THE ADVOCATE

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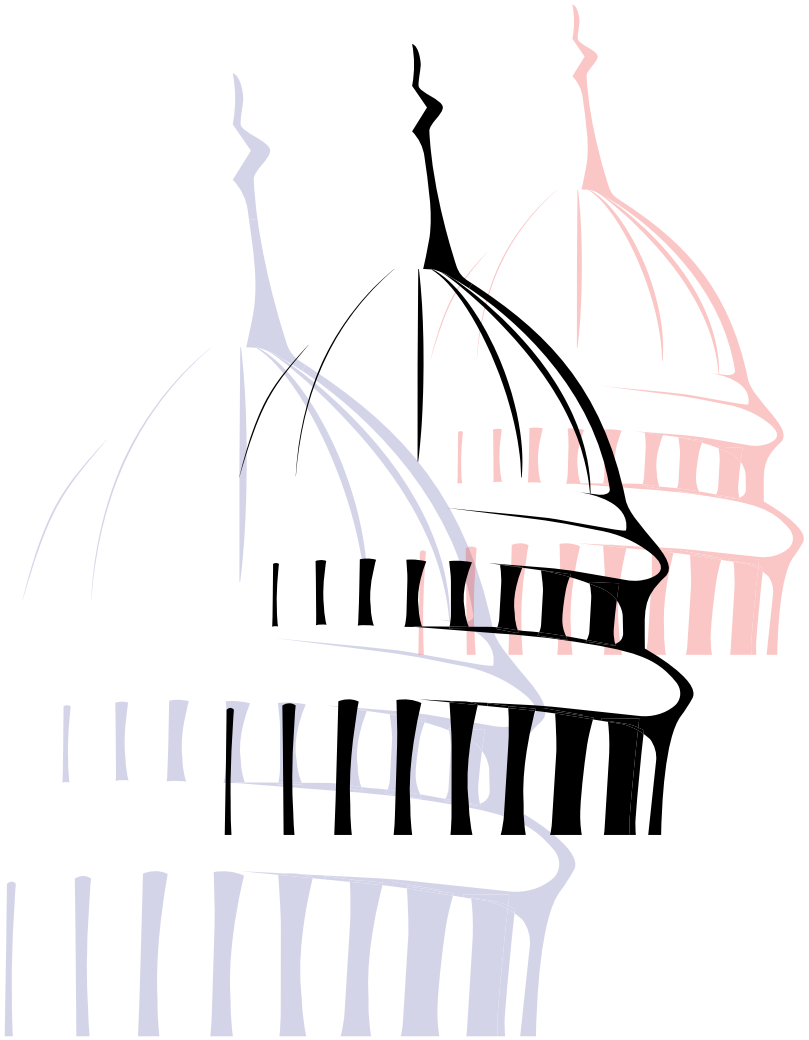

CSEA
Local 1000 AFSCME, AFL-CIO

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New York's Marijuana Legalization Law

On March 31, 2021, New York Governor Andrew Cuomo signed the "Marijuana Regulation and Taxation Act" ("MRTA") into law. The MRTA legalizes the adult recreational use of cannabis products in New York State and protects employee marijuana use under certain circumstances. The law legalizes the drug for adults 21 years and older and allows it to be used, smoked, ingested or consumed. New Yorkers are now allowed to possess up to three ounces of cannabis for recreational use or 24 grams of concentrated cannabis, such as oils derived from a cannabis plant. With this new law, New York joins more than a dozen other states and Washington, D.C., who have taken similar steps in legalizing recreational marijuana use.

The legalization of cannabis will have significant short and long-term effects on certain facets of our lives, including policies and procedures in the workplace. The MRTA prohibits, with certain exceptions, disciplinary action and discrimination against employees for their lawful use of marijuana. New York Labor Law is now amended and employers may not take adverse action against an employee because of their marijuana use:

1. outside of work hours;
2. off the employer's premises; and,
3. without the use of the employer's equipment or other property.

However, even with this new protection, not all CSEA members may use recreational marijuana without a possible adverse employment action. Despite the new state law, marijuana remains an illegal controlled substance under federal law, which means that it is illegal to consume, sell, or possess in the United States. Additionally, the U.S. DOT strictly prohibits marijuana use by employees considered to be in "safety sensitive" positions, such as those requiring a CDL, even if marijuana is legal in the state where the employee lives.

Further, the MRTA contains exceptions to the Labor Law protections for employee cannabis use. An employer does not violate section 201-d of the Labor Law based on employee cannabis use when it takes an adverse employment action and:

- The employer's actions were required by state or federal statute, regulation, ordinance, or other state or federal government mandate;
- The employee is impaired by the use of cannabis, meaning the employee manifests specific articulable symptoms while working that interfere with the employee's performance of the duties or tasks of the employee's job position, or such specific articulable symptoms impair the employer's ability to provide a safe and healthy work place, free from recognized hazards, as required by state and federal occupational safety and health law; or
- The employer's actions would require such employer to commit any act that would cause the employer to be in violation of federal law or would result in the loss of a federal contract or federal funding.

This makes clear from the outset that although adult recreational

use of marijuana is broadly legalized, use is not without limitation. Rather, adult recreational use of marijuana is likely to be treated in a similar fashion to adult use of alcohol: impairment at work, impairment while operating a vehicle, and consumption in prohibited places, among other circumstances, will still have consequences. Unlike alcohol use, however, there is currently no easy way to quickly and reliably measure whether a person is under the influence of marijuana, especially since traces of the drug can stay in someone's system after the high has worn off.

For CSEA members who require certifications and/or licensure subject to federal law and regulations, such as CDL drivers or peace officers, if they are randomly tested and test positive, they will have consequences that may include loss of their CDL, discipline, and/or stringent return to work testing, even if there is no impairment. Furthermore, if an employee loses a CDL or certification, which is a minimum qualification for the position they hold, they may be terminated without any recourse to statutory or contractual disciplinary procedures.

With these changes to the law, it is important to note that employers may still discipline employees for using or possessing marijuana at work or working under the influence of cannabis if it negatively affects performance or safety or the employee's position is subject to federal law. Any new policy or workplace rule should be negotiated with CSEA to ensure supervisors are aware of the legal protections under the law. As with any new law, CSEA will continue to monitor any changes to this law or additional regulations or guidance that is issued on this subject area.

DISCIPLINARIES

State Disciplinaries:

OPWDD
(Arbitrator Deinhardt)
Matter No. 20-0593

In this Article 33 proceeding, the Grievant successfully challenged three disciplinary charges proffered against him. Grievant is a Direct Support Assistant at a Developmental Disabilities Service Office ("DDSO"), within the Office for Persons with Developmental Disabilities ("OPWDD"). All three charges relate to an incident where Grievant was accused of throwing a cup at an individual residing at the Individual Residential Alternatives ("IRA") where he worked. The only witnesses to the incident were the victim and another individual who chose not to testify at the hearing. The Arbitrator found the record developed at the hearing contained significant evidence that made her dubious about the ability of both the victim and the other individual to be accurate reporters of what occurred during the alleged incident. At the hearing, it was shown that the victim and the other alleged witness to the incident have histories of physical and verbal aggression and assault, including throwing things. Furthermore, the victim has a history of falsely accusing staff of physical contact only to later recant his statements. Given all these factors, the Arbitrator held that the State did not prove it was more likely than not that the Grievant threw a cup at the individual; found that the State did not have just cause to suspend Grievant and directed the Grievant to be reinstated and made whole for all losses.

OPWDD
(Arbitrator Drucker)
Matter No. 18-0981

The Grievant, a Direct Support Assistant with nine years of service, was issued a Notice of Discipline alleging that Grievant engaged

in misconduct by smacking a service recipient in the face. The State sought termination. The State's Notice of Discipline relied principally on the testimony of another service recipient, the sole eyewitness to the alleged abuse. However, the Arbitrator found that this testimony was inconsistent and implausible. Specifically, the Arbitrator noted that the witness claimed he was the only person present during the abuse, but evidence establishes that there were nine to thirteen people present at the time, who would have noticed if the Grievant had abused the service recipient. The Arbitrator additionally found that Grievant's behavior following the alleged abuse did not demonstrate an attempt to conceal or falsify accounts of the incident. Accordingly, the Arbitrator found that the State failed to meet its burden, and awarded Grievant reinstatement with full backpay, benefits and seniority.

OPWDD
(Arbitrator Riegel)
Matter No. 20-0429

The Grievant, a Direct Support Assistant with less than one year of service, was issued a Notice of Discipline alleging that Grievant struck a service recipient in the face, causing a closed orbital fracture to his left eye. The evidence showed that the service recipient was uninjured before he went into his bedroom alone with Grievant, and that after Grievant came out, the service recipient had suffered an injury. Video from the police body cameras recorded the service recipient's statement that the Grievant had struck him in the face. The Arbitrator found that Grievant failed to offer any viable alternative account of how the service recipient was injured and failed to accept responsibility or show remorse. Accordingly, the Arbitrator upheld the Grievant's termination.

Local Disciplinaries:

Albany County – Dept. of Children Youth and Families
(Arbitrator Lobel)
Matter No. 20-0934

The Grievant, a Supervisor with 20 years of service, no prior disciplines, and positive reviews, was issued a Notice of Discipline alleging that she made a case assignment based on the racial composition of the caseworkers and the neighborhood to which they were being sent. The County charged her with misconduct and sought termination. The charges were based on a statement allegedly made by the Grievant two weeks following the disputed assignment, that "two Black caseworkers would be better to go out on the case because my worker is White and I do not owe Caseworkers an explanation." The Grievant argued that her decision to assign a house visit to two on-call Caseworkers was based on departmental policy. The policy requires Caseworkers to go in pairs for this type of house visit, but there was only one Caseworker in the unit that day. Additionally, the policy discourages Supervisors from going out into the field. Finally, the Grievant asserted that she had no idea who the on-call Caseworkers were at the time of the assignment. The Arbitrator found that the County failed to show the Grievant was aware of who the on-call Caseworkers were when she put in the request, and that there was insufficient evidence that race was the basis for the Grievant's assignment decisions. The Arbitrator reinstated Grievant with full backpay and benefits, though required Grievant to participate in counseling sessions for sensitivity and diversity training.

Chautauqua County
(Arbitrator Gelernter)
Matter No. 20-0553

The Grievant, a Disposal Site Attendant with 23 years of service, was issued a Notice of Discipline alleging that he engaged in explicit verbal sexual harassment of a customer from 2018 to 2020. The Union successfully challenged as untimely parts of

the specification that the alleged misconduct occurred prior to January 15, 2019. The Arbitrator found that evidence and Grievant's admissions supported the fact that some inappropriate comments were made. However, the Arbitrator held that termination was not appropriate because there were credibility lapses in the testimony of the Complainant and his business partner, there was no record of any complaints about the sexual nature of Grievant's comments during his 22 years of employment, the Grievant's previous disciplinary history had nothing to do with sexual comments or customer relations, and the Grievant demonstrated willingness and ability to correct his behavior. The Arbitrator reasoned that termination was inappropriate under a progressive discipline structure, but found that a nine-week suspension without pay would be appropriate.

Westchester County
(Hearing Officer Bernbach)
Matter No. 20-0705

In this Section 75 disciplinary matter, the Appellant had been employed at the County for approximately two years when he was accused of numerous allegations of incompetence and misconduct, most which involved his failure to properly perform the daily functions of his job as a Community Work Assistant. While in many of the charges, the Hearing Officer noted that the County's evidence was "less than compelling," it was also noted that the Appellant acknowledged and admitted "a significant number of performance failings sufficient to justify the County's dissatisfaction with his performance." Taken as a whole, the evidence supported the County's concerns that the Appellant's performance did not meet the legitimate expectation of the County. In evaluating a proposed penalty, the Hearing Officer found that the Appellant had never been formally warned of the County's dissatisfaction with his work, despite having at least one meeting during the period in question with the Union about the Appellant and his pay scale. Therefore, the Hearing Officer recommended a two-month suspension without pay, excluding the one-month penalty already imposed. In rendering this recommended remedy, the Hearing

Officer counseled and informed the County that it should closely monitor the Appellant's performance and promptly notify him of any perceived problems.

Village of Brockport
(Arbitrator Denson)
Matter No. 20-0507

The Grievant, a 13-year employee of the Village, was charged with making a racial slur while working as part of a crew on sidewalk removal in a residential neighborhood. The incident was reported to the Village Mayor by a Village resident, whose house was located across the street from the work site. The Village resident sent an email to the Mayor, stating what she heard, through an open window in her house. As part of the Village's investigation of the alleged incident, it sought additional information from the Village resident, to attempt to identify the accused worker. During the hearing, the Village resident testified and explained that, on the day in question, she was working from home and her desk was near an open window overlooking the work crew. The Arbitrator credited the Village resident's testimony and the County's circumstantial evidence, which included the Grievant notifying other employees on the same day of the Juneteenth holiday being announced and that the Grievant admitted to using a racial slur on a previous occasion. Rather than upholding the penalty of termination, the Arbitrator ordered a six-month suspension without pay, with any back-pay award being offset by the Grievant's earnings during the reinstatement period.

Town of Brookhaven
(Hearing Officer Maier)
Matter No. 21-0165

In this Section 75 disciplinary matter, the Respondent was charged with misconduct for allegedly using inappropriate language to a female employee. Respondent first began work with the Town in March 2011 as a part-time Clerk Typist and was later hired as a full-time Building Permits Examiner in February 2021. Prior

to the instant proceeding, while working as a part-time Typist, the Respondent had entered into an agreement with the Town which resolved a separate situation in which he allegedly made inappropriate comments to two different female co-workers. In that matter the Respondent was suspended for one week and agreed that he must always be respectful to his co-workers and abide by all direction given to him regarding interactions with fellow employees. In the instant proceeding Respondent was accused of commenting inappropriately about a female co-worker's fingernails during a training the co-worker was providing Respondent. The Union argued that one comment cannot constitute harassment or misconduct and does not support the penalty of termination. The Hearing Officer disagreed and relied on the Respondent's previous pattern of behavior for which he was already disciplined, and recommended Respondent's termination from employment.

Eastport-South Manor Central School District
(Hearing Officer Maier)
Matter No. 20-0931

In this Section 75 disciplinary matter, the Respondent, was charged with 24 charges of misconduct for behavior she engaged in from July 2020 through November 2020. Respondent began her career for the District as an Account Clerk in the District's Business Office in 2014. After course of misconduct engaged in by the Respondent, she was transferred to the Facilities Department in November 2020 to remedy the situation. The Transfer was the result of an investigation into Respondent's conduct prompted by a complaint from a co-worker. Respondent's conduct post-transfer led to further specifications and ultimately resulted in this proceeding. At the hearing, it was shown the Respondent engaged in serious misconduct in her dealings with co-workers which included harassment and demeaning them. Respondent also refused to perform essential duties as directed. Ultimately the Hearing Officer recommended the Respondent be terminated. In his decision, the Hearing Officer relied on the fact that Respondent had many opportunities to modify her behavior but failed to do so. Furthermore, in support of his decision, the Hearing Officer

cited to the fact that even after Respondent was transferred from the Business Office to the Facilities Department, her misconduct continued and she again refused to be trained and was not performing essential functions of her position, such as processing payroll. For all these reasons the Hearing Officer recommended termination.

Mount Sinai Union Free School District
(Hearing Officer Cafarella)
Matter No. 20-0979

The Appellant, an Aide/Monitor with eight years of service, was issued a Notice of Discipline alleging she engaged in misconduct by failing to abide by COVID-19 quarantine rules. Specifically, the charge alleged that the appellant intentionally reported for work with COVID-19 symptoms, failed to wear a face covering while at work, failed to report her exposure to an individual who had COVID-19 symptoms, exposed co-workers and students to COVID-19 causing them to be quarantined, failed to immediately report a positive COVID-19 test result, and failed to deliver a Quarantine Release Letter following a period of mandatory self-isolation. The School District offered the School Nurse's testimony and medical records to support its claim that Appellant had experienced COVID-19 symptoms prior to coming to work, but the Appellant denied experiencing symptoms except for a headache which is a side effect from her medication. The hearing officer credited the Nurse's testimony and medical records from the incident over the Appellant's testimony, in part because the Appellant did not provide a viable explanation for why the Nurse would lie under oath and falsify records. Accordingly, the Hearing Officer found that the Appellant knew she was sick when she reported to work and remained at work despite feeling sick, in violation of the School District's directives regarding COVID-19. However, the Hearing Officer dismissed the allegations that the Appellant engaged in misconduct by failing to wear a mask, because she removed her mask during a panic attack in which she felt like she could not breathe. Such response to a perceived health emergency is reasonable and is not considered misconduct. Similarly, the Hearing Officer dismissed the charge that Appellant

failed to immediately report a positive COVID-19 test, because Appellant did not receive the test result until after the school day was over, and it was reasonable for her to report the result the next morning. Despite this, the Hearing Officer found that dismissal was an appropriate penalty because of the seriousness of the risks that Appellant exposed employees and students to, and because of her false accusations against the School Nurse and the lack of remorse demonstrated during the hearing.

CONTRACT GRIEVANCES

Local Grievances:

Lackawanna City School District
(Arbitrator Foster)
Matter No. 19-0361

This grievance alleged that the School District failed to give the Grievant opportunities to earn overtime pay by responding to security or alarm calls, and only gave opportunities to other bargaining unit employees, in violation of the contract. The Union showed that during a one-year period, the Grievant had received no overtime call-ins, while a similarly situated co-worker received 13 calls during the same period. Although the contract provided that the remedy for inadvertent bypassed overtime is restoration of the lost opportunity, the Arbitrator found that the school district's failure to offer overtime opportunities was initially not inadvertent. Accordingly, the Arbitrator awarded the Grievant monetary compensation for the overtime opportunities that the school district intentionally denied him and awarded restoration of overtime opportunities for the instances which were inadvertent.

The Newburgh Enlarged City School District
(Arbitrator Selchick)
Matter No. 18-0827

In this contract grievance, the Union successfully argued that four Grievants holding the Typist position were required to perform

duties of a higher classification uncommon to their classifications but were not compensated in accordance with the contractual provision. First, the District argued that the grievance was untimely because the alleged out-of-title work began on March 30, 2017, but the grievance was not filed until October 12, 2017, and thus not within the ten working days limit for filing a grievance per the collective bargaining agreement. The Arbitrator held that this grievance was the classic example of a continuing violation grievance and therefore cannot be considered as untimely, however, the contract did impose a cutoff date in terms of relief by stating that a grievance, if sustained, shall be retroactive to the date of the filing of the grievance. In considering the merits of the grievance, the Arbitrator relied on the language of the contract which provided this type of claim must rest on the "performance of work" that is not "the same or similar to the work contained in the employee's job description." Because the Grievants did not hold the Senior Typist position, the Arbitrator focused on the aspects of a Senior Typist that are not found in the Typist position which they held. In considering the comparison of the two positions and the relevant record evidence, the Arbitrator held that the Grievants had been performing work in three distinct but related categories of the Senior Typist position that is a type of work outside the Typist position. In conclusion, the Union's grievance was sustained, and as a remedy, the District was directed to pay the Grievants at the Senior Typist compensation rate retroactive to the date of the filing of the grievance, October 12, 2017.

Town of Irondequoit
(Arbitrator Kash)
Matter No. 20-0412

In this contract grievance, the Union successfully argued that the Town violated the collective bargaining agreement when it assigned the Grievant, a Laborer, to operate a vehicle with a "rotating broom" without being paid out-of-title at the rate of a Motor Equipment Operator. The Town argued that because part of the Laborer job description read "Other related activities may be performed although not listed" they were not obligated to compensate

Grievant for out-of-title work. The Town also argued there is a valid past practice because since 2015, the Town has had employees within the title of Laborer performing the duties described by the grievance. The Arbitrator found that there was negotiated language concerning Laborers being required to operate equipment dating back to 2005, but this language was implicitly abandoned by both parties because of failed efforts in 2011 and 2019 to revise them. Since no alternative language was applicable to the operation of this specific vehicle and because there was no past practice to provide an alternative meaning to contract language, the Arbitrator held that Article 29 of the contract says what it means: a Laborer cannot perform out-of-title work unless he receives out-of-tile pay. Based on the foregoing, the Grievant's operation of that specific vehicle entitled him to out-of-title pay at the Motor Equipment Operator rate, and therefore the grievance was sustained.

Monroe County
(Arbitrator Gelernter)
Matter No. 19-1050

In this promotional grievance, the Grievant challenged the County's failure to promote him to the position of Senior Maintenance Technician/Operator. The Grievant worked for the County for 20 years, starting as a Laborer and then was promoted to Maintenance Technician/Operator and Foreman. This was the second attempt by the Grievant to promote to the Senior Maintenance Technician/Operator position. Instead of promoting the Grievant, the County appointed another worker with five years of County service. The parties agreed that the 20-year-old process for selecting provisional promotion appointees in the competitive classification involves an appointment committee making a weighted, four-factor assessment on the following factors: (1) the accuracy of a candidate's answers to oral questions; (2) the candidate's skill level for several different job skills; (3) the candidate's time and attendance record; and, (4) the candidate's seniority. The Union argued that the five-point difference in scores between the Grievant's and the successful candidate's ratings did not show a relative difference in qualifications sufficient to deny the Grievant

the position, especially when he had more seniority and years of service. Finding that the five-point difference in scoring was significant and not an unreasonable basis to promote the successful candidate, the Arbitrator determined that it was unnecessary to decide whether seniority is used to break a tie. It was found that the County designed the system so that point totals covering several job factors would determine who is the best candidate. Therefore, the grievance was denied.

County of Erie
(Arbitrator Rinaldo)
Matter No. 19-0461

In this contract grievance, the Union claimed that the County improperly terminated the Grievant's employment after the probationary period and without progressive discipline. The Grievant's appointment commenced on March 7, 2016 and was terminated at the close of business on March 3, 2017. The County also informed the Grievant that she completed the 26 weeks of service in Step 0 (probationary step), effective on September 26, 2016 and would advance to Step 1 of the salary scale. The collective bargaining agreement set forth a probationary of "no less than eight weeks and no more than 26 weeks." The Erie County Civil Service Rules, which is referenced in the collective bargaining agreement, states that the probationary periods for certain titles, such as that held by the Grievant, are 12 to no more than 52 weeks. Finding an ambiguity in the language between its provisions on probationary terms and its reference to the Erie County Civil Service Rules, the Arbitrator looked to extrinsic evidence and found that the County had regularly placed appointees in Grievant's title to a probationary term of up to 52 weeks. Therefore, the grievance was denied.

North Rockland Central School District
(Arbitrator Lobel)
Matter No. 20-0869

In this contract grievance, the Union claimed that the School District violated the parties' collective bargaining agreement when

it failed to appoint the Grievant to a vacancy for the position of Custodial Worker on two different occasions. Each situation involved a different fact pattern where another applicant was appointed to a night custodial position and the Grievant was not selected for the posted position. The contract language called for the District to first make an evaluation of all candidates for relevant positions based on "merit, fitness, skill, ability, prior work experience and job performance." After this evaluation, if all facts are "relatively equal," the District shall give preference to non-probationary members of the bargaining unit. The Arbitrator explained that in relative ability cases such as this, the employer will prevail so long as it can be shown that the decision to choose one candidate over another was made in a manner that was not discriminatory, arbitrary, or capricious. In analyzing the work history of both candidates, the Arbitrator held that the qualifications of the two people selected were superior to those of the Grievant, and therefore not relatively equal. In conclusion, the grievances were denied because the Arbitrator found that the interview committee decided, in a well thought-out and sensible fashion, that both individuals selected were clearly the most qualified applicants in the interview group, and other candidates did not have relatively equal qualifications to the candidates selected.

County of Nassau
(Arbitrator McLaughlin)
Matter No. 20-0611

In this contract grievance, the Union filed a class action grievance claiming that the County violated the collective bargaining agreement when the class members were placed in the wrong step of the graded salary plan, when their titles changed from Crossing Guard to Police Service Aids. The County raised an objection to the timeliness of the grievance claiming the alleged changes took place in 2009. The Union argued that the members of the class did not know they were placed in the wrong step until 2020, and therefore the grievance was timely, because the collective bargaining agreement provides the time for filing a grievance

was within one year of the time that the members discovered the contractual violation. The Arbitrator disagreed and found that the plain meaning of the contract provided that the Union may initiate a grievance within one (1) calendar year after the occurrence of the event grieved, provided that it does not merely effect an individual. Because the Arbitrator found the contract states the time frame that an employee should have known of the occurrence of the event grieved only applies to individual grievances brought by the Union members and not Class Action grievances, he found the instant grievance to be untimely and granted the County's motion to dismiss.

JUSTICE CENTER

Rockland Children's Psychiatric Center, OCFS (ALJ Bristow)
Matter No. 20-0871

This matter arose from an indicated report alleging that Appellant abused a 12-year-old Resident of the Rockland Children's Psychiatric Center by striking her in the face with her hand. The ALJ found that principal evidence in support of the allegations was hearsay statements from the Resident. The ALJ found that this hearsay evidence was seriously controverted by statements made by other staff and was not sufficiently reliable because the Resident made untruthful statements during the investigation. Additionally, video evidence showed that another staff member was observing the interaction between Appellant and the Resident, and that staff member testified that Appellant did not hit the Resident. Accordingly, the ALJ held that a preponderance of the evidence did not support the allegation and found the charge to be unsubstantiated.

COURT ACTIONS

DeJesus-Hall v. NYS Unified Court System
(Second Circuit Court of Appeals)
Matter No. 20-0321

Plaintiff filed this appeal of her Title VII civil rights action, when the District Court granted the Unified Court System's ("UCS") motion for summary judgment and dismissed the Plaintiff's petition. The Court reviewed the Plaintiff's claims that she suffered from three discriminatory adverse employment actions, two of which related to UCS's failure to place her in an "in-part" clerkship assignment and the other related to her transfer from the Criminal Division to the Foreclosure Part. With respect to the issue of an "in-part" clerkship assignment, the Court found that the two clerks selected over the Plaintiff were not similarly situated, as they had more civil experience and such clerkships were with judges who oversaw civil dockets. Reviewing the Plaintiff's allegation of discrimination and retaliation due to her transfer to another assignment, the Court concluded she did not demonstrate that her transfer resulted in a setback to her career. Therefore, the District Court's ruling was affirmed.

Carmona v. Village of Spring Valley et al.
(Supreme Court County of Rockland)
Matter No. 20-0413

In January 2019, the Assistant Village Attorney for Respondent Village of Spring Valley preferred various disciplinary charges pursuant to Civil Service Law § 75 against Petitioner, the Deputy Building Inspector for the Village. These charges were then supplemented with additional disciplinary charges in July of 2019. After a hearing, the Hearing Officer issued a Report and Recommendation, concluding that certain charges should be sustained, and the remaining charges should be dismissed. The Hearing Officer recommended a penalty of a 60-day suspension without pay and for Petitioner to continue his position as Deputy Building Inspector. Respondent Village of Spring Valley Board

of Trustees considered the Report and Recommendation and determined to sustain certain disciplinary charges. It also passed a resolution demoting Petitioner's employment, in grade and title, from Deputy Building Inspector to Assistant Building Inspector, and decided to maintain the 60-day suspension without pay that the Hearing Officer proposed. Petitioner filed the instant Article 78 proceeding alleging Respondents violated Civil Service Law § 75(3) by imposing a dual penalty upon him and asked the Court to annul his demotion and suspension and remand the matter to Respondents to elect only one of the two imposed disciplinary penalties. The Respondents filed a pre-answer motion to dismiss the Petition alleging the Petitioner failed to exhaust his administrative remedies. In response to this motion, Petitioner filed a motion for default judgment alleging the Respondents' motion to dismiss was untimely, and therefore the petition was not answered. The Court denied Petitioner's motion for default judgment and granted Respondents' motion to dismiss. The Court held that because Petitioner's employment is governed by a collective bargaining agreement between the Union and the Village which provides for a two-stage grievance procedure, as well as binding arbitration for non-termination disciplinaries, the Petitioner needed to file a grievance to challenge the Respondents' actions, and by failing to do so, he failed to exhaust his administrative remedies and the petition was dismissed.

Glantz v. BOE of the City of Rye School District
(Supreme Court County of Westchester)
Matter No. 20-0613

This proceeding alleged that the School District violated Education Law Section 3013(2) and the related mandate in the parties' collective bargaining agreement by failing to follow seniority in implementing layoffs. The School District claimed that the protections of election Law Section 3013 do not extend to petitioners because they were part-time, not full-time, Teaching Assistants. The School District showed that while prior CBAs provided part-time Teaching Assistants with the contractual right to seniority in layoffs, this protection was eliminated from the

applicable CBAs in effect at the time of the layoffs. Instead, the CBA provided that the layoff and recall decisions would be governed by Election Law. The Union argued that the petitioners were de-facto full-time Teaching Assistants, because they worked 6.5 hours per day, nearly identical to the full-time Teachers employed by the School District. However, the Judge found that because the School District expressly advised them on an annual basis that they were part-time, and that they were appointed as 0.9 FTE Teaching Assistant, then the petitioners were, in fact, part time. Accordingly, because Education Law Section 3013(2) does not cover part-time Teaching Assistants, the Judge dismissed the petition.

Green v. Office of Children and Family Services
(Supreme Court County of Rensselaer)
Matter No. 20-0843

This case appealed OCFS's termination of Petitioner after one year of leave under Civil Service Law Section 71 following injuries Petitioner sustained while at work. Petitioner claimed her injuries were due to an assault, and that she is therefore entitled to two years of leave under CSL Section 71. After reviewing the video evidence submitted by OCFS, the Court held that OCFS's determination that Petitioner's injuries were not due to an assault was not irrational. Specifically, the Court found that although Petitioner was injured while attempting to restrain two youth Residents, she was not the target of the youths' violent outbursts. Instead, the evidence demonstrated that Petitioner's colleague was the intended target of the attack. Accordingly, the Court held that OCFS's determination that Petitioner was not injured due to an "assault" was rational.

OCFS
(ALJ Del Re)
Matter No. 21-0161

The Appellant, a former Mental Health Therapy Aide, sought amendment of an indicated report held by the NYS Central Register alleging that, in 2009, she grabbed an 11-year old child by the neck and pushed him to the ground, resulting in a red mark on the child's neck. The ALJ found the Agency failed to prove by a fair preponderance of the evidence that the Appellant committed the maltreatment alleged. The Appellant was found to have credibly testified that she had no recollection of the 11-year old incident and admitted it was her handwriting and signature on her handwritten statement, which contained a narrative of the alleged event. Moreover, the child was spitting and struck the Appellant and continued to be aggressive toward the Appellant and other Residents. With this evidence, the ALJ found that, even if it is concluded that the Appellant pushed or propelled the child, the Appellant's actions may have constituted "an emergency physical intervention necessary to protect the safety of any person." As a result of the decision, the Central Register was ordered to be amended to reflect that the Appellant is not a subject of the indicated report.

OCFS
(ALJ Johnson)
Matter No. 19-0803

The Appellant, a licensed owner of a daycare, sought amendment of an indicated report held by NYS Central Register alleging that, in 2019, she failed to properly supervise the children at her daycare and as a result, a child was bitten on the back by another child while in her care. The ALJ found the Agency was able to prove by a fair preponderance of the evidence that the Appellant committed the maltreatment alleged. More specifically, the ALJ found there was credible evidence on the record that under the circumstances the

Appellant failed to provide proper supervision of a child who was of an age that required heightened supervision, and the Appellant failed to provide adequate guardianship of the daycare child. Furthermore, the ALJ found that Appellant as a daycare provider demonstrated an impaired level of judgment towards the child who was entrusted to her care. Despite holding that the indicated report will not be amended to unfounded and sealed, the ALJ determined that the indicated report is not relevant and reasonably related to childcare issues. In making this finding, the ALJ relied on the fact the child in this proceeding sustained no serious or permanent injuries due to the incident, and since that time the Appellant has taken Early Childhood Education and Training Classes, is engaged in a degree program concerning Early Childhood Education and is no longer providing daycare through her business, but is providing private childcare.

PERB

Town of Ticonderoga
(ALJ Scott)
Matter No. 18-0290

The Union successfully argued this Improper Practice Charge (the "Charge") that the Town violated § 209-a.1(a) of the Taylor Law by interfering with, restraining, and coercing Union representatives in the exercise of their rights, specifically by issuing a Work Rule Directive to the Unit President, instructing him not to involve himself with the assignment of operating equipment to bargaining unit members. The Charge also successfully argued that the Town violated §§ 209-a.1 (a) and (c) of the Taylor Law when it issued a Notice of Discipline to the Unit President that imposed a written reprimand for harassing and creating a hostile environment. The Unit at issue contained full-time employees at the Town Highway Department and Transfer Station. The underlying issue in the charge arose when the Unit President, who is a Motor Equipment Operator ("MEO"), became aware that Laborers in the Unit were being asked to perform possible out-of-tile work by operating plow

trucks for snow removal on the roads. This work was the work of MEOs who hold CDL licenses. When the Unit President contacted the Town's Highway Superintendent, he was met with hostility, and the Superintendent stated that the Union would not tell him what to do. After this incident, the Town issued a Work Rule Directive (the "Directive") to the Unit President which directed him "not get involved" in the deployment of employees in the Laborer class, including, specifically, "the assignment to operate highway equipment." The Directive also contained a warning that stated harassing, intimidating, coercing, threatening, assaulting, or creating a hostile environment against another employee, whether on or off Town premises is prohibited and may result in termination of employment. Shortly thereafter the Town issued a Notice of Discipline -- Written Reprimand charging the Unit President with violation of the Directive for allegedly telling other employees the Superintendent was going to fire him if they did not get the Commercial Driver's License. The ALJ held that the Town violated the Taylor Law when it issued the Notice of Discipline to the Unit President because the Unit President was engaged in a protected activity. The ALJ relied on the fact that the conversation the Unit President had with the laborers was communicating with unit members regarding the terms of employment related to distinct titles in the CBA, and the compensation they are due when they perform certain tasks, which is presumptively a protected activity unless there is evidence of bad faith, which there was not. The ALJ also held that the Town violated the Taylor Law when it issued the Work Rule Directive, because in doing so, the Town acted deliberately for the purposes of cautioning the Unit President not to get involved in the deployment or assignments of distinct titles within the Unit, which is well within his scope of responsibility as Unit President. Finally, the ALJ held that the threat of reprisal contained in the Work Rule Directive constituted unlawful coercion because it was in relation to the Unit President exercising a protected right. Ultimately the ALJ ordered the Town to immediately rescind the Work Rule Directive and Notice of Discipline; ordered the Town to stop threatening the Unit President with reprisal for the exercise of rights protected the Taylor Law; ordered the Town to stop interfering with the Unit President's

rights to form, join and participate in the employee organization; and finally ordered the Town to post a Notice to all physical and electronic locations customarily used to communicate information to unit employees to notify them that the Town will do what was ordered as described above.