THE ADVOCATE

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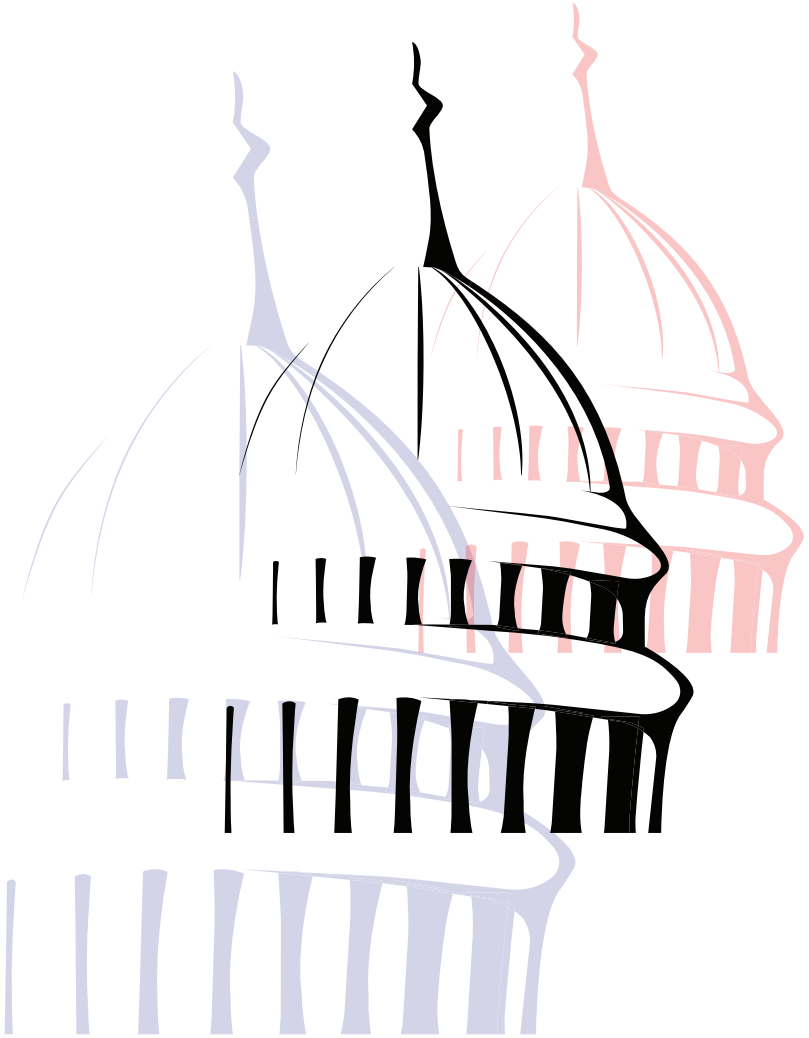

January 2022

CSEA
Local 1000 AFSCME, AFL-CIO

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Counsel's Corner

By: Daren J. Rylewicz
General Counsel

Happy New Year! I hope everyone had a great holiday season and had the opportunity to spend some time with loved ones and friends.

Janus Update

I thought I would take this opportunity to revisit *Janus v. AFSCME Council 31*. As you know, on June 27, 2018, the U.S. Supreme Court ruled in a 5–4 decision that the application of public sector union fees to non-members is a violation of the First Amendment, ruling against AFSCME. Justice Alito wrote for the Court, joined by Justices Roberts, Kennedy, Thomas, and Gorsuch. Alito wrote that agency-shop agreements violate "the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern." Alito recognized that losing these fees would put a financial burden on the public sector unions, who would continue to have to represent nonmembers even without their agency fees, but stated that "we must weigh these disadvantages against the considerable windfall that unions have received." In the decision, the Court held that the conclusion reached by *Abood*, the previous Supreme Court decision that upheld agency fees, was inconsistent with the First Amendment and thus overruled that decision.

Since the Supreme Court's 2018 Janus decision, various organizations have been filing lawsuits against

public sector unions to recoup pre-Janus agency fees, to challenge exclusive representation, and to expand the Janus decision in an effort to prohibit maintenance of dues agreements, among other theories. Over 100 such lawsuits have been filed to date; none have been successful.

Most recently, the Supreme Court denied petitions for review in seven cases: *Masuo v. AFSCME, Hough v. SEIU Local 521, Brice v. California Faculty Assn., Cook v. Oregon AFSCME Council 75, Grossman v. Hawaii Government Employees Association, Wolf v. University Professional and Technical Employees,* and *Smith v. Kate Bieker.*

These denials follow other recent denials of petitions in *Ocol v. Chicago Teachers Union, Bennett v. AFSCME Council 31, Hendrickson v. AFSCME Council 18, Fischer v. Murphy,* and *Troesch v. Chicago Teachers Union*.

In total, the Court has denied petitions in eight exclusive representation cases, eight maintenance cases, and seventeen back fees cases.

As a result of these denials, the decisions of every U.S. district court that has addressed these arguments and the circuit courts of appeals decisions upholding them remain in effect.

Currently, the First, Second, Third, Fourth, Sixth, Seventh and Ninth Circuit Courts of Appeals have all held that unions are entitled to a "good faith" defense to claims seeking recovery of agency fees collected pre-Janus. In New York, we are in the Second Circuit.

With respect to maintenance cases, the Third, Seventh, and Tenth Circuits recently joined the Ninth Circuit in upholding the enforceability of one-year maintenance provisions and declining to consider unions to be state actors based on dues deductions. The Supreme Court will be considering at least four certiorari petitions in maintenance cases in January 2022.

Challenges to exclusive representation have often been included in suits for back fees or maintenance cases, but every circuit that has addressed this question has upheld exclusive representation, and the Supreme Court continues to decline to grant petitions for review presenting the issue.

We remain cautiously optimistic that the Supreme Court will remain uninterested in reviewing these issues. However, the Court will continue to be presented with opportunities as pending cases progress through 2022 and beyond.

Despite our successes, we must remain cognizant of groups such as the "Freedom Foundation," the "National Right to Work Foundation," the "Fairness Center," the "Goldwater Institute," and their ilk, as they continue, now over three years later, their unending efforts to expand the meaning of *Janus* and destroy public sector labor unions.

COVID Vaccine Mandates

On December 13th, the Supreme Court turned down two requests to block New York's vaccine mandate for health care workers. Two groups of health care workers are challenging the mandate, arguing that it violates their constitutional right to freely exercise their religion. But the court denied the workers' requests to put the mandate on hold while litigation continues.

The dispute centers on a regulation issued by New York's state health department that requires all health care workers in the state to be vaccinated against COVID-19 unless they qualify for a medical exemption. The regulation does not contain a religious exemption.

The challengers went to federal court, contending that they cannot comply without violating their religious beliefs because the three vaccines available in the United States all were tested or developed with cells descended from decades-old aborted fetal cells.

The use of historical fetal cells is routine in the development and testing of drugs and vaccines, and the COVID vaccines themselves do not contain aborted fetal cells. The U.S. Conference of Catholic Bishops and other anti-abortion religious leaders have said it is ethically acceptable to receive the vaccines.

After the U.S. Court of Appeals for the 2nd Circuit declined to freeze New York's mandate earlier this fall, the health care workers went to the Supreme Court, asking the justices to intervene on an emergency basis. The workers told the court that, like restrictions

imposed on worship services to combat the spread of COVID-19, "vaccine mandates raise difficult questions about balancing indubitably strong public health interests on one side and core constitutional rights on the other." However, the workers continued, "it is not difficult to see that New York's uniquely punitive treatment of religious objectors, which is an extreme outlier nationally, violates the Free Exercise Clause."

The State of New York urged the justices to leave the mandate in place. It compared the COVID-19 vaccine requirement, with only a medical exemption, to "preexisting vaccination requirements for measles and rubella that have been in effect for decades." And the state pushed back against the premise of the health care workers' objection to the vaccine, telling the justices that Pope Francis and the Conference of Catholic Bishops have encouraged people to get vaccinated. Fetal cells used during the research and development phase of the Pfizer and Moderna vaccines, the state said, "are currently grown in a laboratory and are thousands of generations removed from cells collected from a fetus in 1973." Moreover, the state stressed, "the use of fetal cell lines for testing is common, including for the rubella vaccine, which New York's healthcare workers are already required to take."

In October, the court rejected a similar challenge to Maine's vaccine mandate for health care workers who sought religious exemptions.

DISCIPLINARIES

State Disciplinaries:

OMH
(Arbitrator Drucker)
Matter No. 20-0855

In this Article 33 disciplinary proceeding, the Grievant, a Mental Health Therapy Aide, was charged with five charges of misconduct for engaging in an inappropriate altercation with a patient at the Children's facility where she is employed. The charges allege that the Grievant lunged at the patient, causing her to fall backward. The charges further allege that the Grievant failed to utilize proper de-escalation techniques and engaged in an unauthorized restraint in a congested area, increasing the risk of injury to the patient. At the hearing, the State's evidence consisted of almost exclusively surveillance video of the interaction, which contained no sound and, as the Arbitrator noted, did not reflect the approximately 40 minutes of interaction that preceded the event at issue. In reviewing the evidence, the Arbitrator concluded that the allegations set forth in the charges were not established. The Arbitrator relied on the credible testimony of the Grievant to conclude that the Grievant had attempted an appropriate two-person restraint and that it was a trainee that did not take appropriate action. As a result, the Grievant was left to do the best he could to use effective techniques to stop the patient's assault. Furthermore, the Arbitrator notes there was evidence that the Grievant had attempted to deescalate the situation for roughly 40 minutes before the altercation, which showed the Grievant took necessary action in compliance with applicable policies and procedures, and training, in response to unfolding circumstances and the presence of imminent danger. In finding the allegations unestablished, the Arbitrator found the Grievant not guilty of the charges stated in the Notice of Discipline. Additionally, the Arbitrator found that the State did not have probable cause to suspend the Grievant and directed the Grievant to be returned to work with full back pay, benefits, and seniority.

OPWDD
(Arbitrator Simmelkjaer)
Matter No. 19-0806

In this Article 33 disciplinary proceeding, the Grievant who has worked as a Direct Support Aide ("DSA") in an Individualized Residential Alternative ("IRA") for approximately five years was charged with one specification of misconduct and incompetence for allegedly refusing to work mandatory overtime. The State sought termination because the Grievant had previously been disciplined for similar charges. During the hearing, the Grievant testified that on the day in question, he was not feeling well, and for this reason, he told his supervisor he could not stay after his shift to work overtime. After leaving work that day, he was so ill he was taken to the hospital by ambulance. Ultimately, the Arbitrator held that the State failed to establish that the Grievant's emergency medical trip to the hospital was pretextual and, therefore, any discipline for insubordination was inappropriate. The Arbitrator relied on the fact that there was no evidence that Grievant was not being truthful because the State did not do an investigation or an interrogation to ascertain the validity of the Grievant's medical emergency and only relied on the Grievant's past disciplinary issues. Additionally, the Arbitrator held that the State had no probable cause to suspend the Grievant because the nature of the allegations posed no imminent threat to persons or property, and it did not severely interfere with operations. In conclusion, the Arbitrator found the Grievant not guilty of the charge and ordered the State to reinstate the Grievant immediately with full back pay from the date his suspension began through his reinstatement date with commensurate employee benefits.

OPWDD
(Arbitrator Hyland)
Matter No. 20-0769

In this Article 33 disciplinary proceeding, the Grievant, a Direct Support Assistant with Long Island DDSO, was charged with six different charges of misconduct in two separate Notices of

Discipline. The charges all related to submitting falsified medical notes and falsifying sign-in/out sheets. At the hearing, in support of the charges associated with the medical notes, the State offered emails from the doctor's office allegedly refuting the accuracy of the notes; however, they failed to produce the author of the emails or a witness with direct knowledge of what occurred on the dates in question. The Arbitrator held that the doctor's office's assertion about whether it did or did not treat the Grievant on the relevant dates at issue goes to the heart of grave misconduct. The bare hearsay evidence the State provided was insufficient to meet its contractual burden. Therefore, the Arbitrator found the Grievant not guilty of the charges related to the falsified medical notes. Regarding the charges relating to falsifying sign-in/out sheets, the Grievant was accused of reporting to work one-half hour late but then falsifying her sign-in sheets to make it appear she was on time. In support of these charges, the State called three witnesses, all colleagues lateral to Grievant, who testified they had not seen the Grievant on-site when she claimed to have been on-site. The Arbitrator found their testimony credible and that Grievant's version of events to be implausible. The Arbitrator found the Grievant guilty of these two charges and held the State's proposed penalty of termination appropriate. The Arbitrator held that the penalty was appropriate because the State had previously disciplined the Grievant for similar conduct, including making false statements and poor attendance. Finally, the Arbitrator also found that the State had probable cause to suspend the Grievant because her alleged falsification of records presented a potential danger to the Residents she is responsible for.

OPWDD
(Arbitrator Deinhardt)
Matter No. 21-0227

The Grievant is a Developmental Disability Secure Treatment Aide with Broome DDSO, OPWDD. He had been employed for just over a year when the events leading to the NOD took place. The Grievant was issued a NOD on December 23, 2020, alleging that he punched a service recipient during two takedowns and

witnessed but failed to report another staff member's abuse, in the form of a one-person physical intervention, of the service recipient. The penalty sought was termination. A hearing was held before Arbitrator Deinhardt on August 27 and September 20, 2021. The Arbitrator issued her award on November 13, 2021. The Arbitrator noted there was no dispute that two "takedowns" occurred. The service recipient had been acting out prior to the incident and had been corrected and redirected by staff. The Arbitrator found that the State did not meet its burden of proving the first charge. She took into consideration the Justice Center Investigative Report, which did not conclude that the Grievant had engaged in any wrongdoing during the first takedown. The Investigative Report showed that the service recipient denied being punched by the Grievant during the first takedown. The Arbitrator did not give much weight to the service recipient's statements due to his service plan describing his tendencies toward lying and manipulation. She noted that some witnesses denied seeing any wrongdoing by the Grievant during the first takedown, and others were inconsistent or not credible. Similarly, the Arbitrator found testimony of another service recipient who allegedly witnessed the second takedown to be inconsistent and not credible. Although the State relied heavily on the service recipient's injuries in an attempt to prove that an assault occurred, the Arbitrator credited a doctor's testimony that the injuries most likely would have occurred from falling backwards, not from being punched in the chest. The Arbitrator dismissed the first charge. The second charge alleged that the Grievant saw another staff member use an improper technique and failed to report it. The Arbitrator found no evidence that the Grievant had witnessed how the other staff member and the service recipient ended up on the floor, and therefore dismissed the charge. The Arbitrator ordered the Grievant to be reinstated and made whole.

OPWDD
(Arbitrator Crangle)
Matter No. 21-0327

The Grievant has been employed by OPWDD since 2016, and is a Developmental Assistant 1 ("DA1") at the Capital District DDSO Lapp Road Individualized Residential Alternative ("IRA") facility. The Grievant was issued a Notice of Discipline ("NOD") and Notice of Suspension on March 17, 2021, alleging that he sexually harassed a subordinate employee by suggesting that she would suffer negative employment outcomes if she refused his sexual advances, by harassing her about various issues after she refused his advances, and sending her sexually explicit text messages. The Grievant had been on paid administrative leave since June 29, 2020. A hearing was held before Arbitrator Crangle on September 2 and 13, 2021. The Arbitrator dismissed the first charge of the NOD – that the Grievant engaged in quid pro quo sexual harassment – in significant part because the alleged victim testified that the Grievant told her "You are only a trainee, I can make your life a living hell" before she told him she only wanted a coworker relationship with him, and not after. The NOD alleged that the threat had been made after the Grievant's sexual advances were rebuffed. The Arbitrator also dismissed the second charge, finding that the State had not met its burden of proving by a preponderance of the evidence that the harassment occurred. Specifically, the NOD alleged that the Grievant harassed the alleged victim about various conduct: dressing inappropriately, texting in the back of the van, using her cell phone, and not signing out. As with the first charge, the Arbitrator based her decision in part on the alleged victim's testimony about the order in which events occurred. She also determined that some of the comments (for instance, about cell phone use) might have been justified. The Arbitrator found that the State did not meet its burden of proving that the events happened as charged, or that they were in retaliation for the alleged victim rebuffing the Grievant's sexual advances. Three charges alleged that the Grievant sent the alleged victim sexually explicit text messages. The Arbitrator noted that there was no dispute the text messages were sent to the alleged victim by the Grievant, and also

determined it was "more likely than not" that they were sent in the time frame specified in the NOD. Although the Grievant argued that the State did not prove the text messages were unwanted, the Arbitrator found no evidence to the contrary and found the Grievant guilty of the three charges related to the text messages. Based on the seriousness of the conduct, the Arbitrator found termination to be the appropriate penalty. She also determined that the suspension was appropriate, based on the seriousness of the allegations, the credible evidence, and the Grievant's denial of the conduct. The Arbitrator found that, under the circumstances, the State had met the contractual standard of "probable cause to believe that the Grievant's continued presence on the job represented a potential danger to persons or would severely interfere with operations."

Local Disciplinaries:

The Town of Ontario
(Arbitrator Reden)
Matter No. 21-0374

At the time of this disciplinary proceeding, the Grievant was employed by the Town as a Motor Equipment Operator. The Town suspended the Grievant for thirty days without pay for an alleged confrontation he had with a co-worker over the cleanliness of a Town work truck. During this confrontation, the co-worker threatened the Grievant with a two-by-four inch length of wood. The Town terminated the co-worker; however, it still decided to suspend the Grievant because he responded to the co-worker by stating, "go ahead and hit me," which they considered a provocation and a violation of the Violence in the Workplace Policy. In defense of the charges, the Grievant argued that he did nothing to provoke his co-worker's violent attack and that his statement was a spontaneous reaction to the threat. Ultimately, the Arbitrator held that the Town did not have just cause to suspend the Grievant but did have cause to reprimand him for his comment to his co-worker. In his ruling, the Arbitrator found that the Town's position that the Grievant's statement somehow provoked his co-worker's threat was

not supported by credible evidence. The Arbitrator agreed with the Grievant that chronologically, his comment could not possibly have prompted his co-worker to make the threat because it followed it. Despite holding that the Grievant's comment did not constitute a violation of the Violence in the Workplace Policy, the Arbitrator still maintained that the Grievant should have retreated from the co-worker after the threat was made and not encourage him with such a statement. In his decision, the Arbitrator directed the Town to substitute the suspension with a written reprimand and make the Grievant whole for his loss of pay, loss of accruals, and other contractual losses, if there were any.

CONTRACT GRIEVANCES

Local Grievances:

The Town of Evans
(Arbitrator Gelernter)
Matter No. 20-0700

This contract grievance alleged that the Town violated the collective bargaining agreement when it determined that the widow of a deceased employee must pay a portion of the health insurance premium if she wished for the coverage to continue for a set period defined in the contract. First, the Town argued that CSEA did not refer the matter to the Public Employment Relations Board ("PERB") within ten days of the Town Board's answer as the contract requires. The Arbitrator denied the Town's argument because while it appeared the demand for arbitration was not made within ten days, there was excusable confusion caused by the pandemic. Additionally, while CSEA did not comply with the exact technical requirements of the contract, it did substantially comply, and there was no prejudice to the Town. Regarding the actual merits of the grievance, the Town argued that although the contract does not expressly require a surviving spouse to contribute to health insurance, the clause must be read within the context of the entire insurance provision, which requires employees to contribute

to the costs of health insurance. CSEA argued the contract's plain language states that the Town will provide the surviving spouse with health insurance and makes no reference to them needing to contribute. In support of its position, CSEA had the former Unit President, who was one of the prime negotiators of the contract when the language was first added, testify that the intention was to provide health insurance at no cost for a defined time. The Arbitrator agreed with CSEA and found that the Town had violated the contract by requiring the surviving spouse to contribute to health insurance. The Arbitrator highlighted that the Town did not present any conflicting testimony of the bargaining history of the relevant provision. Therefore, the record was devoid of the parties' intention to have the surviving spouse contribute to the cost of health insurance. At the parties' request, the Arbitrator retained jurisdiction and reserved her determination to allow the parties to confer on the appropriate remedy.

Onondaga County
(Arbitrator Selchick)
Matter No. 20-0956

A grievance was filed on or about December 3, 2020, after a County Board of Elections ("BOE") employee was forced to use her own accruals to cover a period of time during which the BOE office was closed due to a workplace COVID-19 exposure. The employee who was required to charge her own accruals had received paid leave without charge to accruals twice in 2020 due to COVID-19 exposures outside of work. This paid leave was provided by the County in accordance with the federal Families First Coronavirus Response Act ("FFCRA"). On November 13, 2020, this employee and others were sent home – and the Board of Elections Office was closed – following a workplace COVID-19 exposure. The employee in question received a quarantine order from the County health department that expired on November 18, 2020. The BOE Office remained closed on November 19th and 20th, and reopened the following week. Once the employee exhausted her available leave under the FFCRA, the County determined that she was not entitled to any additional paid leave under the New York State

paid COVID-19 sick leave law due to the County's interpretation of the two laws – specifically, that they run concurrently, not consecutively. A hearing was held before Arbitrator Selchick on September 14, 2021. The Arbitrator found that the County's interpretation of the two laws was incorrect. He found that the State paid leave law is applicable where an individual with an order of quarantine would receive a greater benefit than what was available under the federal law. The employee in question had only a few hours of federal leave remaining in November of 2020, so for the remainder of her order of quarantine, the state leave law applied to her. The Arbitrator found that the County improperly charged the employee's accruals on November 17 and 18. On November 19 and 20, the employee's order of quarantine had expired, but she could not report to work because the BOE Office remained closed. The County also charged the employee's accruals for those two days, but the Arbitrator found this to be a violation of the contract, as well. He noted that the CBA contains a provision dealing with closures due to weather or other emergency, and found this provision to be applicable to the situation at issue. This provision in the CBA provides that non-essential workers will be paid in the event of such a closure. The Arbitrator ordered that the employee be restored the accruals improperly charged.

City of Beacon
(Arbitrator Douglas)
Matter No. 19-0185

This contract grievance concerned the City's failure to offer the Grievant the opportunity to be selected for the on-call duty rotation. The City argued that the Grievant, a full-time Maintenance Worker who is also a Working Supervisor, was not eligible for the on-call list because he did not possess a commercial driver's license ("CDL"). The City's argument relied on the fact that all on-call designees since 1984 have held a CDL. The Union argued that the employee holding the title of Working Supervisor belongs on the on-call list because they are in the best position to assess the nature of any emergency and can determine and assign the necessary workforce to resolve the problem. The Union further

argued that many emergency call-outs do not require a CDL and that the City's reliance on Grievant's lack of a CDL as a reason to deny him the opportunity to be placed on the on-call list was pretextual. The Arbitrator agreed with the City and denied the grievance. In his holding, he relied on the fact that there was an established past practice of not calling or placing an employee on call-out assignments if they did not possess a CDL. Furthermore, the Arbitrator noted that if the Grievant had a CDL, he would have been correct in asserting his rights as he did in this matter.

COURT ACTIONS

Atanov v. County of Ulster
(Appellate Division, Third Department)
Matter No. 20-0670

The Petitioner has been employed as a Probation Officer with Ulster County since 2015. In January of 2018, the Petitioner was involved in a domestic altercation with his then-girlfriend that resulted in charges of unlawful imprisonment in the second degree, criminal mischief in the fourth degree, and criminal obstruction of breathing or blood circulation. The criminal charges were subsequently resolved for a plea to harassment in the second degree and a conditional discharge. The employer commenced a CSL Section 75 proceeding against the Petitioner shortly after his arrest, alleging misconduct based on the events leading to the criminal charges. A hearing was held in August of 2019. The Hearing Officer found the Petitioner guilty of all but one specification and recommended a penalty of termination, which the employer adopted. The Petitioner subsequently commenced a proceeding under CPLR Article 78 in which he alleged that the disciplinary charges were facially insufficient; that the employer's determination that he should be terminated was not supported by substantial evidence; and that the penalty of termination was shocking to ones sense of fairness. The Supreme Court found the charges to be facially sufficient and transferred the matter to the Appellate Division, Third Department, to address the questions of substantial

evidence. The Third Department issued a Memorandum and Judgment on October 28, 2021. The Third Department agreed that the charges were facially sufficient, because they alleged misconduct not only based on the arrest and criminal charges, but based on the conduct which led to the arrest and criminal charges. The Petitioner argued that the charges were repetitive, but the Third Department did not address this argument because the Petitioner had not raised it in the Section 75 hearing. The Petitioner also argued that the hearing officer relied improperly on various statutes and regulations that were not entered into evidence; the Third Department found that this was proper because the hearing officer could take "judicial notice" of statutes and regulations. The Petitioner also argued that the hearing officer improperly considered a Code of Conduct and a police file which Petitioner contends were not in evidence. The Third Department pointed out that there is a dispute between the hearing officer and employer, on one hand, and the Petitioner, on the other, as to whether those documents were in evidence. The Third Department determined that the Supreme Court should have resolved that issue before transferring the case to the Appellate Division. The Third Department withheld a decision and remitted the case to the Supreme Court to determine what documents were in evidence.

Gurin v. Utica Municipal Housing Authority
(NYS Supreme Court, Oneida County)
Matter No. 21-0779

Petitioner brought this CPLR Article 78 proceeding challenging the Housing Authority's decision to terminate him following a hearing conducted pursuant to New York Civil Service Law § 75. The petition also raised a question as to whether the Housing Authority's determination was supported by substantial evidence. The Court ordered that because the Petitioner raised a substantial evidence issue, and no other objection terminated the proceeding, the proceeding must be transferred to the Appellate Division, Fourth Department for determination pursuant to CPLR 7804(g).

Washington v. Nassau Civil Service Association
(District Court, Nassau County)
Matter No. 21-0811

In this small claims action, the Plaintiff sought to recover from CSEA the value of two vacation days he lost as a result of discipline action his employer took against him. CSEA moved to dismiss the claim on several grounds. The Court denied the motion as moot because prior to deciding the motion, CSEA defeated the Plaintiff's claim at trial.

Fowler v. Hannibal Central School, David Grasso and CSEA 1000
(Supreme Court, Oswego County)
Matter No. 21-0213

The Plaintiff, a former Bus Driver with the Hannibal Central School District ("District"), brought an Article 78 proceeding against the District, CSEA, and Hearing Officer David Grasso, after she was terminated for misconduct. The District had filed five disciplinary charges against the Plaintiff: (1) misconduct for failing to enter an absence into a timekeeping system, (2) insubordination for failing to enter an absence into a timekeeping system, (3) insubordination for refusing an assignment to drive a full-size bus, (4) incompetence for refusing an assignment to drive a full-size bus, and (5) misconduct for failing to reimburse the District for health insurance premiums. The fifth charge was dismissed by the Hearing Officer, who found that the Plaintiff had reimbursed the District, albeit after a delay. He found the Plaintiff guilty of the other four charges and recommended a penalty of termination. By Decision and Order dated November 8, 2021, Oswego County Supreme Court Justice Gregory Gilbert dismissed Plaintiff's petition. The Court dismissed the claims against Hearing Officer Grasso because he is entitled by law to absolute immunity. As for the Plaintiff's claims against CSEA, the Court dismissed the petition in part because the Plaintiff had already filed an Improper Practice Charge with PERB and it would be improper for the Court to exercise jurisdiction over a matter properly before PERB, and also because the petition failed to state facts sufficient to support a claim for

a breach of the duty of fair representation. As for the Plaintiff's claims against the District, the Court dismissed the petition in part because she had not filed a notice of claim setting forth her claims for monetary damages, reinstatement, and her assertion that a disability excused her from certain duty assignments. The Plaintiff also argued that she was not afforded an opportunity to secure new legal counsel after CSEA withdrew representation and was not allowed to present evidence in the disciplinary hearing. The Court rejected this argument, finding that the Plaintiff did have time to secure new counsel, chose to represent herself in the hearing, and did present evidence on her behalf but not the medical records she needed to present in order to support some of her claims.

CSEA v. NYS Unified Court System
(Appellate Division, Third Department)
Matter No. 21-0767

On August 23, 2021, the New York State Unified Court System ("UCS") announced a mandatory vaccine policy ("Policy") for judges and non-judicial employees. The Policy would require employees to obtain a COVID-19 vaccination or be barred from reporting to UCS facilities. On September 3, 2021, CSEA filed an improper practice charge with PERB against UCS alleging that the vaccine mandate initiated by UCS was implemented in violation of Civil Service Law § 209-a (1) (d) because proper negotiations did not occur. Concurrently, CSEA also filed an application for injunctive relief pursuant to Civil Service Law § 209-a (4) (a). On September 13, 2021, PERB issued a notice of sufficient showing pursuant to Civil Service Law § 209-a (4) (b) and authorized CSEA to proceed to Supreme Court to seek an injunction which would enjoin UCS from implementing the Policy. In its initial filing, CSEA sought and was granted a temporary restraining order ("TRO") which stopped the Policy from being implemented until the underlying petition is heard. Shortly thereafter several other unions followed CSEA's lead and filed Improper Practice Charges challenging the unilateral implementation of the vaccine mandate. The other unions that followed CSEA in challenging this mandate at PERB were authorized to proceed to Supreme Court, and the

Court ordered their proceedings to be consolidated with CSEA's. In this proceeding, the Court was not asked to determine whether the Policy is itself legal or whether it was implemented illegally. The only question before the Court was whether the Unions could satisfy the Taylor Law's two requirements necessary to stop the Policy's implementation. Those two requirements are that there must be reasonable cause to believe an improper practice has occurred and it must appear that immediate and irreparable injury will result thereby resulting in judgment on the merits ineffectual. Ultimately the Court denied CSEA's request for injunctive relief and dismissed the petition on the basis that the vaccine mandate did not create an irreparable harm to employees. More specifically, the Court's decision relied on the fact the ultimate harm in this case would be an employee being terminated on the basis they could not report to work, and loss of employment does not constitute irreparable harm because it is a compensable injury, and compensable injuries are not irreparable. Notably, the Court relied heavily on the fact that the vaccine mandate does not require employees to be vaccinated against their will, rather it provides that should an employee not get vaccinated they are not allowed to report to work. The employee has a choice to either comply or deal with the potential consequences of not being permitted to report to work. Finally, the Court also noted that although the injunction is denied, if an employee believes that the condition to be vaccinated or the consequences of not doing so are wrong, they have other areas of recourse. The unions filed notices of appeal from the Supreme Court decision on October 18, 2021. The unions and PERB subsequently filed with the Third Department on October 20, 2021, an Order to Show Cause to stay the Supreme Court decision continue the TRO. By decision and order dated October 28, 2021, the Third Department denied the unions' motion to stay the Supreme Court decision and continue the TRO. The Court gave no explanation for its decision to deny the motion to stay. With this decision from the Third Department, the TRO ended and UCS was able to move forward with its vaccine mandate.

Miller v. Onondaga County et al.
(NYS Supreme Court, Onondaga County)
Matter No. 21-0659

Petitioner brought this CPLR Article 78 proceeding challenging Onondaga County's ("County") determination to place the Petitioner on involuntary leave status based on the finding that she was unfit to perform the duties of her position after a fitness-for-duty examination pursuant to Civil Service Law Section 72. Furthermore, Petitioner claimed that respondents failed to follow their FMLA leave policy when they unilaterally reduced her leave time based on the hardship it caused her department. The Court denied the petition because the Petitioner failed to exhaust administrative remedies available to her pursuant to the collective bargaining agreement. The Court relied on the fact that the County's FMLA policy terms are terms of Petitioner's employment, and the CBA provides a grievance procedure to review any violation or improper application of its terms. Therefore, when Petitioner's FMLA was reduced, it was not final and could have been administratively reviewed by filing a grievance, which the Petitioner did not do. Furthermore, the Court cited the fact that when Petitioner was eventually placed on a leave of absence, she requested a hearing in accordance with Civil Service Law Section 72. The parties have since agreed to the appointment of a Hearing Officer and are working on scheduling the hearing. Therefore, the petition fails to state a cause of action because the County's determination is not yet final.

PERB MATTERS

Nassau Community College
(Director Wlasuk)
Matter No.21-0350

Nassau Community College filed a unit clarification petition on April 20, 2021. The College sought to fragment a group of CSEA-represented employees jointly employed by the College and the

County from the bargaining unit of employees employed by the County only, although the College also seemed to allege in its filing that a joint employer relationship no longer existed between the College and the County. The fragmentation sought by the College would not have resulted in a change in representation; the employees in question would have remained CSEA members.

The Director of Public Employment Practices and Representation issued a decision on October 27, 2021, dismissing the petition. The Director found that a unit clarification petition is not the appropriate type of petition by which to seek fragmentation. Rather, the correct type of petition is a decertification/certification petition. The Director's decision made clear that the College was not foreclosed from filing the proper type of petition in the future.

Office of Mental Health
(ALJ Sergent)
Matter No. 21-0813

On October 6, 2021, the Office of Mental Health ("OMH") announced a mandatory COVID-19 vaccination policy ("Policy") for employees, including CSEA-represented employees, working in the 24 OMH-operated hospitals. OMH also issued a regulation to the same effect. The Policy required covered employees to be partially vaccinated by November 1, 2021, and fully vaccinated by December 10, 2021. CSEA filed an Improper Practice Charge on October 13, 2021, asserting that the mandatory vaccination policy and regulation constitute work rules which change employees' terms and conditions of employment, and that OMH failed to negotiate those changes with CSEA. CSEA also filed with PERB on October 25, 2021, an application for injunctive relief related to that Improper Practice Charge. On November 1, 2021, PERB issued a decision denying the application for injunctive relief. The Taylor Law allows PERB to petition the Supreme Court for injunctive relief where the charging party shows that there is reasonable cause to believe an improper practice occurred and where immediate and irreparable injury, loss, or damage would result and therefore render a future decision on the merits ineffectual. PERB found

that this standard was not met. PERB found that CSEA had not demonstrated a reasonable cause to believe that an improper practice occurred. The decision cited and applied prior PERB decisions finding that patient safety is related to the core mission of hospitals and that actions taken in furtherance of that mission outweigh employees' interests. PERB was persuaded that, as an agency tasked with providing care, treatment, and rehabilitation to individuals with mental illness, OMH owes a statutory duty of care to the population it serves, and that mandatory vaccination of staff against COVID-19 was consistent with that duty. Because PERB found that the first prong of the test – demonstrating reasonable cause to believe that an improper practice occurred – was not met, it did not address the irreparable harm portion of the test. This decision is not an assessment of the merits of the underlying Improper Practice Charge, but only denies the application for injunctive relief.

Wayne County
(ALJ Thomas Scott)
Matter No. 20-0013

On January 3, 2020, CSEA filed an Improper Practice Charge against Wayne County alleging an employee was suspended because of protected activities. During the pre-hearing conference, CSEA notified ALJ Scott that a contract grievance had been filed regarding the same issue. The parties agreed to arbitrate the grievance and defer the Improper Practice Charge. The ALJ conditionally dismissed the charge, subject to a motion to reopen if, during the arbitration, the County successfully made an argument that prevented the grievance from being decided on the merits, or if the arbitration award did not meet the Board's deferral standards.

County of Nassau
(Director Wlasuk)
Matter No. 21-0633

On June 23, 2021, a Nassau County employee ("Charging Party") filed an Improper Practice Charge against CSEA alleging violations

of Sections 209-a.2(a), (b), and (c) of the Taylor Law. The charge allegedly attached a "class action lawsuit," although it was, in fact, an arbitration award relative to a class action grievance on behalf of members employed at the County Sewage Treatment Plants operated by Suez. The charge also alleged that CSEA violated the CBA and MOA; that the Charging Party lost emoluments including overtime and night differential; and that the Charging Party was denied participation in the class action grievance regarding the distribution of overtime. PERB advised the Charging Party on July 22, 2021, that his charge was deficient for two reasons: first, that an individual cannot allege a § 209-a.2(b) violation, and second, that there was no summary of the alleged violations. PERB advised the Charging Party to provide more detail as to his allegations. The Charging Party filed an amended charge on August 10, 2021. The amended charge form was not completed, but the Charging Party removed the § 209-a.2(b) claim. He also included a brief summary of two conversations he had with the Unit President, in August 2020 and May 2021, in which the Unit President told him he was not part of the "lawsuit" because he no longer worked at the Sewage Treatment Plant. The Director of Public Employment Practices and Representation issued a decision on December 1, 2021, dismissing the charge in its entirety. First, although the Charging Party apparently withdrew the § 209-a.2(b) claim, the Director noted that this charge would have been dismissed, anyway, because an individual lacks standing to bring such a charge – only a public employer can allege a violation of that section. Second, the Director found the charge to be untimely filed. The first conversation that the Charging Party identified with the Unit President about the "lawsuit" (the class action grievance) took place in August of 2020. The Improper Practice Charge was filed almost ten months later, in June of 2021, well beyond the four-month period of limitations. Third, the Director found the Charging Party did not provide any facts that would support a finding that CSEA violated its duty of fair representation towards him. Nothing in the facts provided by the Charging Party demonstrated that CSEA's conduct in excluding him from the class action grievance was arbitrary, discriminatory, or in bad faith. Even if CSEA was wrong to exclude the Charging Party, the Director pointed out, there is no breach of the duty of fair representation due to honest mistakes.

OTHER

<u>OCFS-Daycare Licensing</u>
(ALJ Walsh)
Matter No. 21-0696

In this enforcement action, OCFS suspended and proposed the revocation of a family daycare provider's license on the basis that there was an ongoing gas leak at the daycare home, and there were numerous other safety hazards observed at the property. While a hearing date was scheduled, CSEA negotiated a settlement agreement which provided that the Appellant would withdraw her appeal to the action and admit to the violations alleged against her while surrendering her group family day care license without any other available penalties. The settlement also allowed for the Appellant to reapply for her license in eighteen months, provided she completed an OCFS health and safety training. Furthermore, it was agreed that the Appellant's surrender in this matter could not be a sole reason for denying her future application. Following the terms of the stipulation of settlement, the ALJ issued a decision holding OCFS's determination as final.