarily terminated without due process rights. That grievance will be proceeding to arbitration shortly.

It should be noted that effective February 17, 2023, UCS removed its requirement that all non-judicial staff be vaccinated against

COVID-19. With the removal of the mandate, staff that were terminated or resigned due to the vaccine mandate are urged to reapply. Even with the mandate being dropped, CSEA intends to pursue these actions against UCS.

CSEA has also won some favorable arbitration decisions relating to other employees being terminated for not complying with a vaccine mandate imposed by their employers. It is expected that these decisions will be challenged by the respective employer. CSEA will continue to defend such employees' rights and pursue relief to reinstate these employees to their positions.

# DISCIPLINARIES

**State Disciplines:**

**New York State Police Headquarters**
**(Arbitrator Crangle)**
**Matter No. 22-0411**

The Division of State Police has employed the Grievant as an Office Assistant 1 in its Pistol Permit Bureau since January 2006 and, prior to the instant proceeding, had neither been the subject of discipline nor received a counseling memorandum. He was suspended and served a termination Notice of Discipline ("NOD") containing three charges of misconduct, all related to an incident where the Grievant was accused of engaging in masturbatory conduct while seated at his desk. Ultimately, the Arbitrator found that the State established that the Grievant engaged in masturbatory conduct while seated at his desk. However, the Arbitrator dismissed sexual harassment charges, relying on the fact that this was a single, isolated instance of self-gratification, and that there was no evidence that the Grievant's conduct was directed at anyone, or that he had any intention of having his conduct observed. In addressing penalty, the Arbitrator found that termination was inappropriate; rather a six-month suspension without pay was appropriate.

**Office of Mental Health**
**(Arbitrator Panepento)**
**Matter No. 22-0682**

The Grievant, who is employed by the New York State Office of Mental Health ("OMH") as a Secure Care Treatment Aide Level 2, was served with a Notice of Discipline ("NOD") proposing a penalty of termination as a result of failing to receive his first dose of the COVID-19 vaccine by the stated deadline in accordance with OMH's regulations. Although the Grievant eventually received both doses of the vaccine, albeit after the stated deadline, and returned to work, Arbitrator Panepento determined that OMH had probable cause to suspend the Grievant because there was no

dispute that he failed to comply with the vaccine mandate, which he was given notice of and had the opportunity to comply with in advance of the stated deadline. As such, Arbitrator Panepento upheld suspension.

**Office of Mental Health**
**(Arbitrator Day)**
**Matter No. 22-0536**

OMH employed the Grievant as an Office Assistant 2 at the Pilgrim Psychiatric Center for eight years. The Grievant was ordered to obtain a COVID-19 vaccine after her request for a religious exemption was denied. The Grievant did not receive a COVID-19 vaccine and was suspended and served a Notice of Discipline ("NOD") seeking her termination for failing to receive a COVID-19 vaccination pursuant to the New York State Office of Mental Health regulation. CSEA argued that the Grievant's position is not patient-facing, she maintains social distancing, works alone at her desk, and therefore the mandate should not apply to her. OMH argued that the Grievant's position required her to enter areas where she is likely to contact hospital patients and/or staff and that she was subject to deployment to other areas during staffing shortages, which would require her to be vaccinated. The Arbitrator gave deference to OMH's authority to determine the Grievant's duties and whether they fell within the vaccine mandate, upheld the NOD, found termination appropriate, and found that OMH had probable cause to suspend the Grievant.

**Office of Mental Health**
**(Arbitrator Crangle)**
**Matter No. 22-0525**

The Grievant, who was employed by the OMH as a Mental Health Therapy Aide, was charged with misconduct for failing to receive the COVID-19 vaccine in accordance with the OMH regulations. Although the Grievant submitted requests for medical and religious exemptions from the vaccine requirement, Arbitrator Crangle upheld her suspension without pay and termination, determining

that the Grievant was afforded due process before her termination from employment was sought, through notice of the vaccine mandate and the time frames for compliance, despite the fact that she was never interrogated with respect to her refusal to become vaccinated. Further, the Grievant's refusal to become vaccinated constituted misconduct as well as insubordination and resulted in Arbitrator Crangle upholding the proposed penalty.

**Local Disciplinaries:**

**City of Johnstown**
**(Arbitrator Trela)**
**Matter No. 22-0741**

The City of Johnstown employs the Grievant as a Laborer in the City Maintenance Department. The City preferred charges against the Grievant for his continued tardiness in reporting to work and failing to call his supervisor to inform him that he would be unable to make it to work. The City claimed the Grievant violated its Tardiness Policy ("Policy") which establishes a progressive discipline system in which an employee can ultimately be terminated for their fourth violation of the Policy within one year of their last offense. The City established that the Grievant violated the Policy four times and, therefore, the Arbitrator found the Grievant guilty of the charges and affirmed the termination penalty. Although the Arbitrator affirmed termination as the appropriate penalty, he also directed the City to hold the penalty in abeyance only to be implemented should the Grievant violate the Policy again. In making his decision, the Arbitrator relied on the fact that the Grievant was permitted to return to work for almost six months after his last violation of the Policy and had not violated it again. Furthermore, the Arbitrator considered that the Grievant admitted his tardiness at the hearing, sincerely apologized, and demonstrated he wanted to keep his job.

**City of Cohoes**
**(Arbitrator Rinaldo)**
**Matter No. 22-0551**

The Grievant, who is employed by the City of Cohoes ("City") as a Laborer, was served with a Notice of Discipline ("NOD") proposing a penalty of two (2) days' suspension without pay as a result of failing to sign an acknowledgement of the sick leave language contained in the CBA that he, and all other Department of Public Works' ("DPW") employees, were directed to sign by their supervisor. Although the Grievant's signature on the acknowledgement would have no effect on the operation of the language itself, Arbitrator Rinaldo determined that it was not his choice or contractual right to assess the usefulness of the management decision to have the DPW employees sign the acknowledgement, and that it was also not his choice or contractual right to refuse to sign the acknowledgment and not follow his supervisor's directive because, in his opinion, the directive was unnecessary. As such, Arbitrator Rinaldo concluded that the Grievant's refusal to sign the acknowledgement constituted insubordination and upheld the proposed penalty.

# CONTRACT GRIEVANCES:

**<u>Local Grievances</u>:**


**Sullivan County Sheriffs**
**(Arbitrator Campagna)**
**Matter No. 22-0326**

CSEA filed a grievance alleging that a memo published by the County Sheriff violated the CBA by unilaterally modifying the management of the leave calendar system contained in the CBA. CSEA demanded the memo be withdrawn, but the County Sheriff denied the grievance. The County argued the contractual language unambiguously limited the leave calendar system solely to vacation time, has been present in all CBAs since 2008, and that

the County has the right to revert to the contract even if there was a past practice of handling the leave calendar system differently. CSEA argued that the language was ambiguous so extrinsic evidence should be relied upon, which demonstrated that for 10 years the leave calendar system included vacation, holiday, and compensation time. This past practice was memorialized in an MOA between the parties, between the dates of the current and prior CBAs. The Arbitrator held that the past practice prevails over the contractual language, as the County did not contest the past practice as laid out in the MOA. The Arbitrator sustained the grievance, ordered the County to withdraw the contested memo to the extent that it violates the CBA, and directed the County to reinstate the terms of the MOA.

**Schenectady County DSS**
**(Arbitrator Brown)**
**Matter No. 22-0434**

CSEA filed a class action grievance alleging the County violated the CBA by prorating leave days granted to certain employees in lieu of working shortened summer hours, based upon those employees' workplace absences during the summer months. The County argued the matter was not arbitrable, as the Demand for Arbitration was untimely and was not filed with the correct County official. The County also argued that the Management Rights clause allowed for it to prorate leave days, and furthermore that the past practice was to prorate the forementioned leave days based upon employee absences during the summer months. CSEA argued that the initial grievance was timely, making the matter arbitrable, that the County was untimely in issuing its decision on the grievance, that the grievance was filed properly with the County, and that the grievance was filed in a manner commonly accepted by the parties. CSEA argued that the CBA did not contain any language on prorating leave days, only restricting when those leave days could be utilized, and that the parties' past practice was to not prorate leave days, unless it was for new employees hired after the start of the summer. The Arbitrator found the matter arbitrable and also found the contractual language to unambiguously mandate that

these employees receive leave days, without limitation based upon their workplace absences. The Arbitrator sustained the grievance, ordered the leave days which were prorated be restored to those class members still employed by the County, and ordered the County to pay the retired class members their daily rate of pay for each prorated leave day.

# COURT ACTIONS:

**The City of Long Beach, et al.**
**(U.S. District Court, E.D.N.Y.)**
**Matter No. 22-0253**

Plaintiff commenced a lawsuit against John Mooney ("Mr. Mooney"), individually and as President of CSEA Local 1000 AFSCME, AFL-CIO; the City of Long Beach Unit 7569-00, Nassau County Municipal Employees Local 882 ("Union"); and the City of Long Beach ("City"), alleging retaliation in violation of the First and Fourteenth Amendments, as well as prima facie tort. Plaintiff specifically alleged that, after informing the City he had voted for Republican candidates rather than the Democratic candidates he was compelled by the City to campaign for, the City claimed that he quit his job and communicated its acceptance of his resignation, and the Union refused to represent him in connection with a grievance over this issue. Mr. Mooney thereafter filed a motion to dismiss the Complaint, and Judge Shields determined that the motion should be granted in part and denied in part. This is because, at the pleading stage, Plaintiff had set forth a plausible claim that Mr. Mooney engaged in joint action, such as agreeing and/or conspiring, with the City in order to terminate Plaintiff's employment, as well as a plausible claim of First Amendment retaliation. However, with respect to Plaintiff's claims pursuant to the Fourteenth Amendment, Judge Shields determined that they should be dismissed because he was attempting to bring a "class-of-one Equal Protection" claim against his employer, which is barred because allowing such claims "would impermissibly constitutionalize the employee grievance," and because he did

not plead any "similarly situated" individuals who were treated more favorably on the basis of their political preferences. Judge Shields finally determined that Plaintiff's claim of prima facie tort should be dismissed because he failed to allege special damages or malevolence, which are required in order for such a claim to be successful.

**State of New York v. PERB**
**(Court of Appeals)**
**Matter No. 20-0962**

In 2009 the State began to require all applicants to pay promotional exam application fees under CSL § 50(5), even though it had previously waived the fees for employees represented by CSEA, District Council 37, and NYSCOPBA. CSEA and the other Respondents filed improper practice charges with PERB and argued this was a unilateral change which the State failed to negotiate, in violation of CSL § 209-a.1(d). PERB found that not charging the fees was an enforceable past practice and a condition of employment because it was an economic benefit to employees. The State filed an Article 78 petition by the Supreme Court, Appellate Division. On review, the Court of Appeals reversed, holding that for an economic benefit to be a term and condition of employment, it must have some nexus to the employment. The Court of Appeals held that the State's statutory authority to require fees under CSL § 50(5) is unrelated to the employment itself and is more akin to its authority to impose licensing fees that an employer may demand as a job requirement. Therefore, the fees were not a term and condition of employment, the State was not obligated to negotiate regarding the fees, and PERB's conclusion was erroneous. The Court granted the petition to annul PERB's decision.

# PERB DECISIONS:

**CSEA and Monroe Community College and County of Monroe**
**(ALJ Thomas Scott)**
**Matter No. 19-0279**

CSEA filed an improper practice charge against the College for violating CSL § 209-a.1(d) by unilaterally modifying retirement health insurance benefits for employees represented by CSEA. CSEA asserted that the new health insurance plan purchased by the College offered a lower level of coverage than the prior plan. PERB advised the parties that the County may be a joint employer with the College, so CSEA filed an amended charge, against both the College and the County. After filing the IP charge, CSEA also filed a breach of contract claim in New York State Supreme Court against the College and the County, in which the Judge certified the class of current and future retired employees of the College represented by CSEA. The College appealed the decision, which remains pending. The ALJ deferred the IP to the pending judicial litigation, with no opposition from CSEA or the College. The charge was conditionally dismissed.

**CSEA, Inc. et al. v. New York State Unified Court System**
**(ALJ Manichaikul)**
**Matter Nos. 21-0722 & 21-0700**

CSEA, along with nine other unions, filed separate improper practice charges alleging that the New York State Unified Court System ("UCS") violated the Taylor Law when, without bargaining, it announced the implementation of a mandatory COVID-19 testing requirement for unvaccinated non-judicial employees ("Testing Policy"), and the implementation of a mandatory COVID-19 vaccination program for non-judicial employees ("Vaccination Policy"). All the improper practice charges were consolidated and heard collectively. PERB held that UCS was not required to bargain over its decision to require employees to test or vaccinate because the individual interests of the employees did not

outweigh UCS' core mission of providing an accessible forum for the public to redress grievances. However, PERB held that UCS still had a duty to negotiate with the unions over the chosen procedures used to implement the Policies to the extent that they implicate terms and conditions of employment, and ordered UCS to cease and desist from unilaterally imposing procedures that employees must follow in order to be tested or vaccinated. PERB also held that UCS make whole bargaining unit employees who were harmed as a result of the implementation of the Polices. Finally, PERB also directed UCS to bargain with the unions that alleged that it failed to engage in impact bargaining regarding its decision to test and vaccinate.