# THE ADVOCATE

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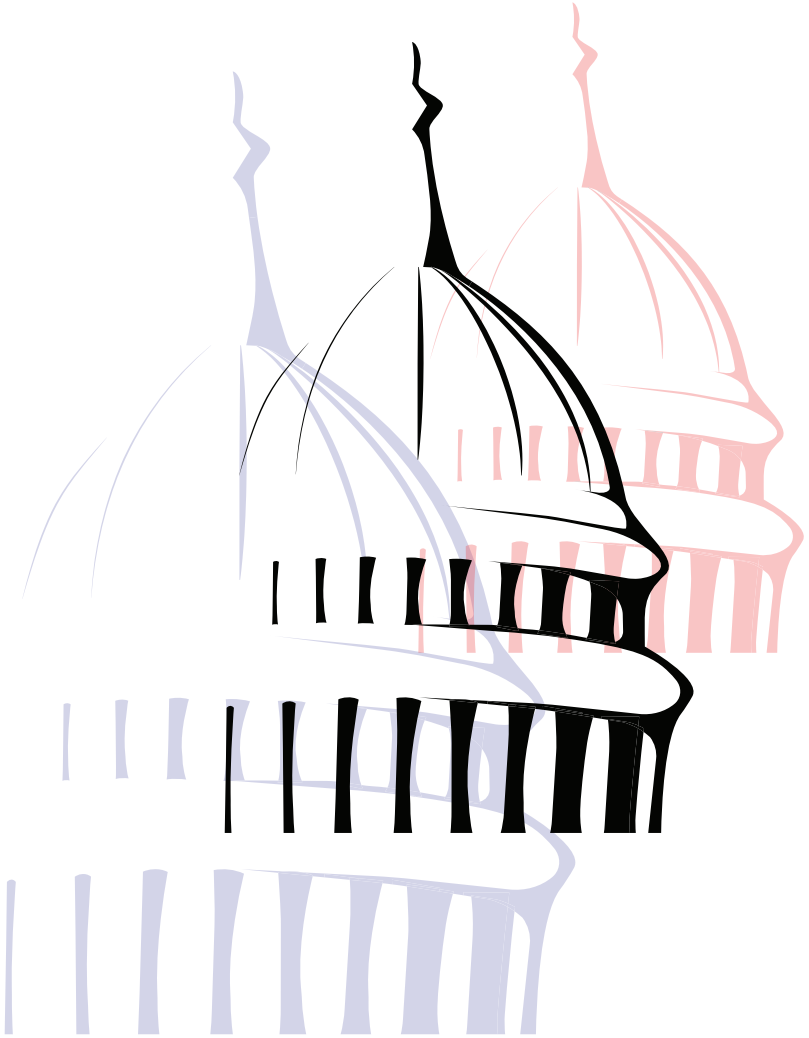

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CSEA
Local 1000 AFSCME, AFL-CIO

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# Counsel's Corner

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

## The National Labor Relations Board (NLRB)

For the first time in several years, the National Labor Relations Board has a Democratic majority. In its final years, the Trump Board had shifted its attention to promulgating administrative rules and regulations that establish employer-friendly policies and strip workers of their rights. With its new Democratic tilt, the Board has the opportunity to reverse many of these precedents.

The newly appointed National Labor Relations Board General Counsel Jennifer Abruzzo issued GC Memorandum 21-04 ("GC Memo"), which outlined an expansive agenda both for reversing the damage the Trump NLRB inflicted as well as moving beyond the pre-Trump status quo. Abruzzo's memo takes aim at a wider variety of employer practices.

The GC Memo is a nationwide directive to NLRB Regional Directors to submit certain cases and issues to the NLRB's Department of Advice, for direction about whether NLRB regions should issue an unfair labor practice complaint in a given case or whether the NLRB should be urged to reconsider a regional decision directing an election (rather than apply existing NLRB precedent). In that way, by signaling the types of cases the GC intends to pursue - notwithstanding current NLRB doctrine, it reveals the GC's policy goals and how she intends to urge the new Democratic-majority NLRB to reorient the law.

Among the issues addressed in the GC Memo:

**Employer handbook rules:** In *The Boeing Co.*, 365 NLRB No. 154 (2017), the Trump Board instituted a different and more employer-friendly test for evaluating employer handbook policies. This is significant to organizing campaigns, because employers are permitted to enforce lawful rules including issuing discipline during organizing campaigns if they can point to a preexisting written policy or rule. The GC will revisit whether certain rules are improper on their face and/or as applied because they chill or hinder employee rights, including "confidentiality rules, non-disparagement rules, social medial rules, media communication rules, civility rules, respectful and professional manner rules, offensive language rules, and no-camera rules."

**Confidentiality provisions:** In a series of cases, the Trump Board overturned prior precedent by approving employer gag-rules that allowed employers to maintain and enforce confidentiality requirements in workplace investigations. Before those decisions, employers had to establish a "legitimate and substantial business justification that outweighs employees' Section 7 rights" in order to hold employees to confidentiality requirements (enforced through employee discipline). This is a significant issue because such gag rules undermine solidarity, self-help, grievance processing, *Weingarten* rights and due process.

**Protected concerted activity:** The Trump Board reduced the types of "mutual aid and protection" the NLRA protects, which the current GC will seek to reverse, including decisions that:

- Permitted employers to limit the use of email to only workplace communications.
- Limit protected activity to only issues involving wages.
- Allowed employers to prohibit discussions of union voting or membership under non-solicitation policies.

**Strike Activity:** The GC will seek to revisit older Board cases involving permanent replacement of strikers, what constitutes prohibited intermittent striking, and when secondary strikes are prohibited/unprotected.

***Weingarten* Rights:** Currently, *Weingarten* rights are accorded only to employees represented by a union. There is no statutory basis for why this would be the case. The GC Memo indicates she will prosecute cases in which non-union workplaces deprive employees of *Weingarten* representatives.

**Test for Unlawful Union Animus:** In several cases, the Trump Board made it harder to prove that employer retaliation was motivated by an anti-union intent. The GC will take on a greater number of retaliation cases with the expectation that the current NLRB will return—even perhaps make stronger—protections against employer retaliation.

**Union Access:** Several Trump Board decisions expanded the right of employers to expel union organizers or representatives from publicly accessible workplaces. The GC hopes to reverse these cases and establish a more rigorous standard that would prevent employers from singling out union organizers for special treatment.

**Union Dues:** The GC will seek to revisit several Trump Board cases which permitted employers to unilaterally cease remitting union dues after a CBA expires, rather than requiring any such changes to be negotiated as a change to the status quo.

**The Duty to Bargain in Good Faith:**

- Unilateral Changes: The Trump Board held that an employer could make unilateral changes during a contract if the CBA did not directly address the subject. The GC will urge the Board to return to the prior standard whereby an employer is only permitted to make such unilateral changes if the CBA indicates the union has explicitly waived the subject.

- Withdrawal of Recognition: The Trump Board reversed longstanding precedent by holding that, when faced with a withdrawal of recognition, a union could only reacquire the right to bargain by filing for an NLRB election (rather than establishing its majority support through other means). The GC will ask the NLRB to return to the rule that allows a union to negate an employer's doubt of majority status by presenting objective evidence of its majority status.

- The G.W. Bush Board had permitted employers to withdraw recognition after the third year of a CBA, even if the CBA had not expired. Prior to that, employers could not withdraw recognition during the term of a contract. The GC will prosecute cases where an employer withdraws recognition during the term of a contract.

- Successorship: The GC will seek to strengthen successorship doctrine, including by reversing the Trump Board's decision to allow employers to discriminate in hiring employees in order to avoid successorship obligations.

- Issuance of Bargaining Orders: The GC will seek the remedy of a bargaining order in a greater number of cases. In addition, the GC will seek a return to the 1949 Joy Silk doctrine, which authorized bargaining orders when a union can show it had majority status, requested recognition, and then during the time the employer refused to recognize or bargain with the union, the union lost its majority support.

- Employer's Duty to Furnish Information: The Trump Board invented several new reasons to excuse employers from their duty to furnish information to the union (a requirement of the duty to bargain in good faith). The GC will seek to reverse these and urge the NLRB to adopt even broader standards under this duty.

**Misclassification:** The Trump Board made it easier to misclassify employees as independent contractors. The GC will seek to reverse that and will likely issue unfair practice complaints where the misclassification is intended to deprive employees of their rights under the NLRA.

**Religious Institution Exemption:** The Trump Board expanded the types of institutions that, due to a religious affiliation, are exempted from the NLRA. If presented with a case, the GC will seek to return to the limited application of the religious institution exemption.

With this ambitious agenda, hopefully the NLRB can get back to enforcing workers' rights as contemplated by the NLRA and prevent overreach by employers.

# DISCIPLINARIES

**State Disciplinaries:**

**Office of Mental Health**
**(Arbitrator Trela)**
**Matter No. 21-0383**

The Grievant, an Office Assistant 2, was charged with the fraudulent reporting of his work hours and starting times and claiming $17,500 in unearned overtime. Arbitrator Trela found that the Grievant falsified his work starting times. However, he further found that OMH failed to prove that the Grievant did not work the overtime he claimed, so that charge was dismissed. The penalty was reduced to a $3,000 fine and a one-year incident specific probation.

**DOCCS**
**(Arbitrator Crangle)**
**Matter Nos. 21-0306, 21-0807**

The Grievant, a Cook employed by DOCCS at Bedford Hills Correctional Facility, was served with two Notices of Discipline seeking his termination for failing to address inappropriate inmate behavior, and for engaging in inappropriate and/or sexual physical contact with and making an inappropriate and/or sexual comment to an inmate. In a February 2022 award, Arbitrator Crangle found that the video evidence presented did not prove the Grievant had seen the inmate's behavior, and therefore he could not be held responsible to report the behavior. For the same reason, she held that the suspension related to the first Notice of Discipline was inappropriate. The first Notice of Discipline was dismissed and the full back pay and benefits were ordered. As for the second Notice of Discipline, Arbitrator Crangle found the Grievant guilty of the alleged inappropriate conduct and comment, although she did not find either to be sexual in nature. Finding the proposed penalty of termination to be too harsh, she imposed a suspension of approximately eight months and found the pre-hearing suspension to be appropriate.

**SUNY Stony Brook University Hospital**
**(Arbitrator Glanstein)**
**Matter No. 20-0379**

The Grievant, a Nursing Assistant, was charged with failing to perform her job responsibilities, jeopardizing patient care, and violating Stony Brook's Administrative Policy and Procedures by sleeping on duty and failing to remain alert and/or maintain visual contact with a patient, who left his room without her knowledge. The Arbitrator found the Grievant guilty of all charges, but further found that termination was an inappropriate penalty. Instead, she ordered that the Grievant be reinstated with no back pay, amounting to a two-year suspension without pay.

**SUNY Stony Brook University Hospital**
**(Arbitrator Nadelbach)**
**Matter No. 21-0072**

The Grievant, a Sterile Supply Technician at SUNY Stony Brook University Hospital, was charged with violating a prior disciplinary settlement's incident specific probation by engaging in 18 separate instances of disruptive or unprofessional behavior in October 2020. In a January 2022 Award, Arbitrator Jay Nadelbach found the Grievant guilty of all the allegations and further found that the prior disciplinary settlement's incident specific probation had been violated and, therefore, that the settlement's standard for termination was met.

**SUNY Downstate Medical Center**
**(Arbitrator Hyland)**
**Matter No. 21-0502**

The Grievant, an LPN at SUNY Downstate Medical Center, was charged with 62 counts of misconduct for failing to triage a patient prior to administering medication, failing to ascertain whether the patient had been triaged, administering medication without a physician's order, and other charges. Although the Arbitrator dismissed some of the charges because there was insufficient

evident of malice or ill intent on the Grievant's part, the Arbitrator nonetheless found that administering medication without a doctor's order and without checking the patient's vital signs warranted termination. The Arbitrator also determined that the employer had probable cause to suspend the Grievant.

**SUNY Upstate Medical Center**
**(Arbitrator Trela)**
**Matter No. 21-0453**

The Grievant, a Unit Support Technician, was suspended and served with a termination Notice of Discipline alleging that he behaved inappropriately towards and in the presence of, and failed to properly supervise, a suicidal patient. Arbitrator Trela found the Grievant guilty of 10 of the 12 charges against him. Although the Grievant had no prior disciplinary history, the Arbitrator found that termination was appropriate, in part based on the seriousness of some of the charges and the Grievant's failure to take responsibility for his actions.

**Local Disciplinaries:**

**Oswego County**
**(Arbitrator Whalen)**
**Matter No. 21-0479**

The Grievant, an Equipment Operator for Oswego County, was served with termination charges alleging theft and dishonesty for engaging in unpaid construction work while out on County-paid Workers' Compensation leave in July and August 2020. The State Workers Compensation Board found that the Grievant had engaged in fraud, but in a February 2022 Award, Arbitrator Michael Whalen refused to give that finding any collateral estoppel effect, and found that the County did not independently prove misconduct because it never proved that the Grievant had the requisite intent. The Grievant was reinstated to the payroll with full back pay and benefits.

**Village of Attica**
**(Arbitrator Lewandowski)**
**Matter No. 21-0617**

The Grievant, a Chief Waste Water Treatment Plant Operator for the Village of Attica, was served with termination charges for directing a subordinate to pose as the Grievant and attend training on his behalf for the purpose of maintaining the Grievant's Chief Operator license. The Grievant was a long-term employee with no prior disciplinary history. The Arbitrator found that the Village failed to meet its burden of proving the allegations against the Grievant, and ordered him reinstated with full back pay and benefits.

**City of Beacon**
**(Arbitrator Siegel)**
**Matter No. 21-0058**

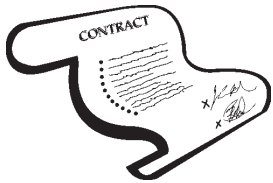
The Grievant, a Maintenance Worker, was charged with numerous instances of misconduct and insubordination, which stemmed from failing to perform work, failing to timely return from his lunch break, a minor motor vehicle accident, failing to timely notify his supervisor of the accident, an allegation that he was disrespectful and/or defiant to his supervisor, an allegation that he berated and cursed at his supervisor, and allegations that his work vehicle was at various locations which were not within the scope of his job assignments. After a hearing, the Arbitrator determined that the Grievant was guilty of most of the alleged instances of failing to perform work, failing to timely return from his lunch break, and his work vehicle being at various locations that were not within the scope of his job assignments. He was also found guilty of berating and cursing at his supervisor. With respect to the motor vehicle accident, the Arbitrator determined that the Grievant's responsibility for the accident did not rise to the level of misconduct or insubordination because the accident was minor and there was no evidence that the accident was part of a pattern of poor driving by the Grievant. The Arbitrator determined that a 60-day suspension, in addition to the 30-day suspension initially imposed after the Notice of Discipline was served, would suffice.

**Westchester County Department of Social Services**
**(Hearing Officer Ponzini)**
**Matter No. 21-0754**

In this Section 75 proceeding, a Senior Social Worker with the Westchester County Department of Social Services was charged with seven counts of misconduct for taking a child to the home of their biological mother in violation of a court order, and failing to report the same to a supervisor; failing to report concerns of depression and suicide; divulging personal/confidential information to a customer; and telling a customer her children would not be returned for four years if she made a complaint. The Hearing Officer found that the County met its burden of proving four of the seven charges, and recommended that the proposed penalty of termination be imposed.

# CONTRACT GRIEVANCES

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




**Town of Brookhaven**
**(Arbitrator Lipkind)**
**Matter No. 21-0757**

The Grievant, a Real Property Appraiser II, was appointed on March 8, 2021, at Salary Grade 30, Step 3. Prior to her appointment, the Town and the Union had discussed, but had never agreed, to an MOA upgrading the position that would have increased its salary by approximately $10,000. When the Grievant was not offered the higher salary, CSEA grieved, claiming the CBA required fairness in allocating pay grades. The Arbitrator denied the grievance because the MOA contained no language referring to an inequity in the salary schedule and made no mention of a review having been conducted. Instead, the evidence demonstrated that the upgrade was proposed in order to retain the prior Real Property Appraiser II, who ended up taking a higher-paying job in a neighboring jurisdiction.

**Onondaga County Water Authority**
**(Arbitrator Gelernter)**
**Matter No. 21-0658**

The Grievant, an Assistant Water Maintenance Supervisor, was not allowed to answer a posting for on-call work because the Authority claimed that under its CBA with the Teamsters covering its non-supervisory unit, only their members were eligible for the posted positions. As a result of this, CSEA filed a grievance, requesting that the Grievant be added to the on-call list or given a written explanation as to why he could not be added. After a hearing, the Arbitrator denied the grievance, finding that the Authority would have had to violate the Teamsters CBA if it had filled any of the newly created openings with CSEA-represented employees.

**North Tonawanda CSD**
**(Arbitrator Foster)**
**Matter No. 21-0334**

CSEA filed this contract grievance alleging that the Grievant, a North Tonawanda CSD Automotive Mechanic, was repeatedly denied overtime in late 2020 through early 2021, that was instead offered to another unit member with less seniority. The District contended that the Grievant was not qualified to perform the overtime duties because he lacked a CDL and that the overtime was being offered for times when the Grievant was already working. The relevant CBA language did not require that overtime be awarded based on seniority but did require the employee to be able to perform the overtime duties. In a January 2022 Award, Arbitrator Howard Foster denied the grievance, finding that the District could require that another Mechanic with a CDL be available to assist the Grievant and that if this required that other Mechanic to be paid overtime while the Grievant was paid his regular rate of pay, this did not violate the CBA.

# COURT ACTIONS

**Donohue, et al. v. Cuomo, et al.**
**(NYS Court of Appeals)**
**Matter No. 18-1085**

CSEA, along with 11 other State employee unions, filed a breach of contract/unconstitutional impairment lawsuit in 2011 in Federal District Court when the State unilaterally increased health insurance premiums by 2 percent for employees who retired between 1983 and 2011. The State was granted Summary Judgment in September 2018 and CSEA appealed that decision to the Second Circuit Court of Appeals. The Second Circuit certified two questions of State law to the State Court of Appeals. There was oral argument in January 2022, and the Court of Appeals issued this narrow decision on February 10, 2022. The decision held that there is no presumption of rights vesting (known as the "Yard Man" inference) under State law. Second, the language of the 2007-2011 CSEA/State CBA does not provide for a vesting of benefits on its face. The Court declined to determine whether the language was ambiguous, thus requiring extrinsic evidence to determine whether there is a vested right. The Court also declined to answer the second question, which was whether if there is a vested right, is there an adequate remedy under New York State law. A very narrow, esoteric holding to say the least, and the Federal litigation continues.

**Donohue, et al., v. Madison, et al.**
**(U.S. District Court, N.D.N.Y.)**
**Matter No. 13-0796**

CSEA and the Teamsters filed an action alleging that the Thruway Authority and Canal Corporation terminated certain employees or otherwise took adverse employment action against them as part of a reduction in force based on their association with their respective unions. The litigation has been ongoing for years; most recently, the court addressed the Plaintiffs' amended motion for

class certification. The court had previously considered the motion for class certification and requested additional information, which the Plaintiffs provided. In a February 2022 decision, the court determined that the union Plaintiffs did not satisfy the requirements for class certification, and denied the Plaintiffs' motion for class certification. The court terminated Danny Donohue, CSEA, and the Teamsters as Plaintiffs, leaving only the named individual employees (and former employees) impacted by the reduction in force.

**Town of Amherst v. CSEA**
**(Appellate Division, Fourth Department)**
**Matter No. 20-0735**

A grievance was filed on behalf of an employee of the Town of Amherst, alleging that he was terminated in violation of the CBA. CSEA subsequently sent the Town notice of intent to arbitrate the grievance. The Town commenced an Article 75 proceeding to stay the arbitration; CSEA cross-petitioned to compel arbitration of the grievance. The lower court granted the stay of arbitration after determining that CSEA was not a party to the CBA and had failed to adhere to the timing requirements in the CBA. The Appellate Division reversed that decision, and granted CSEA's cross-petition to compel arbitration.

# PERB MATTERS

**City of Poughkeepsie**
**(ALJ Parker)**
**Matter No. 21-0142**

In this DFR Improper Practice Charge, a City of Poughkeepsie employee alleged that CSEA violated Section 209-a.2(a) and (c) of the Taylor Law by refusing to provide her with an attorney to either negotiate or review a CSL §75 disciplinary settlement agreement prior to issuance of the charges, and for refusing to reimburse her for the cost of private counsel she retained to do the same. After a

hearing, a PERB ALJ found that CSEA had provided the employee with an experienced Labor Relations Specialist to represent her, that the Union had no duty to provide her with an attorney at that early stage of the disciplinary process, and that CSEA's decision not to provide her with an attorney to negotiate the settlement was pursuant to its long-standing policy and was not discriminatory. Additionally, it was found that an attorney had reviewed the proposed settlement with her Labor Relations Specialist nonetheless, and that CSEA's decision to not reimburse her for the cost of retaining private counsel was also pursuant to long-standing policy and thus not discriminatory. Based on this, the charges were dismissed.

# OTHER

**OPWDD**
**(Industrial Board of Appeals, Counsel Shaw)**
**Matter Nos. 21-0585, 21-0584, 21-0583**

CSEA filed three separate petitions with the Industrial Board of Appeals ("Board") concerning three separately identified New York State Office for People with Developmental Disabilities ("OPWDD") facilities, alleging that the Public Employee Safety and Health ("PESH") stated it would not be issuing violations with regard to 29 CFR 1910.132 or 19010.134, or otherwise with respect to OPWDD's respiratory and PPE requirements or practices at the facilities. In support of the Petitioners, CSEA attached a June 3, 2021 letter, an investigation narrative, and a June 2, 2021 letter, which was referred to as a Hazard Alert Letter. Counsel for the Department of Labor ("DOL") moved to dismiss the petitions on the basis that the June 2, 2021 Hazard Alert Letter was not a determination subject to review, and that the Board lacked jurisdiction to grant the relief requested by CSEA. CSEA opposed the motion but also cross-moved for leave to amend the petition. The Board denied DOL's motion to dismiss because its jurisdiction pursuant to Labor Law §§ 101 (1) and 27-a (6) permits review of orders, rules and regulations, as well as determinations issued by

DOL, including determinations not to issue violations. The Board granted CSEA's motion to amend the petitions and directed DOL to file an answer to the petitions within 30 days.

**OCFS – Daycare Licensing**
**(ALJ Walsh)**
**Matter No. 21-0778**

The Appellant is a licensed group family day care home operator. She was notified by OCFS that her license would be suspended and revoked. She requested a hearing to challenge the determination, and a hearing was scheduled. After the first day of hearing, OCFS and the Appellant reached a stipulation resolving the issues. Once the parties confirmed that all the terms of the stipulation had been satisfied, OCFS withdrew the enforcement action, leaving no issues to be decided by the Hearing Officer.

**OCFS – Daycare Licensing**
**(ALJ Walsh)**
**Matter No. 21-0913**

The Appellant was a licensed group family day care operator. She was notified by OCFS that her license would be suspended and revoked. She requested a hearing to challenge the determination, and a hearing was scheduled. After the hearing began, the Appellant withdrew her request for a hearing, leaving no issues to be decided by the Hearing Officer.