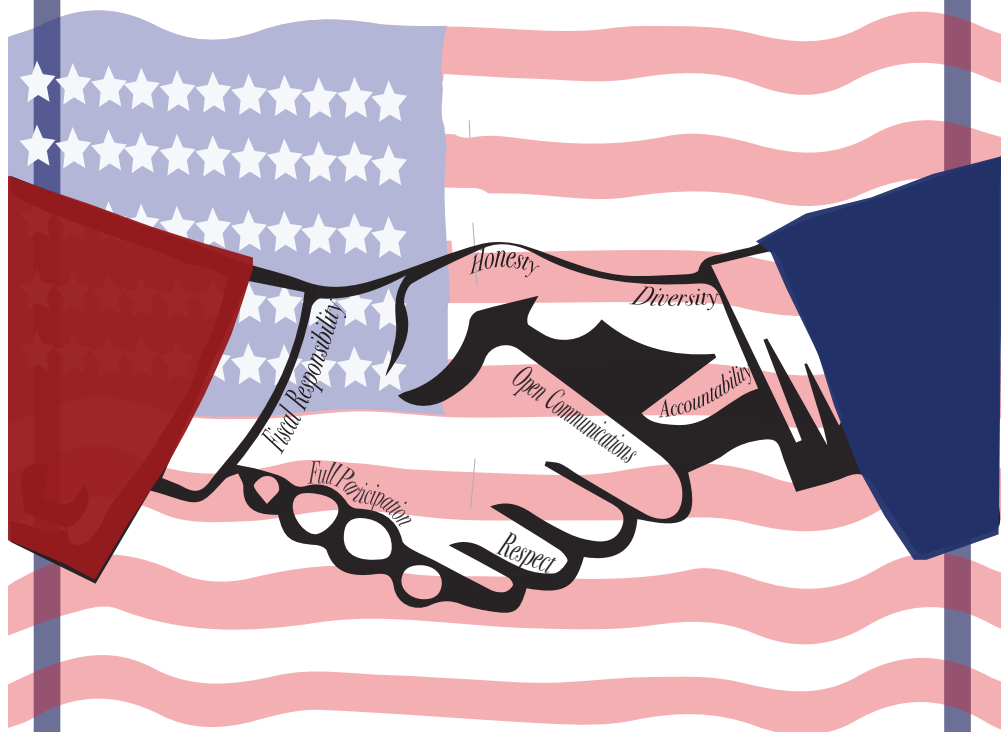


THE ADVOCATE

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CSEA 
Local 1000 AFSCME, AFL-CIO

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Counsel's Corner

By: Daren J. Rylewicz
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CSEA's New York State Retiree Health Insurance Case Comes to An End



As we have previously reported on, in 2011, CSEA filed a federal lawsuit against the State of New York when it implemented an increase to the health insurance contributions for retired State employees. The lawsuit was filed on behalf of thousands of CSEA State retirees claiming that the State violated and impaired the collective bargaining agreements with respect to retiree health insurance. Specifically, and effective October 1, 2011, the State increased the health insurance premium contribution rates for individual retirees from 10% to 12% and for families from 25% to 27%. The increases were made to employees who retired after 1983. Prior to the 2011 increase, the last time the State increased retiree health insurance contributions was in 1983. Besides CSEA, approximately nine other labor unions filed parallel lawsuits and all were venued in Federal District Court, the Northern District of New York. In all 10 matters before the court on this issue, CSEA was deemed the lead case.

During the course of the litigation, all 10 lawsuits were consolidated for purposes of discovery. The labor unions conducted oral depositions of about 33 employees and representatives for the State. Whereas, the State did not conduct any depositions. In addition, the parties exchanged over 10,000 documents.

After the conclusion of discovery, the State moved for summary judgment and CSEA opposed such motion and made a cross-motion for summary judgment. On September 24, 2018, the district court judge found that the State could unilaterally change health insurance contributions for this group of retirees. While the court found that the collective bargaining agreements do provide for the continuation of health insurance benefits in retirement, the court also found that the language of the labor contract does not provide for a vested right to a certain contribution rate for retirees.

CSEA appealed the district court's decision to the United States Second Circuit Court of Appeals. Before ultimately deciding the case, the Second Circuit Court of Appeals sought guidance from the New York State Court of Appeals, the highest court in New York State, on two certified questions relating to unresolved issues of state law breach of contract claims. After reviewing the Court of Appeals' decision clarifying and ruling on questions of contract law, the Second Circuit Court of Appeals issued a decision on April 27, 2022, affirming the judgment of the district court, which found that the State could unilaterally increase the health insurance contribution rates for these retirees. The Second Circuit Court of Appeals found that the collective bargaining agreements do not speak about lifetime vesting of health insurance contribution rates. Therefore, it was decided that the State did not breach its contractual obligations when it increased the contribution rates for retirees. Since there was no contract violation, the Court further dismissed CSEA's contract impairment clause.

While CSEA is disappointed with the ultimate ruling in this matter, it is in line with The U.S. Supreme Court's 2015 decision in *M&G Polymers USA, LLC v. Tackett*.

DISCIPLINARIES



State Disciplines:

**SUNY Stony Brook
(Arbitrator Campagna)
Matter No. 21-0987**

The Grievant, a Nursing Station Clerk employed by SUNY Stony Brook University Hospital, was issued a notice of discipline seeking termination for her failure to be vaccinated against COVID-19. Arbitrator Campagna found the Grievant guilty of the charges against her and noted that the employer was entitled to give directives necessary to enforce laws and regulations (i.e., to require covered personnel to be vaccinated). The Grievant admitted that she had failed to comply with the vaccine mandate due to her religious beliefs. She had submitted an application for a religious exemption which was denied; subsequently, the Department of Health eliminated religious exemptions from its COVID-19 vaccine mandate. In his decision, the Arbitrator explained with respect to penalty that although the Grievant had a favorable work record, she would not comply with the vaccine mandate if returned to work and would be disciplined again. Accordingly, he found that progressive discipline was not applicable and imposed a penalty of termination. He also deemed the Grievant's suspension to be proper.

**Canal Corporation
(Arbitrator Siegel)
Matter No. 21-0752**

The Grievant, a Laborer employed by the New York State Canal Corporation, was served with a notice of discipline alleging three separate charges of misconduct all relating to his alleged use of inappropriate language and verbal abuse of his supervisors. The Grievant argued that the evidence presented by Canal Corporation was woefully inadequate, that his words were taken out of context, and that he was being singled out by his supervisors. The

Arbitrator disagreed and found the Grievant guilty of all charges with the exception of one specification which lacked evidence. The Arbitrator upheld the penalty of termination on the basis that the totality of the Grievant's conduct not only rose to the level of workplace violence, but his refusals to follow directives were so frequent, aggressive, and hostile, that the Grievant became intimidating and extremely difficult to handle by his supervisors. The Arbitrator also found that the Canal Corp had probable cause to suspend the Grievant because on three separate occasions in one month he refused directives from multiple supervisors while he was in the presence of other co-workers which had the potential to undermine supervisory authority and destroy morale.

OMH

(Arbitrator Butto)

Matter No. 22-0056

The Grievant, a Mental Health Therapy Aide employed by the New York State OMH was issued a notice of discipline seeking termination for her failure to be vaccinated against COVID-19 in accordance with emergency regulations promulgated by OMH. Upon being informed she needed to be vaccinated, the Grievant submitted two requests for reasonable accommodation on both medical and religious grounds, both of which were denied. In her defense, CSEA argued that the Grievant should be found not guilty of misconduct because she has not been insubordinate. CSEA's argument relied on the fact that the Grievant's situation was one of the well-accepted exceptions to the insubordination rule, because it would place the Grievant in physical danger, and because there was no just cause for discipline or termination. The Arbitrator disagreed with CSEA's position and held that the Grievant submitted a reasonable accommodation request to avoid vaccination, without a supporting statement or documentation from a treating physician on the basis of her undiagnosed medical condition. The Arbitrator found that by failing to submit medical support for her accommodation request, the Grievant was engaged in self-help and substituted her judgment for that of her doctors. In conclusion, the Arbitrator found the Grievant guilty of insubordination and held

termination to be the appropriate penalty. Furthermore, he found that the Grievant's suspension was appropriate.

**SUNY Stony Brook
(Arbitrator Campagna)
Matter No. 21-0698**

The Grievant, a Nursing Assistant employed by SUNY Stony Brook University Hospital, was issued a notice of discipline accusing him of signing and knowingly submitting false timecards, representing a theft of time and a breach of trust. At the hearing, Stony Brook introduced evidence of 120 different occasions in a one-year period where the Grievant was paid for the time he did not work at the rate of time-and-one-half. Most of the occasions concerned the Grievant leaving work early. The Grievant claimed that he saved his lunch and break times for the end of the day to leave work early and had supervisory permission to leave early. Ultimately, the Arbitrator found that Stony Brook met its burden of proof and that the Grievant was guilty of the alleged charge. Because the Grievant's actions constitute theft of time, which the Arbitrator considered an egregious action, he upheld the termination penalty. The Arbitrator also held that it was reasonable to suspend the Grievant because his deception gave Stony Brook a basis to assume the Grievant would not act in a trustworthy fashion pending the outcome of this matter.

**SUNY Stony Brook
(Arbitrator Cassidy)
Matter No. 21-1018**

The Grievant, an Attendant I employed by SUNY Stony Brook University Hospital, was issued a notice of discipline seeking termination for her failure to be vaccinated against COVID-19. Stony Brook argued, and Arbitrator Cassidy agreed that it was a covered entity under the New York State Department of Health Mandate, which requires certain personnel to be vaccinated against COVID-19, and that the Grievant is considered covered personnel under the Mandate. The Grievant argued that Stony Brook did

not conduct a fair analysis of her religious exemption request, which is a pre-condition to their right to suspend her and to seek her termination. Arbitrator Cassidy found the Grievant guilty of insubordination and misconduct because she refused to comply with a clear and legal work-related order given by someone with authority to issue it. Furthermore, Arbitrator Cassidy held that it was outside his authority to determine whether one who refuses to be vaccinated on religious grounds should be allowed to go unvaccinated but accommodated. Additionally, Arbitrator Cassidy held that even a determination of whether or not the Employer conducted a fair investigation into a religious belief raises questions over which he does not have jurisdiction. Finally, because the Grievant did not intend to comply with the order in the future, Arbitrator Cassidy found that progressive discipline was not applicable and imposed a penalty of termination. He also deemed the Grievant's suspension to be proper because her continuation at work while unvaccinated would have represented a potential danger to others and would have violated the Mandate.

**SUNY Stony Brook
(Arbitrator Cassidy)
Matter No. 21-1019**

The Grievant, a Hospital Attendant employed by SUNY Stony Brook University Hospital was served with a notice of discipline seeking termination for his failure to be vaccinated against COVID-19. Stony Brook argued, and Arbitrator Cassidy agreed that it was a covered entity under the New York State Department of Health Mandate, which requires certain personnel to be vaccinated against COVID-19, and that the Grievant is considered covered personnel under the Mandate. CSEA argued that the Grievants' suspension was not justified and that he should not be disciplined because Stony Brook did not adequately consider his request for a religious exemption. CSEA's argument relied on the fact that the Grievant submitted his request for a religious exemption prior to his interrogation and that Stony Brook did not question his request but rejected it without explanation. Arbitrator Cassidy found the Grievant guilty of insubordination

and misconduct because he refused to comply with a clear and legal work-related order given by someone with authority to issue it. In his decision, Arbitrator Cassidy held that it was outside of his jurisdiction to rule on the quality of Stony Brook's inquiry into the Grievant's religious exemption. Finally, because the Grievant did not intend to comply with the order in the future, Arbitrator Cassidy found that progressive discipline was not applicable and imposed a penalty of termination. He also deemed the Grievant's suspension to be proper because his continuation at work while unvaccinated would have represented a potential danger to others and would have violated the Mandate.

**SUNY Stony Brook
(Arbitrator Cassidy)
Matter No. 21-1022**

The Grievant, a Nursing Assistant employed by SUNY Stony Brook University Hospital, was served with a notice of discipline seeking termination for her failure to be vaccinated against COVID-19. Stony Brook argued, and Arbitrator Cassidy agreed that it was a covered entity under the New York State Department of Health Mandate, which requires certain personnel to be vaccinated against COVID-19, and that the Grievant is considered covered personnel under the Mandate. Prior to the deadline to be vaccinated, the Grievant had requested and was denied a religious exemption. CSEA's main argument is that Stony Brook never conducted an actual review of the Grievant's request for a religious exemption. CSEA cited the fact that the Grievant's request was made prior to interrogation, however, Stony Brook never questioned the Grievant concerning her religious exemption at the interrogation but rather denied the request. Arbitrator Cassidy found the Grievant guilty of insubordination and misconduct because she refused to comply with a clear and legal work-related order given by someone with authority to issue it. In his decision, Arbitrator Cassidy held that it was outside of his jurisdiction to rule on the quality of Stony Brook's inquiry into the Grievant's religious exemption. Finally, because the Grievant did not intend to comply with the order in the future, Arbitrator Cassidy found that progressive discipline was not

applicable and imposed a penalty of termination. He also deemed the Grievant's suspension to be proper because her continuation at work while unvaccinated would have represented a potential danger to others and would have violated the Mandate.

DOCCS

(Arbitrator Riegel)

Matter No. 21-0799/21-0809

The Grievant, a Library Clerk-2 employed by the NYS Department of Corrections and Community Service ("DOCCS"), was served with two notices of discipline alleging a total of five charges all relating to the same alleged events. Grievant was first accused of being under the influence of alcohol at work, which lead to her car being searched, which resulted in DOCCS finding marijuana and a metal pipe with marijuana residue. The Grievant was arrested and later tested positive for being under the influence of marijuana that was not prescribed to her. On the first day of the hearing CSEA successfully moved to preclude and dismiss one of the charges on the basis that the related criminal matter on which the charge relied was resolved in the Grievant's favor. Ultimately the Arbitrator found the Grievant guilty of three of the remaining four charges and upheld the penalty of termination. The Arbitrator relied on the credible testimony of staff members who concluded that she was evidently intoxicated and/or under the influence of an intoxicant which was later to be proven true by a urinalysis. The Arbitrator found that the State had probable cause to suspend the Grievant because her conduct reasonably led to the conclusion that drug/alcohol testing was an appropriate course of action, and that a positive drug test further warranted the suspension. In upholding the penalty of termination the Arbitrator relied heavily on the fact that the Grievant works in the library of a correction facility that maintains a zero-tolerance policy relative to use and/or possession of drugs.

Local Disciplines:

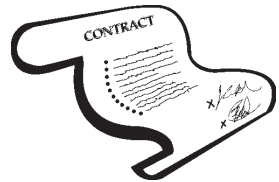
County of Cattaraugus
(Arbitrator Rinaldo)
Matter No. 21-0923

The Grievant, a Commercial Driver Class B employed by the County of Cattaraugus, was served with a notice of discipline alleging continued misconduct when he tested positive for cocaine. Having previously been reprimanded for a positive drug test, the Grievant was required to submit to drug tests every other month for one year. As a result of the initial positive drug test, he was removed from his safety-sensitive position; he continued his employment with the County as a contact tracer. After a few months, he submitted a return-to-duty drug test, which was negative, and he returned to his previous position as a Commercial Class B Truck Driver. A few months after returning to the Truck Driver position, the Grievant again tested positive for cocaine. Arbitrator Rinaldo found the Grievant guilty of the charges against him and deemed termination an appropriate penalty.

CONTRACT GRIEVANCES

Local Grievances:

Town of Hempstead
(Arbitrator Shriftman)
Matter No. 21-0925



A contract grievance was filed alleging that the parties' CBA was violated when another employee, and not the Grievant, was promoted to the title of Labor Crew Chief II. The parties agreed that Grievant had more seniority than the promoted employee. Given the Grievant's seniority, the Arbitrator took the position – supported by prior arbitration awards – that the burden shifted to the Employer to demonstrate that its promotional decision was

based on ability, adaptability, and/or the needs of the department, as stated in the CBA. Although Arbitrator Shriftman discussed both of the common interpretations of the contractual provision at issue, he determined that regardless of which interpretation was used, the Employer had not met its burden. The Arbitrator ruled that the CBA was violated, and ordered the Grievant appointed to the position in question retroactively. The Employer was also ordered to make the Grievant whole for all lost wages and benefits.

**Town of Hempstead
(Arbitrator Shriftman)
Matter No. 21-0665**

Similar to the above-referenced case, another contract grievance was filed alleging that the parties' CBA was violated when another employee, and not the Grievant, was promoted to the title of Labor Crew Chief II. The parties agreed that Grievant had more seniority than the promoted employee. Given the Grievant's seniority, Arbitrator Shriftman took the position – supported by prior arbitration awards – that the burden shifted to the Employer to demonstrate that its promotional decision was based on ability, adaptability, and/or the needs of the department, as stated in the CBA. The Arbitrator found that the Employer never meaningfully considered more senior candidates for the promotion, and therefore violated the parties' CBA. The Arbitrator ordered the Grievant appointed to the position in question retroactively. The Employer was also ordered to make the Grievant whole for all lost wages and benefits.

COURT ACTIONS

**Youngman v. County of Rockland
(Supreme Court, Rockland County)
Matter No. 20-0591**



In this Article 78 proceeding, the Petitioner seeks an order mandating and ordering Respondents to return him to its payroll

pending the outcome of disciplinary proceedings as required by N.Y. Civ. Serv. Law § 75 (1)(a), and additionally award him back-pay for a period of four months prior to the commencement of this proceeding. Respondents answered the petition but also moved for Summary Judgement seeking dismissal based on Petitioner's failure to file a Notice of Claim and failure to exhaust his administrative remedies. The Court denied the Respondents' motion because a Notice of Claim is not required as a condition precedent to commencing an Article 78 proceeding in the nature of a mandamus seeking judicial enforcement of a legal right. Additionally, because the relief the Petitioner seeks is in the nature of mandamus, the Petitioner has the option of litigating via Article 78 proceeding and the exhaustion of his administrative remedies is not the exclusive method of review. Ultimately, the Court ordered that the Petitioner be restored to the payroll based on his clear statutory right provided by Civil Service Law § 75 (1)(a). The Court did not make a ruling on the back pay prong of the petition but ordered a conference to be scheduled to hold an argument on that portion of the petition.

Devlin v. County of Orange et al.
(Supreme Court Rockland County)
Matter No. 21-0866

In this Article 78 proceeding, the Petitioners unsuccessfully sought to annul and reverse their terminations from their nursing positions for failing to get vaccinated against COVID-19. On August 6, 2021, the New York State Department of Health approved certain emergency regulations that instituted a broad vaccine mandate for New York Healthcare Facilities. The facility where the Petitioners were employed was subject to the Mandate, and the Petitioners were instructed that they were required to have the first dose of the vaccine by September 27, 2021. The Petitioners failed to get vaccinated by the deadline, and the facility terminated them without first utilizing the disciplinary procedure in the CBA. The Petitioners argue that their termination must be reversed because they were deprived of their rights under the CBA. Furthermore, they argue that their termination was arbitrary, capricious, and an abuse of discretion. This portion of the

Petitioners' argument alleged that the Mandate was illegal in that it was unconstitutional because it failed to provide for a religious exemption. The Respondents moved for dismissal because the Petitioners were not terminated for misconduct or insubordination but because they were no longer qualified to continue employment at the facility. The Court agreed with the Respondents and dismissed the Petition. The Court held that the Petitioners' failure to obey a state-wide vaccination mandate is not properly characterized as incompetence or misconduct and therefore not subject to disciplinary review. In its ruling, the Court noted that the case law generally treats such mandates as a condition of employment, which does not engage disciplinary procedures. Furthermore, the Court held that because the Petitioner's termination was based on their failure to follow the Mandate, the County's decision could not be deemed arbitrary and capricious. Finally, the Court found that the Petitioners lacked standing to challenge the Mandate's constitutionality because they had not suffered an injury, which is necessary to survive a standing challenge. The Court relied on the fact that the Petitioners did not argue that they are entitled to a religious exemption and never sought a religious exemption from the Respondents.

County of Onondaga
(Supreme Court, Justice Greenwood)
Matter No. 22-0073

The County brought a proceeding under CPLR Article 75 to vacate an arbitration award issued by Arbitrator Selchick. Arbitrator Selchick found that the County violated the parties' CBA by requiring a Board of Elections employee to (1) use her own accruals to cover a period of quarantine ordered by the County Health Department, and (2) use her own accruals to cover a period of time after the quarantine order expired, but while the Board of Elections remained closed. The County sought to vacate only the first portion of the arbitrator's award. Justice Greenwood granted the petition to vacate as to the first portion of the award, finding that Arbitrator Selchick exceeded his authority by deeming the grievance arbitrable and interpreting the federal and state COVID-19 paid sick leave statutes in his decision. CSEA is appealing this decision.

OCFS LICENSING

**NYS Office of Children and Family Services
(ALJ Walsh)
Matter No. 22-0014**

A group day care operator was advised December 30, 2021, that OCFS would revoke her license to operate a group family day care. The day care operator requested a hearing to challenge the determination. A hearing was scheduled for March 9, 2022, and then adjourned. The day care operator subsequently entered a Stipulation of Settlement pursuant to which she withdrew her request for a hearing and surrendered her license.

