THE ADVOCATE

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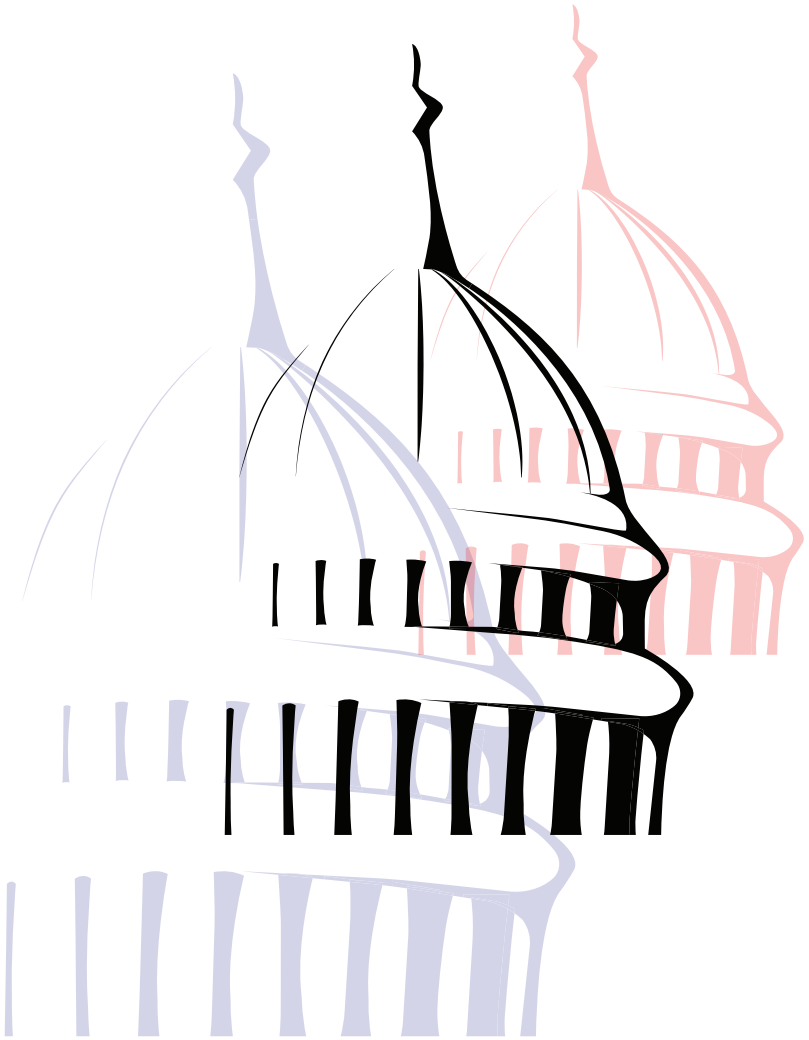

CSEA
Local 1000 AFSCME, AFL-CIO

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Counsel's Corner

By: Daren J. Rylewicz
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The COVID-19 Pandemic: How Travel Restrictions May Impact Our Employees

In our previous article, both the New York State and Federal COVID-19 paid leave laws were outlined. Since that article was published, Governor Cuomo has issued many new executive orders pertaining to COVID-19, including Executive Order 202.45. Amongst other items, Executive Order 202.45 clarifies New York's COVID-19 paid sick leave laws when an employee voluntarily travels to a state which is subject to a mandatory quarantine.

In response to increased rates of COVID-19 transmission in certain states within the United States, Governor Cuomo issued Executive Order 205, requiring a travel advisory mandating that all travelers entering New York from states with a seven-day rolling average of positive COVID-19 tests in excess of 10% – or positive COVID-19 cases exceeding 10 per 100,000 residents – to quarantine for 14 days from the time of their last contact within a restricted state. At the time that Executive Order 205 was issued, it was unclear whether an employee required to quarantine under the State's travel advisory would be entitled to paid leave while in quarantine under the New York State COVID-19 sick leave law.

By issuance of Executive Order 202.45, Governor Cuomo clarified this issue and modified New York State's COVID-19 sick leave law to provide that an employee who travels to a

restricted state is ineligible for paid leave under this law if the travel was not undertaken for employment purposes or at the direction of the employer, and the employee was provided notice of the Commissioner's travel advisory and the limitations of the law before traveling. This exemption to paid leave for travel to a restricted state is in addition to the State's preexisting exclusion of paid leave for the same kind of travel to a foreign country for which the Centers for Disease Control and Prevention ("CDC") has issued a level two or three travel health notice, so long as the employee is given similar notice before such travel begins.

While New York State's COVID-19 sick leave law excludes paid time off when an employee voluntarily travels to a restricted state, an employee may still be able to utilize his/her leave time under a collective bargaining agreement during the employee's period of quarantine.

A question may arise about the use of sick leave time in such a circumstance, as an employer may question an employee having a medical need for such leave. Our office has encouraged the right to use sick leave time, as the mandatory quarantine serves a medical purpose and is related to the COVID-19 pandemic. Even if an employer disallows the use of sick leave when an employee is in quarantine for voluntarily traveling to a restricted state, such an employee should be granted the use of personal or vacation leave to cover the period of quarantine. Where paid leave is unavailable, under New York State's COVID-19 law, employees are entitled to unpaid leave. If an employee chooses or needs to travel to a restricted state, it is advisable for he/she or a union officer to verify, in advance, the use of leave time for a necessary period of quarantine.

As issues continue to arise in the workplace with the COVID-19 pandemic, union officers should be mindful and consider the language of their collective bargaining agreements as it relates to leave time. When negotiating new successor labor contracts, quarantine leave may be an issue to bring to the table or at least discuss with management. While no one would have expected a pandemic to arise, it is our responsibility to protect our employees in this critical time.

DISCIPLINARIES

State Disciplinaries:

OCFS
(Arbitrator Campagna)
Matter No. 20-0158

The Grievant, a 28-year employee working as a Youth Division Aide, challenged the Notice of Discipline seeking his termination for allegedly disclosing confidential information related to another CSEA bargaining unit employee's disciplinary charges and disrupting the arbitration proceeding for that employee. The alleged incident arose in the context of the Grievant serving as a union officer. The Grievant was accused of disclosing and identifying the State's witnesses with non-involved staff and, in doing so, stating that such witnesses were "snitching." In his defense, the Grievant denied the allegations and asserted that the issue in the other bargaining unit employee's disciplinary matter was important to his own disciplinary case, as it demonstrated motive. Specifically, the other disciplinary matter established that another employee failed to provide proper care to a Resident. That employee was the individual who complained that the Grievant disclosed certain names and referenced him as a snitch. In considering the vastly different testimony between the State's witnesses and the Grievant, the Arbitrator examined the evidence for credibility purposes and found that the Grievant was not being truthful. As a result, the Grievant was found guilty of all charges. Given the Grievant's behavior, the Arbitrator found that he severely interfered with operations and compromised the integrity of the other employee's disciplinary matter, along with threatening the health and safety of staff and Resident. Therefore, the State had probable cause to suspend the Grievant. Standing alone, the Grievant's actions were found to warrant termination, however, the penalty was assessed for an approximate one-year suspension without pay. The mitigating factors serving to reduce his penalty included the fact that he was a long-term employee, without any serious disciplinary record, and that he was entrusted by his colleagues to serve in a

union officer position, which reflected positivity on his character.

OPWDD
(Arbitrator Siegel)
Matter No. 18-1042

In this Article 33 disciplinary proceeding, the Grievant was employed as a Direct Support Assistant for approximately 11 years. The State sought termination of the Grievant for allegedly hitting a Resident on the side of his head with a closed fist. On the day in question, the Grievant was assisting a Resident in a pre-vocational room. As the parties were waiting for the program to commence, the Resident was eating a snack and the Grievant became concerned that the Resident may choke, as he was placing large amounts of food in his mouth. After the Grievant attempted to prevent the Resident from eating in such a manner, an altercation between the Grievant and the Resident ensued. An eyewitness reported seeing the Grievant strike the Resident to his head. Law enforcement were also contacted and the Grievant was charged with two penal law violations. The Notice of Discipline also accused the Grievant of misconduct for being arrested and charged with these two penal law violations. The Arbitrator found that the eyewitness was credible in his claims that the Grievant struck the Resident, as his version of the altercation never changed and he had been steadfast about his insistence that he observed the conduct in question. According to the Arbitrator, the record further established that there was no negative history between the eyewitness and the Grievant. With respect to the charge relating to the criminal charges, the Arbitrator dismissed both charges, finding that a "penal law charge in and of itself does not constitute misconduct as it simply is an allegation. Moreover, the charges . . . were resolved in favor of Grievant in the form of an ACD [Adjournment in Contemplation of Dismissal]." In rendering a penalty, the Arbitrator found two mitigating factors, namely the Grievant's lengthy service record without issue and the fact that the Grievant was attempting to assist the Resident when the incident occurred. Even so, the Arbitrator ordered an almost two-year suspension without pay. Finally, the State was found to

have probable cause to suspend the Grievant as the allegation was sufficient to determine that the Grievant's continued presence at work could interfere with operations or represent a danger to individuals he was charged with caring for.

OPWDD
(Arbitrator Siegel)
Matter No. 18-0868

The Grievant, a Direct Support Assistant with approximately 15 years of service, was charged with misconduct for allegedly pouring water over one Resident, while also yelling and withholding food from Residents. At the hearing, the State introduced two Residents as witnesses, both of which testified that the Grievant poured water over another Resident and that she controlled food intake. The Grievant denied all such allegations. The Arbitrator dismissed all the allegations, except for the charge that claimed that the Grievant poured water over a Resident. While it was noted that the Grievant's attorney did an outstanding job in accentuating some of the inconsistencies in the statements made by the two Residents about the water incident, the Arbitrator found that such inconsistencies are to be "expected," given the witnesses' cognitive disabilities. In looking at the Grievant's fairly extensive disciplinary record, the Grievant was issued a 9-month suspension, to hopefully send a clear message to her and "correct Grievant's behavior once and for all." The State was also found to have probable cause for suspending the Grievant without pay during the pendency of this proceeding.

OCFS
(Arbitrator Siegel)
Matter No. 19-1153

A short-term Youth Division Aide 3 was accused of failing to deescalate a confrontation between youth and staff, resulting in the initiation of an inappropriate and excessive restraint. The Grievant was found guilty of taking a joke with a Resident too far and then pulling a chair out from under the Resident, resulting in

the Resident retaliating by punching him in the face. The Arbitrator found that the Grievant's poor decision warranted a serious penalty, but that since there was no evidence of an intent to harm the Resident and a strong employment record, termination was not appropriate. A six-month suspension without pay was imposed.

OPWDD
(Arbitrator Drucker)
Matter No. 19-0612

A short-term Direct Support Assistant was charged with failing to properly secure a Service Recipient when using a track lift, resulting in the Service Recipient falling to the floor and then falsifying documentation and a report stating that the strap broke as a means of explaining the situation. It was proven by a preponderance of the evidence that the Grievant had tampered with the straps on the lift to create the perception that they had failed, rather than the Grievant failing to properly secure the Service Recipient on the lift. Considering this serious misconduct, termination was imposed as the appropriate penalty.

OCFS
(Arbitrator Drucker)
Matter No. 19-0972

A male Youth Division Aide 3 was accused of staring at a female Resident's breasts while she was in a towel and bra and stating, "I better go before I get in trouble." The Grievant was also charged with talking with a Resident about her sexual activity, suggesting that she used to be pimped out and provided sexual pay-to-play services. The Arbitrator dismissed all the charges on the basis that the State's proof rested on unreliable hearsay evidence. Notably, the Resident in the first allegation made the accusation following the Grievant's decision to impose a loss of privileges for an unrelated allegation and a vow to get even with the Grievant for that loss of privileges. The Grievant was reinstated with full back pay and benefits.

Local Disciplinaries

County of Rockland
(Arbitrator Townley)
Matter No. 19-1139

Working in the title of Security Aide, the Grievant is a 19-year employee without any disciplinary record. The County sought his termination when he allegedly stated that he did not care if a certain co-worker died. According to the County, the statement was not only made in the presence of the co-worker, but was also witnessed by two other employees. Besides allegedly making such remark, the County also charged the Grievant with being untruthful about the incident since, when asked to provide a report of the occurrence, the Grievant failed to acknowledge making such comment. After hearing the testimony of all witnesses and reviewing the evidence presented, the Arbitrator determined that the County's witnesses were credible and all stated that it was uttered and repeated several times by the Grievant. The Arbitrator found that, "while the comment was highly inappropriate, it could not reasonably be viewed as a threat," since it was nothing more than a "wish," rather than a "goal." Considering that the comment was non-threatening in nature and that the Grievant had a clean disciplinary record, with a lengthy period of employment, the Arbitrator issued a three-day suspension and ordered that he be returned to his position and made whole for his losses.

Westchester County Health Care Corporation
(Hearing Officer Korn)
Matter No. 20-0058

Pursuant to Section 75 of the Civil Service Law, this disciplinary matter was brought seeking the termination of the Respondent, who served as a Junior Laboratory Technician for 29 years with a fairly clean disciplinary record and satisfactory work performance. The events underlying the nine charges of misconduct and incompetence originated when the Respondent was moved into a room to perform his work duties which was shared with a group

of phlebotomists. The Hearing Officer noted in his Report and Recommendation that problems arose "almost immediately" after the Respondent was moved into the room. The Respondent complained several times to this supervisor that it was difficult to work, due to the noise and heat. In particular, the room had two thermostats and the heat was adjusted on multiple occasions by one particular phlebotomist to its highest level (78°). These complaints were noted as being "unheeded." The charges alleged that the Respondent got into verbal disagreements with certain phlebotomists, to the point where he spoke in an impolite and rude fashion, including using profanity and making physical threats. The Hearing Officer sustained some of the charges, while dismissing others which lacked proof and were not supported by the testimony. Because the offensive behavior was found to have been, in part, provoked by the Respondent's co-worker and considering his long tenure of employment, the recommended penalty was a 45-day suspension.

Town of Clarkstown
(Arbitrator Townley)
Matter No. 19-0717

The Grievant, a Motor Equipment Operator, was responsible for driving trucks and other vehicles. Due to his safety sensitive position, he was subject to random substance abuse testing. The Town sought the Grievant's termination after he admitted to obtaining a fake urine sample from a co-worker to cheat a random drug test, and repeatedly badgered the testing monitor to accept the urine sample even though it did not register a temperature. In addition, the charges stated that the Grievant tested positive for marijuana. In support of termination, the Town presented proof that the Grievant tested positive for marijuana in the past. In fighting for his job, the Grievant pointed out that he was fit for duty on the day in question and, while he had admitted to smoking marijuana a day or so prior to the test, the Town still allowed him to work for about seven days until the test results became available. The Grievant also denied that he was belligerent when he interacted with the test monitor, but agreed to being upset and pleading for his

job with him. Furthermore, the Grievant was extremely remorseful and apologized for his actions. The Arbitrator denied the grievance and sustained the penalty of termination, finding that the Grievant engaged in a passive form of insubordination, as he knew that he had to take the random urine test and failed to properly do so. It was noted that the Grievant's conduct is an example of "the cover-up being worse than the crime."

Nassau County
(Arbitrator Gold)
Matter No. 19-0662

A Range Manager at the Nassau County Pistol and Rifle Range was accused of allowing an unauthorized vendor to perform work at the range and to remove and replace the sand from one of the ranges, sifting and collecting lead bullets worth at least $14,000 with remediation costs of over $100,000. The Range Manager also allowed the work to occur while still allowing range customers to fire live rounds in the adjacent range with only a tarp separating them, among other less serious charges including the failure to properly clean the range. The Arbitrator found that the Grievant reasonably believed the Deputy Commissioner acted within his authority when he authorized the Grievant to have the work performed, but guilty of misconduct related to the safety, manner, and scope of the work. This serious misconduct did not warrant termination in the Arbitrator's eyes, but instead necessitated suspension to date which totaled over a year.

CONTRACT GRIEVANCES

County of Otsego
(Arbitrator Cheney)
Matter No. 20-0020

This grievance was filed after the Sheriff's Department incorrectly calculated the amount of vacation time to be given to the Grievant, based upon his years of employment. The Grievant was initially

hired by the Sheriff's Department in 2015 and voluntarily resigned in 2019. Within approximately two months after his resignation, the Grievant was rehired by the Sheriff's Department. The collective bargaining agreement provides 18 days of vacation for employees who are continually employed for five years. Rather than giving the Grievant 18 vacation days, the Sheriff's Department provided him with 10 vacation days. The Union argued that the seniority provision in the labor contract established that the Grievant should be awarded 18 vacation days, since it stated "should such an employee be rehired within one (1) year of his/her date of leaving service to work in any title in which he/she is qualified, then the break in continuous service shall be removed from his/her record subtracting the prior non-service." The Sheriff's Department claimed this provision did not apply to vacation leave credits. When examining the language, the Arbitrator sustained the grievance and found that the Grievant should be granted 18 days of vacation time, which should be awarded starting from his first date of hire, minus two months, as his break in service occurred for that length of time.

Oceanside Sanitation District No. 7
(Arbitrator Maleson Spencer)
Matter No. 19-0536

The Grievant was employed as a Messenger with the District for approximately five years when the Commissioners at the District voted to abolish the Messenger position, resulting in the Grievant being laid off. The Union filed this grievance, alleging that the layoff was in bad faith and thus violated the collective bargaining agreement. The undisputed record revealed that the Grievant "was well-liked" and "was an excellent employee." The lay-off of the Grievant was not only a shock to him, but also his supervisor who had not been consulted or even made aware that the abolition was being considered. The Commissioners who testified concerning the abolition explained that the Grievant's position was eliminated purely because of economic reasons. Finding that the abolition was made in bad faith, the Arbitrator stated that the Board of Commissioners' actions were rushed as to have been pre-ordained. Stressing how "chaotic" the workplace became after the Grievant's position was eliminated, the Arbitrator noted that "one would

expect the abolition of such a position to be undertaken only after serious consideration of the need for and impact of such a decision. This did not occur in this case." In a very detailed decision, the Arbitrator also stated that the "casualness" of the Board's action was inappropriate, especially considering that it never formally informed the Grievant that his position was eliminated until almost a month later. Finally, the Arbitrator took great dissatisfaction with the District's hiring of two employees less than a year after the Messenger position was abolished, at a total yearly cost of more than $50,000 above that of the Grievant's salary. These two employees were responsible for performing significant duties previously performed by the Grievant. Therefore, the grievance was sustained and the Grievant was reinstated, with full back pay, benefits and seniority.

Lackawanna Central School District
(Arbitrator Bantle)
Matter No. 18-1154

In this promotional grievance, the Union argued that the District failed to properly promote the Grievant, a 36-year employee, to the position of Building Maintenance Mechanic. The District awarded the position to another bargaining unit employee who had far less years of service, but was believed to have greater experience to perform the duties of the positions due to his previous employment. The collective bargaining agreement stated that promotions "shall be based on qualifications, experience, ability and seniority." While there was no dispute about the language of the labor contract, the disagreement fell with the "practice" of the District in the past regarding promotions under the same language. Noting the "extensive history of disagreement" concerning the application of the contract language and analyzing numerous other arbitration decisions involving the District on this same issue, the Arbitrator found that the District violated the collective bargaining agreement because it did not fairly consider the required criteria when deciding who would be promoted. In terms of a remedy, the Arbitrator awarded the Grievant to the position, with all back pay and benefits to the time of the incumbent's appointment.

Town of East Hampton
(Arbitrator Cacavas)
Matter No. 19-0408

This contract grievance addressed whether the Town of East Hampton violated the collective bargaining agreement when it denied the Grievant vacation leave on two occasions. The Town argued that the grievance was untimely as the grievance was essentially seeking to change the rotational basis for applying seniority to vacation requests which it had implemented without being controverted over a year prior when the grievance procedure provided for a 90-day window. The Arbitrator agreed and denied the grievance as being untimely.

Village of Arcade
(Arbitrator Gelernter)
Matter No. 19-0408

This grievance alleged the Village violated the collective bargaining agreement when it stopped crediting non-holiday paid leave toward overtime. The contract language at-issue was found by the Arbitrator to require the Village to count paid holidays toward overtime, but not counting all paid leave. Any practice to the contrary was negated by an anti-past practice clause which explicitly states, "neither party is required to continue any past practice." Thus, the grievance was denied.

JUSTICE CENTER

OPWDD
(ALJ Nasci)
Matter No. 19-1094

A Developmental Assistant 2 was charged with Category 2 neglect for allegedly driving in an unsafe manner while transporting a Service Recipient. The Subject admitted to the police that while driving an agency vehicle with a Service Recipient riding as

passenger, she drove through a red light, colliding with a car travelling across the intersection as a result of her error. Based on this admission, the request to amend and seal the report of neglect was denied and upheld as Category 2 neglect.

PUBLIC EMPLOYMENT RELATIONS BOARD

OCFS
(ALJ Strauss)
Matter No. 17-1434

CSEA successfully proved that OCFS interfered with and retaliated against a Local President for his union activity by issuing a counseling memorandum that referenced his failure to act upon information provided to him in the context of Local President. OCFS was ordered to not retaliate against or interfere with the Local President, rescind the counseling memorandum, and sign and post a notice of the violation.

COURT ACTIONS

Lasnier, et al. v. Kings Park Central School District, et al.
(Suffolk County Supreme Court)
Matter No. 18-0640

This Article 78 petition challenged the District's reporting of less than full-time hours to the New York State Local Retirement System for certain individuals in the titles of Bus Drivers and Aides. The petition alleged that six-hour employees who worked at least 180 days in the school year were not being credited for full-time status in accordance with NYS guidelines. Furthermore, some employees were fully credited for some years and not others. In dismissing the petition in its entirety, the Court found that the application failed to show any resort or attempt to redress or

remedy the situation under the collective bargaining agreement. The Court also noted that the petition did not establish a clear legal right to the requested remedy.

CSEA, et al. v. NYS Unified Court System, et al.
(Westchester County Supreme Court)
Matter No. 18-0660

On behalf of a bargaining unit employee, the Union filed this Article 78 application after the Unified Court System affirmed its decision to reduce the employee's pay grade by two levels and change her job title from Principal Court Attorney to Associate Court Attorney. The employee's title was changed to the lower paygrade level when the judge, to whom she was assigned, was not designated as an Acting Justice of the Supreme Court ("AJSC") but rather a County Court Judge. At that time, the employee filed an out-of-title grievance, alleging that she was performing the same job responsibilities, whether the assigned judge was an AJSC or a County Court Judge. The Court found that it was limited in deciding whether the decision rejecting her grievance for out-of-title work was properly denied. In its decision denying the petition, it was held that the employee's title was inextricably linked to the title of the judge for whom she worked, and he was not designated as an AJSC for the time period under review. It was found that "there were only two potential titles for her to be given, both of which encompassed essentially the same duties that she had been performing in her previous role and thus neither would have required her to perform out-of-title work."

CSEA, et al. v. County of Rockland, et al.
(U.S. District Court, Southern District of N.Y.)
Matter No. 16-0906

Based upon a violation of their First Amendment rights, CSEA filed this lawsuit on behalf of County Probation employees who were reprimanded by the County after they sent a letter to the County Executive and County Legislature expressing their concern over issues related to operations and public safety. The Director of

Probation sent each employee a "memorandum of warning letter" threatening disciplinary action for exercising their free speech. After a jury returned a verdict in favor of the County, CSEA made this application for judgment as a matter of law, claiming that the "memorandum of warning letter" and a meeting conducted by the County were explicit threats of disciplinary action if plaintiffs continued to engage in constitutionally-protected speech. While noting that it "does not lightly intervene with the considered judgment of a jury," the Court set aside the jury's verdict and found that the County's actions chilled the plaintiffs' exercise of their First Amendment rights. As part of the Court's decision, the parties were directed to show cause as to why the Court should not order a new trial on damages.