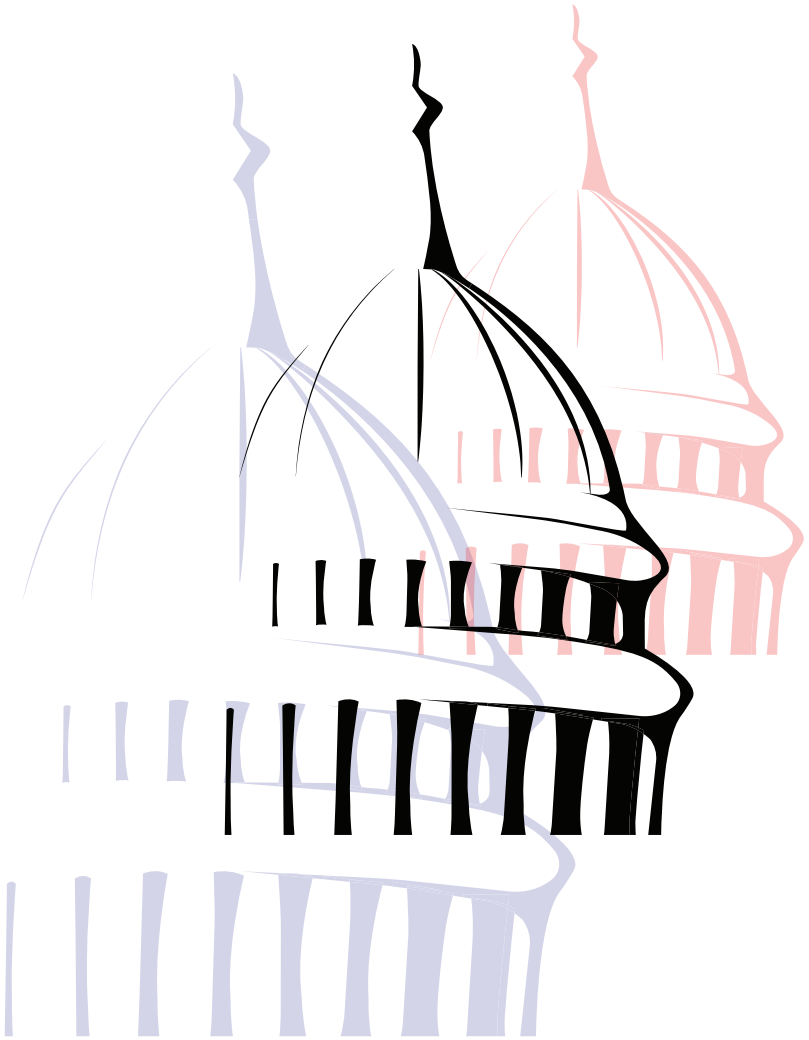
THE ADVOCATE

A publication of CSEA Legal Department



CSEA
Local 1000 AFSCME, AFL-CIO

March 2021

TABLE OF CONTENTS:

Cover designed by David Autida, 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*
Constance R. Brown, *Senior Associate Counsel*
Thomas Morelli, *Associate Counsel*
Aaron D. Samsel, *Associate Counsel*
Sarah M. Coligan, *Associate Counsel*
Michelle L. Browne, *Associate Counsel*
Julie A. Collyer, *Legal Systems Administrator and Legal Office Manager*
Kathy Smail, *Senior Legal Assistant*
Amee Camp, *Senior Legal Assistant*
Kathleen Briody, *Legal Assistant*
Michelle VanKampen, *Legal Assistant*
Virginia O'Brien, *Legal Assistant*
Kimberly Salamida, *Legal Assistance Program Administrator*
Lisa Fairchild, *Legal Assistance Program Administrator*
Sonia Roberts-Smith, *Legal Assistance Program Assistant*

Counsel's Corner

By: Daren J. Rylewicz
General Counsel

New Legislation Grants Employees Leave Time to Receive COVID-19 Vaccination

With government officials focusing on vaccinating as many individuals as possible to combat COVID-19, newly enacted New York State laws have made it easier for workers to receive the vaccine without being charged personal leave time. On March 12, 2021, Governor Cuomo signed a new law amending New York's Civil Service Law and Labor Law to allow public and private sector employees up to four hours of paid time off to receive each dose of a COVID-19 vaccine.

This new law allows all New York employees to receive a paid leave of absence for "a sufficient period of time," not to exceed four hours per vaccine injection. Thus, for COVID-19 vaccines with a two-injection requirement, a worker is entitled to up to four hours for each vaccine. In addition, employers cannot require employees to use other available leave, such as sick or vacation leave, before offering this paid leave time. Paid leave under these new laws must be made at the employee's regular rate of pay. The law prohibits employers from discriminating against or retaliating against any employee who takes or requests paid COVID-19 vaccination leave, or otherwise exercises their rights under the law.

Although the new law was effective immediately, it is silent as to any retroactive effect. It also does not speak to the types of documentation employers can request from employees seeking this leave and to verify its proper use. Furthermore, the law is set to expire on December 31, 2022.

In addition, this law specifically acknowledges that a collective bargaining agreement may provide a greater number of paid hours to be vaccinated. For labor contracts which do not address this issue, it may be a future subject area of negotiation to further assist employees in obtaining vaccines during their worktime hours.

Like other recently enacted New York COVID-19 employee leave laws, the law provides little guidance concerning implementation and may raise questions amongst employees and employers. It is anticipated that some questions may involve any notice requirement that an employee must provide, in order to take leave, what proof of vaccination may be requested of an employee and whether the law applies to any future vaccination "boosters" if any are necessary. We will update our membership with any guidance or opinions that New York State may issue to answer any questions about these new laws.

DISCIPLINARIES

State Disciplinaries:

OMH
(Arbitrator Day)
Matter No. 19-0285

In this Article 33 disciplinary proceeding, the Grievant was employed as a Mental Therapy Aide with approximately ten years of service. The State sought the Grievant's termination for insubordination relating to his refusal to answer questions during an interrogation pertaining to Grievant's arrest. Grievant ultimately answered the questions regarding the criminal charges and was returned to work. The State then issued a suspension from November 2018 through April 2019. The Arbitrator took issue with the fact that the State declared the purpose of the second interrogation was to determine what the Grievant's actions were and if he would put young children, housed at the facility where he worked, at risk. First, the Arbitrator found that because the Grievant had already been interrogated regarding these events roughly a year before the second interrogation date, the State knew of these events and did not consider him a risk for an entire year. Therefore, there was no issue of the Grievant's risk to clients when he was suspended and fired, but only that he refused or failed to answer questions at the second interrogation. Regarding the second interrogation, the State already knew of the circumstances leading to Grievant's arrest from the initial interrogation but still decided to proceed with the second interrogation. At the second interrogation, Grievant asserted use immunity. Grievant, however, was not clear as to what this meant and expressed that he was directed by both his attorney and the Judge presiding over the criminal matter not to discuss the case with anyone. The Arbitrator was deeply concerned that the State did not pause the interrogation to allow Grievant to contact his attorney to inquire about use immunity or call the Grievant's attorney themselves to ascertain the nature of the instructions under which the Grievant was responding. In conclusion, the Arbitrator found Grievant not guilty of the charges

contained in the Notice of Discipline, that the State did not have probable cause to suspend Grievant, and that the State must return Grievant to his previous position and make the Grievant whole for all lost wages for the time spent on unpaid suspension.

OPWDD
Arbitrator Jaquelin Drucker
Matter No. 19-1068

A Direct Support Aide with three years of service grieved a Notice of Discipline seeking his termination. The parties stipulated to the actions specified in the NOD, including that Grievant had possessed and used marijuana at the OPWDD facility and was under the influence while on duty. The NOD did not allege that the Grievant's use of marijuana had any detrimental effect on the welfare of the Residents at that time. The Union highlighted that the Grievant had been addicted to the use of marijuana, but that he was voluntarily engaged in rehabilitation efforts, including the completion of an in-patient program lasting multiple consecutive weeks. Through this process, Grievant became involved with a 12-step program and now attends sessions every evening. The Union argued that these efforts merit leniency and emphasized that OPWDD had permitted employees to return to work in similar circumstances on at least four other occasions. The State argued that it maintained a zero-tolerance policy regarding working while impaired and possession of controlled substances while on duty. While the State's witnesses admitted that on four recent occasions employees had been returned to work despite having been found to have possessed or used marijuana, there was no evidence showing what responsibilities those employees held or what the potential consequences of their impairment could have been. The Arbitrator found that given the nature of the misconduct and the responsibilities of the Grievant's position, there were insufficient facts for the Arbitrator to find that termination was inappropriate.

Local Disciplinaries:

County of Rockland
(Arbitrator Sands)
Matter No. 20-0575

The Union brought this disciplinary grievance on behalf of the Grievant, a Transportation Assistant for Rockland County (the "County"). Grievant was suspended for five days for two specifications of insubordination related to alleged violations of the Department of Transportation's Time and Attendance Policy and formal Letter of Reprimand issued to Grievant in March 2019. Both specifications related to Grievant submitting a request for time off to Assistant Supervisor of TRIPS Operations, however, failing to notify the Deputy Commissioner of Public Transportation or the Assistant Supervisor of TRIPS Operations of the request or subsequent approval. The Arbitrator emphasized the difference between the specifications because one specification dealt with a vacation leave request, and the second specification dealt with a sick leave request. The sick leave clause in the Collective Bargaining Agreement ("CBA") specifically requires that the employee seeking to use sick leave need only notify their supervisor or the appointing authority. Vacation leave requests are subject to no such qualification. The Arbitrator found that the second specification had no merit because the Grievant followed the sick leave policy in the CBA, and any policy that requires any additional notice to individuals violated Grievant's contractual sick leave right. Regarding the first specification, the Arbitrator found Grievant only in violation of the rules for one day, which only warranted a one-day suspension. In conclusion, the Arbitrator sustained the grievance in part and ordered the County to return four of the five days' pay Grievant lost and treat this occasion as a first, nominal suspension for progressive disciplinary purposes.

Town of Niagara
(Arbitrator Gelernter)
Matter No. 20-0244

The Union brought this disciplinary grievance on behalf of the Grievant, an Account Clerk for the Town of Niagara's ("Town") Highway and Building Departments. Grievant had worked for the Town for almost nine years. The Town terminated Grievant for an alleged pattern of attendance problems and abuse of attendance leave, incompetence, and theft of Town Services. Grievant had a significant disciplinary history that included many prior warnings, counseling sessions, and two prior suspensions for similar acts of misconduct. While the Arbitrator found several mitigating circumstances to consider, including the fact that Grievant worked well for several years without any attendance, leave, or performance problems, he still found that the Town had just cause to discipline Grievant and termination was the appropriate penalty. The Arbitrator relied heavily on the fact that the incidents that Grievant was previously disciplined for concerned the same type of behavior that led to the instant termination, therefore Grievant knew her behavior was wrong.

CONTRACT GRIEVANCES

Orange County
(Arbitrator Jay Siegel)
Matter No. 19-0879

This contract grievance addressed whether the County violated the CBA by paying a blanket $4,000.00 health insurance buyout to all employees who opted out of insurance plans. A provision in a prior contract provided that employees who opted out of health insurance because they were covered under a family plan of a spouse also employed by the County, would receive 25% of the County's savings. A Stipulation of Agreement resulting from negotiations increased the insurance buyout payment to $4,000

for employees who had health insurance coverage from a source other than the County, but did not address the 25% provision at issue. The new contract, however, changed all insurance buyout payments to $4,000.00. The Union argued that this change to the contract was an error. The 25% provision was never addressed during negotiations for a new contract, and the Stipulation did not reflect any such changes. Therefore, the terms of the prior contract should have remained in effect, maintaining insurance buyouts for this group of employees at 25% of the County's savings. The County argued that the current CBA sets all payments at $4,000.00 and pointed to notes from a bargaining session, taken by the County's note-taker that showed 25% crossed out, and $4,000.00 written in to indicate that the parties intended to have an across the board buy out amount of $4,000.00 for all employees. The County argued that the doctrine of mutual mistake did not apply because both parties must have been mistaken, but the County was not mistaken. Additionally, the County argued that the Union had the opportunity to modify the draft CBA containing the modification, but chose not to do so. Finally, the County argued that the provision can only be rescinded based on unilateral mistake if there is evidence of fraud, which the Union did not allege. The Arbitrator found that there was no meeting of the minds to modify the provision at issue, and there was no evidence showing that the change from 25% to $4,000.00 was ever legally approved by the Union or the County. The Arbitrator relied on the Stipulation as the best evidence to show the intent of the parties during negotiations, which, in this case, supported the Union's position. Accordingly, the grievance was sustained.

County of Nassau
(Arbitrator Peek)
Matter No. 19-0106

In this Class Action Contract Grievance, CSEA argued that the County had breached the collective bargaining agreement ("CBA") and a previous arbitration award referred to as the Scheinman Award when it assigned overtime to Local 30 members and not CSEA Members. CSEA represents County employees assigned

to the County's Sewage Treatment Plants. Prior to May 4, 2012, the County informed CSEA that it was seeking to turn over the Sewage Treatment Plants' management to a qualified third-party operator. On May 4, 2012, the County and CSEA entered a Memorandum of Agreement ("MOA") in which the Union agreed not to challenge the County's decision to transfer the management of its sewer system to a third-party Operator, and in turn, the County agreed to provide certain job protections to members of the Union whose jobs may be affected by the transaction. On January 1, 2014, the County entered a contract with United Water whereby a certain Operator took over the Sewage Treatment Plants' management. This third party utilized a diverse workforce to run the day-to-day operations, and CSEA represents approximately one-quarter of the workforce. Subsequently, CSEA filed three Class Action Grievances alleging the County violated the MOA. The Class Action Grievances resulted in the Scheinman Award, which held that available overtime at the sewer systems plants shall first be offered to CSEA bargaining unit members, and if no qualified bargaining unit member accepts the assignment, it may be assigned to the third-party's employees. Here, CSEA claims the County again violated its contractual obligation to ensure CSEA members working at the Sewage Treatment Plants receive an equal distribution of overtime, and also, that CSEA members were entitled to a right of first refusal of all overtime opportunities before any overtime was offered to the third-party's employees. The Arbitrator sustained the grievance, holding CSEA members did not receive overtime opportunities in accordance with the clear and unambiguous language of the CBA and the Scheinman Award. Because the case involves many employees, and the amount of lost overtime is significant, the Arbitrator found a monetary award appropriate, rather than trying to grant the affected class members the next overtime opportunity. The Arbitrator disagreed with CSEA's calculation of the award, as it was prepared by a member of the class and deemed unreliable. The Arbitrator adopted the County's calculation. In conclusion, the Arbitrator found for CSEA and awarded three hundred seventy-five thousand ($375,000.00) dollars, and adopted a joint memorandum that the parties had presented, which adjusted the distribution of overtime to allow for

the plants to operate more smoothly by making it easier to find overtime replacements for absent workers.

Village of Lynbrook
(Arbitrator Marlene A. Gold)
Matter No. 20-0351

The Grievant, a Laborer in the Sanitation Department with 23 years of service, alleged that the Village violated the contract by promoting a Highway Department employee with less seniority to a higher paid position in the Highway Department, rather than the Grievant. The Union argued that the contractual provision on promotions governed this question. The provision expressly states that when considering a "promotional position with a salary differential… seniority prevails." The Union argued that even though the opening was described as a "transfer opportunity", the position had a higher salary differential so should be considered a promotion. The Village argued that the provision was not applicable because the opening was expressly designated to be a lateral transfer within the Highway Department, not a promotion. The Arbitrator agreed with the Village and found that because the position was posted as a "transfer opportunity" and because the employee who was appointed did not receive a pay increase, it was not a "promotional position with a salary differential" and did not trigger the promotions provision of the Contract. Accordingly, the Arbitrator denied the grievance.

Middle Country CSD
(Arbitrator Stephen Bluth)
Matter No. 20-0134

This contract grievance alleged that the School District violated the CBA when it denied the most senior Bus Driver a route for which she had applied. The CBA provided that when a route becomes available "the most senior qualified driver may change to the vacant route." The Union argued that the District failed to offer a newly vacated route to the Grievant, and instead the District eliminated the position by consolidating the vacated route into existing routes.

The Union argued that because the route had been vacated mid-school year, it was made "available" under the CBA and that the District was not permitted to make it unavailable by breaking up the runs and assigning them to other routes. The District insisted that it retained discretion to determine whether to make the route available or to break it up. The District argued that it exercised its managerial prerogative to dissolve the route, and that this managerial right was never relinquished in negotiations with the Union. The District distinguished between "vacant" routes and routes that have "become available", insisting it had the managerial right to determine whether a vacant route would become available. The Arbitrator agreed with the District that it had the managerial right to determine staffing needs and to eliminate a route. The CBA does not prevent the District from eliminating a vacant route mid-year. Accordingly, the Arbitrator dismissed the grievance.

Onondaga County
(Arbitrator Barbara Deinhardt)
Matter No. 19-0309

This matter followed a decision finding that the employer violated the CBA by unilaterally changing how voluntary overtime was offered to Onondaga County Corrections Department Sergeants. The unlawful policy was in place for 19 months before being rescinded. The parties disagreed over the method of calculating the payments needed to make the Sergeants whole for missed overtime opportunities during those 19 months. The Arbitrator ordered the following: that the calculation of number of hours a Sergeant might have worked during the violation period would be based on an average of the amount of overtime the sergeant worked for the 12 months prior to the violation and the 12 months after; that the rate of pay would be based on each Sergeant's specific rate of pay during the violation period; that there would be no minimum payment amount; and that the estimated percentage of offered overtime hours that a Sergeant would have accepted will be applied to the actual number of overtime hours that were offered during the 19-month violation period. The Arbitrator directed the parties to recalculate based on this framework.

Town of East Hampton
(Arbitrator Nadelbach)
Matter No. 16-0630

In this contract grievance, CSEA sought to challenge the Town's authority to unilaterally upgrade four job titles listed on Schedule "A" of the parties' collective bargaining agreement ("CBA"). CSEA was generally supportive of any upgrades that could be made to existing positions, however, disagreed with the Town deciding not to negotiate the upgrades. The Arbitrator sustained the grievance for a multitude of reasons. The Arbitrator noted the distinction between upgrading existing titles and the setting of starting salary for new titles. The Arbitrator's decision highlighted that the Town has the contractual right to set the starting salary for new titles. Still, there is no corresponding authority granted in the CBA to extend this discretionary authority to existing titles. In support of the position that the CBA restricted management's authority in this situation, the Arbitrator cited a clause in the CBA which stated, "no employees covered by this Agreement shall receive any benefits other than those provided by this Agreement." The Arbitrator found that this was exactly what the Town arranged, which violated the CBA. In conclusion, the Arbitrator sustained the grievance, and directed the Town to negotiate all changes/upgrades to existing titles with CSEA.

Town of Eastchester
(Arbitrator Drucker)
Matter No. 20-0323

In this contract grievance, CSEA argued that the Town had breached the collective bargaining agreement ("CBA") when it appointed an individual to the newly created position of General Foreman in lieu of another employee. The relevant sections of the CBA address the process in which the Town agreed to promote from within wherever practicable and agreed that where employees are equally qualified for a particular position, they would be considered in order of their length of service. Here, the relevant vacancy arose when the Superintendent of Highways retired, and

the Deputy Superintendent was promoted to Superintendent in February 2020. The Town decided instead of replacing the position of Deputy Superintendent, it would establish a second General Foreman position. Two different Town employees were interviewed for the position. The Town Comptroller and the Highway Superintendent conducted the interviews. After the interviews, the Comptroller and the Superintendent discussed the candidates and ultimately decided one was a better fit given his performance at the interview. At the time, the Comptroller was unaware that the Superintendent and the chosen candidate had a quasi-familial relationship, and the candidate was the godfather to the Superintendent's teenage son. These facts ultimately became public at the arbitration. The Arbitrator relied on the concealment of this information from the Comptroller to analyze how much weight the interview should have been given in the hiring process. Ultimately, the Arbitrator concluded that the candidate not chosen for the position was more experienced and qualified and therefore was entitled to the position. Also, at a minimum, the candidates were equally qualified, and therefore, the second candidate was entitled to the position by virtue of his greater seniority per the CBA. Furthermore, the reliance on the interview where the close familial relationship was concealed from the Comptroller was inappropriate. In conclusion, the grievance was upheld, and it was recommended the individual who was not promoted be placed in the position of General Foreman, and that he be provided with the compensation equivalent to the difference between what he has been paid and what he would have been paid as General Foreman from the date of the contract breach until the date he is placed in the position.

City of Olean
(Arbitrator Foster)
Matter No. 19-0106

In this contract grievance, CSEA argued the City of Olean had breached the collective bargaining agreement ("CBA") when it hired one candidate over another candidate who had more divisional seniority. The first issue addressed by the Arbitrator was timeliness.

The CBA requires a grievance be appealed within five working days of the Union's receipt of the First Step answer. In this case, the City placed the response on the desk of the Union President, which was the "normal" way of handling grievances. The Arbitrator held that because the Union President was absent from work by the action of the City, and his absence was therefore known by the City, the date the response to grievance was not received by CSEA until the date the Union President returned back to work. Additionally, the Arbitrator cited the fact that when the grievance response was left on the Unit President's desk, it was the early days of the COVID Pandemic, and the situation was not normal, so referring to how things were normally done was not appropriate. Addressing the merits of the grievance, the Arbitrator denied the grievance on the basis that the contract allows the City to base its hiring decisions on the work record, skill, ability, and experience of the candidates who are qualified to perform the duties of the vacant position. Here, the Arbitrator found it appropriate to use one candidate's private employment experience in determining his overall experience. Because this candidate had more overall experience than the other candidate, the candidates' work records were not relatively equal, and therefore divisional seniority was not relevant in this hiring decision. In conclusion, the grievance was held to be timely but was denied on the merits because the City was within its contractual right to base its hiring decision on one candidate's superior professional experience.

ADMINISTRATIVE HEARINGS

Nassau County Health Care Corporation
Hearing Officer Kenneth Marten
Matter No. 18-0574

The issue in this matter is whether a stipend paid to a union official on full-release for performing functions during non-working hours pursuant to a CBA is to be included in the calculation of pension benefits. The Hearing Officer found that the CBA made clear that

the stipend was "to provide additional compensation in lieu of overtime to the employees functioning in [official union] roles for overtime that they could not have but would have been entitled to" under the CBA. Accordingly, the Hearing Officer recommended that the stipend should be included in calculating the pension benefits.