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Attorneys at Law

### DECEMBER 2016 LEGAL REPORT TO THE EXECUTIVE ASSEMBLY

This is our report for the December 2016 Executive Assembly regarding the recent developments in some of the cases and legal matters we are handling for NYSCOPBA. For the matters cited, we have described activity occurring since the last report and scheduled future activity.

#### Legislative

This office will provide a legislative update to the Executive Assembly at the Executive Assembly meeting.

#### Litigation

**Retiree Health Insurance Litigation (NYSCOPBA v. State, et al., USDC, NDNY, 11-CV-1523):** We have been negotiating a draft joint confidentiality agreement and protective order with the State Attorney General's Office, together with union counsel in all of the related cases, that we expect to favorably address the State's responses to our discovery demands, and allows for the broad subject matter use of documents during depositions that the State had previously claimed were privileged documents. We expect to be able to file a joint agreement with the Court by the December 2, 2016 motion deadline, or will seek a brief thirty (30) day extension to finalize and file our agreement with the Court. Thereafter, the Court will schedule a conference and issue a revised pretrial order to enable the parties to complete discovery and depositions, and file our summary judgment motions.

**Mid-Hudson Forensic Psychiatric Center:** On November 11, 2016, we submitted a Reply Memorandum of Law and supporting Affidavit in this Article 78 challenge. The member, a probationary employee, had been terminated from his position as a SHTA at Mid-Hudson FPC based upon a Justice Center finding that he used unnecessary force on a patient at the facility. We await the Court's decision.

**Rochester Psychiatric Center:** As you know, we are drafting an Article 78 petition to challenge Rochester PC's unlawful summary termination of the member SSO. The member had completed his probation prior to his summary termination, but Rochester PC terminated him as if he was still probationary, and the petition seeks his reinstatement. The papers have been completed and signed. They are being filed and served on December 7, 2016.

**Ulster Correctional Facility:** This office submitted a Brief and Record on Appeal to the Appellate Division, Third Department, challenging the failure of the court below to

confirm Arbitrator Dais' award. The State filed its brief and we submitted our reply on October 31, 2016. The oral argument before the Appellate Division, Third Department, is scheduled for January 20, 2017.

### **Negotiations**

We have continued to meet with the Collective Bargaining Committee and to attend negotiating sessions with the State.

### **Discipline**

**Interrogations:** For the months of October and November 2016, we represented sixty (60) members who were interrogated by DOCCS.

**Auburn Correctional Facility:** On November 22, 2016, we attended a hearing with Business Agent Al Mothershed and Chief Sector Steward Bruce Delaney before Arbitrator Samuel Butto in Auburn, New York. A second day of hearing is being scheduled.

**Bare Hill Correctional Facility:** The hearing on this matter is scheduled for December 8 and 9, 2016 in Plattsburgh.

**Bedford Hills Correctional Facility:** There is an expedited arbitration hearing scheduled before arbitrator J. Roger Rice for December 13, 2016. The charges contained in the NOD relate to his alleged use of a personal cell phone on several occasions, leaving his post, failure to perform duties, and submitting false attendance records. Settlement discussions with DOCCS are currently underway.

**Bedford Hills Correctional Facility:** On November 21, attorneys and union representatives traveled to Bedford Hills CF to conduct the disciplinary arbitration of the member, who was accused of leaving a shotgun unattended in a perimeter patrol vehicle. The officer chose to settle the case prior to the start of the hearing.

**Bedford Hills Correctional Facility:** On November 28, 2016, we attended the disciplinary grievance arbitration for this member. The member was charged with allowing the inmates to have a birthday party and logging in security rounds that he did not actually make. We concluded the case and are awaiting a decision from Arbitrator Larry Dais.

**Bedford Hills Correctional Facility:** The member's disciplinary grievance arbitration was scheduled for November 29, 2016. The member was charged with driving under the influence of drugs and possession of marijuana and pled guilty to driving under the influence of drugs. On November 27, 2016, the member submitted his resignation.

**Coxsackie Correctional Facility:** The member is being charged with insubordination for failure to obey an order to submit to a urinalysis test. On October 21, 2016, we attended a hearing before Arbitrator Richard Gaba. At the hearing, we argued that we are entitled to



additional documents so that we can ascertain whether DOCCS followed the proper drug testing procedures as set forth in the Directive 2115. The arbitrator ordered DOCCS to put the member back on the payroll as soon as possible. By e-mail dated October 22, 2016, the arbitrator determined that the member shall remain on the payroll pending his decision on member's motion to direct DOCCS to produce all evidence it relied on to support its order to Grievant to report for a drug test on August 15, 2016. Briefs were submitted on November 4, 2016. Despite the arbitrator's direction, the member has not yet been placed on DOCCS' payroll. Arbitrator Gaba issued his decision and directed DOCCS to provide us with all of the requested documents except for two (2) of our demands. The arbitrator ruled that it was not his intention to require DOCCS to provide information underlying its decision to order member to report for a drug test on August 15, 2016. The arbitrator also determined that member is to remain in leave without pay status pending his decision on the issue of the suspension. A second day of hearing will be scheduled.

**Downstate Correctional Facility:** We received a decision in this matter from Arbitrator Campagna on November 12, 2016. The arbitrator held that the proposed penalty of termination was appropriate in this case. This case involved unauthorized contact with an inmate and an inmate's family member, as well as deposits made to two inmate accounts by the officer.

**Downstate Correctional Facility:** This matter was scheduled for expedited arbitration on December 21, 2016 before Arbitrator Tim Taylor. The member is alleged to have used excessive force while attempting to guide an inmate back to his cell after the inmate had refused to lock in. The member has settled the case.

**Fishkill Correctional Facility:** Arbitrator Dennis Campagna has been assigned to handle this disciplinary arbitration. Charges against the member include excessive absenteeism.

**Fishkill Correctional Facility:** Arbitrator Samuel Butto has been assigned to handle this disciplinary arbitration. Charges against the member include excessive absenteeism.

**Greene Correctional Facility:** The hearing on this matter is complete and the transcripts have been received. Closing briefs are due on December 30, 2016.

**Mid-Hudson Forensic Psychiatric Center:** This arbitration is scheduled for January 5 and 6, 2017. The NOD alleges that the member used a personal cellphone while on duty within the facility.

**Mid-Hudson Forensic Psychiatric Center:** This disciplinary grievance arbitration was scheduled for March 17, 2016. We learned prior to the arbitration that the member had checked himself in a rehabilitation hospital and the arbitration was adjourned without date. The member is charged with punching a patient several times during a restraint. This case was scheduled for October 12, 2016. We were unable to contact the member, and the State put in its proof in the absence of the member. The Arbitrator held the record open until October 26, 2016. Late in the day on October 12, 2016, we learned that the member had again checked himself into the hospital. The Arbitrator decided to allow the member to

testify and the hearing was scheduled for November 14, 2016. On November 10, 2016, the member resigned his position.

**Moriah Shock Incarceration Correctional Facility:** The third and final day of hearing in this matter was held on November 21, 2016, before Arbitrator Babiskin. The NOD in this case was issued after the member was arrested and charged with menacing his neighbor with a firearm. Briefs are due December 9, 2016.

**Mohawk Correctional Facility:** The member was accused of using unnecessary and excessive force on an inmate as set forth in a Notice of Discipline issued to him. A hearing was scheduled before Arbitrator Louis Patack on December 20, 2016. On November 29, 2016, the parties were able to resolve this matter prior to the hearing. The member will be signing a Disciplinary Settlement Agreement and be returning to work. The matter has been resolved and the member is back to work.

**Shawangunk Correctional Facility:** On April 6, 2016, the member received an NOD, and was suspended, for allegedly using unnecessary and excessive force on an inmate on July 15, 2015. The NOD was served two days before the incident would have been timed out. The first two days of this arbitration were held July 14 and 15, 2016. The third hearing day was held on August 11, 2016, and the arbitration was completed on September 7 and 8, 2016. Closing Briefs were submitted on November 9, 2016. On December 5, 2016, we received a decision from Arbitrator Butto finding the member guilty of all charges and terminating his employment.

**Sing Sing Correctional Facility:** On November 21, 2016, we attended the disciplinary grievance arbitration for the member. The member was charged with insubordination for getting into an argument with the time and attendance lieutenant and with filing a false workplace violence report. At the arbitration, we were able to settle this matter.

**Sing Sing Correctional Facility:** A second day of hearing is scheduled before Arbitrator Josef Sirefman on December 13, 2016.

**Sing Sing Correctional Facility:** On November 28, we met with this member, who was accompanied by Dave Luther, to prepare for his arbitration hearing. The member was the in the mess hall on June 23, 2016, the evening on which a cook was locked in overnight. The hearing is scheduled for December 9, 2016.

**Sing Sing Correctional Facility:** This was an expedited disciplinary grievance arbitration in which the member worked the Arsenal for the last hour of his shift. His job was to man two Arsenal windows. Several "unauthorized transmitter" civilian PAS alarms came into the Arsenal and no one investigated. On November 9, 2016, we received the Opinion and Award from Arbitrator Crangle. The member was found not guilty of all charges and returned to work with all back pay and accruals. The Arbitrator also found that there was no probable cause for the suspension.

**Upstate Correctional Facility:** Transcripts of the hearing in this matter were received on November 28, 2016. This case involves an allegation that the member failed to properly perform his duties when he did not provide an inmate with a number of meals over a six-day period. Briefs are due on December 28, 2016.

**Valley Ridge CIT:** On October 21, a hearing was held before Arbitrator Ira Lobel at Broome DDSO. The member was accused of stealing \$20 from a coworker while searching the coworker's bag. Arbitrator Lobel recently delivered his decision and found the member guilty of stealing from a coworker and terminated the member's employment with OPWDD.

### **Justice Center**

There are no new updates regarding Justice Center cases at this time.

### **Improper Practice Charges**

**Central New York Psychiatric Center (U-35167):** We previously filed an Improper Practice charge against OMH for its policy change at CNYPC depriving our members of on-site medical care from facility physicians when they are hurt on the job. Now, no medical care is provided to them and a supervisor is responsible for making the medical determination as to whether the employee should seek outside medical treatment. After an initial conference with ALJ Burritt, the matter has been placed on hold until November 21, 2016. During that time, the Union and OMH have been tasked with compiling a running list of instances where members have been hurt on the job and denied facility physician treatment.

**Kingsboro Psychiatric Center (U- 35374):** On November 4, 2016, we filed an Improper Practice Charge alleging that Kingsboro PC unilaterally changed the policies and procedures with respect to attendance taking at pre-shift briefing. Previously during pre-shift briefing, SSOs were given a verbal briefing and were not required to sign in or keep a record of their attendance. Now, SSOs are required to sign in on "pre-shift briefing forms" to verify their attendance. The Improper Practice Charge alleges that this change is contrary to past practice, a new work rule and a mandatory subject of bargaining. The charge has been processed by PERB and a conference date has been scheduled for February 27, 2017, before Judge Kenneth Carlson. The State's answer to the charge is due February 7, 2017.

**Sing Sing Correctional Facility (U-34606):** On November 22, 2016, we met with the member and with Steward Willie Perez to prepare for the hearing scheduled for December 6, 2016. The charge alleges that the member was removed from his long-time bid job at Sing Sing CF in retaliation for having offered expert testimony in a disciplinary arbitration proceeding.

## **Contract Enforcement**

**Appeals to Arbitration:** We received nine (9) requests from NYSCOPBA's grievance department to appeal contract grievances to arbitration during the months of October and November. We have reviewed those grievance files and drafted and submitted arbitration appeals to the Governor's Office of Employee Relations (GOER).

**Albion Correctional Facility:** An expedited contract arbitration was held before Arbitrator Joel Douglas on November 18, 2016. The Union argued that the State violated Article 14.9 of the Collective Bargaining Agreement when it deemed the member leave without pay (LWOP) status from July 28, 2011, through August 14, 2011, because personnel at Albion CF communicated incorrect information to the member about IPRO appeal rights and the consequences of not returning back to work light duty as ordered. We also received a decision from Arbitrator Douglas denying this grievance and finding that the State did not violate the CBA. Arbitrator Douglas determined that the IPRO paperwork mailed from personnel to the officer made sufficient reference to her LWOP potential, and that the member was voluntarily absented for the relevant time period.

**Bedford Hills Correctional Facility:** We arbitrated this case on November 4, 2016. The grievance asserted that DOCCS violated the contract by making certain special watches gender specific, thus denying male officers from overtime opportunities. DOCCS relied on PREA and argued that the special watches were covered by a bona fide occupational qualification (BFOQ). On December 1, 2016, we received the decision from the Arbitrator denying the grievance. The Arbitrator found that DOCCS had established a BFOQ. During special watches, inmates require constant observation. During such time, they may be naked (voluntarily) or may engage in personal, intimate activities. The Arbitrator found that such required an officer of the same gender to perform the constant observation and that alternatives were not reasonably available.

**Orleans Correctional Facility:** The expedited arbitration for the grievance is scheduled for December 14, 2016.

**Otisville Correctional Facility:** On December 2, 2016, this contract grievance was heard before Master Arbitrator Joel Douglas in an expedited arbitration hearing. The grievance alleges that DOCCS violated Article 24.2 of the parties' collective bargaining agreement by including a qualification for bidding a position other than seniority. The parties presented their arguments and we await the decision of Arbitrator Douglas.

## **Retirement**

**Eastern Correctional Facility:** On February 5, 2015, we received the Final Determination from the Retirement System denying the member's application for inmate related disability retirement benefits. The Hearing Officer has the right to decide between conflicting medical opinions and chose to go with the System's IME physician. We have a

strong argument that the opinion of the IME physician was not fact-based and should have not been adopted by the System. On November 22, 2016, we received the Decision of the Appellate Division, Third Department, which denied the member's application. The court held that the opinion of the System's expert was fact-based and supported by substantial evidence.

**Moriah Shock Incarceration Correctional Facility:** On November 28, 2016, we received a decision from the Retirement System denying the disability retirement application on the basis that the member was not injured by the act of an inmate. Surprisingly, the Hearing Officer found that the member was not struck in the knee by a branch released by the inmate. We need to review the record to determine if there is substantial evidence to support the finding of the Hearing Officer. The member was injured when an inmate let go of a branch that struck him in the knee. The Retirement System denied the member's application for disability retirement, pursuant to Retirement and Social Security Law Section 507-b, on the grounds that the incident was not inmate related. The only issue on this hearing is whether or not the incident was the act of an inmate.

### **Civil Service Law – Employee Health Services**

**Ulster Correctional Facility:** On December 1, 2016, this office and the member settled the Article 78 proceeding for restoration of 176 hours of sick leave. The member had been placed on involuntary leave and referred to EHS. DOCCS contended that the member was out "voluntarily" and that restoration of sick leave accruals were not necessary. After filing the proceeding, we negotiated a settlement with the Attorney General whereby all accruals would be restored.

### **General**

**Bedford Hills Correctional Facility (Residency Issue):** On November 4, 2016, we appeared before Director of Personnel Darren Ayotte with the member, Vice President Clarence Fisher, and Sector Steward Deborah Floyd regarding the member's out-of-state residency issue. After discussing this matter with Darren Ayotte, we were able to resolve this matter whereby the member has sixty (60) days to establish her residence in New York State.

**Constitution and By-Laws Committee:** On November 18, 2016, we attended a Constitution and By-Laws Committee meeting.

**Civil Service Commission – ISO Titles:** On November 30, 2016, we appeared before the Civil Service Commission with respect to an appeal of a denial of an upgrade application for the ISO title. The appeal was filed by an individual member. NYSCOPBA was invited to appear as the bargaining agent who represents the title. As such, NYSCOPBA was able to speak to the Civil Service Commission regarding the dangers of the job and the increase



in the job duties in the recent years, in support of the appeal. A decision on the appeal is expected within 30-60 days.

**Directive Revisions:** Upon review of Acting Commissioner Annucci's response to NYSCOPBA's detailed concerns regarding the increase of duties included in recent Directive revisions, we drafted a follow up letter at NYSCOPBA's request. Acting Commissioner Annucci's response failed to answer the direct questions asked and failed to adequately address the number of increased duties included in the Directive and how these duties could possibly be performed based on current staffing and scheduling. A response letter was sent on November 28, 2016.

**Directive 4936 Review:** This office provided the Executive Board with an analysis of the most recent proposed draft of Directive 4936, "Search of DOCCS Employees." For employees who wish to discretely carry sensitive items like hygiene products and medication, the directive requires that employees place those items in a small separate bag that is still clear on one side. This separate bag must be small enough to fit in the Department's clear plastic bag that employees are required to carry into their respective facilities. The Directive does not indicate that this smaller one-sided bag will be provided by the Department to employees. Other changes include employees now have the ability to carry up to \$100 in cash (up from \$60) to use for vending machines and mess. Language allowing staff to bring in enough food for two (2) shifts has been removed from the Directive.

**Roswell Park Cancer Institute:** We have been assisting the Law Enforcement Region with a discussion with RPCI regarding the facility's desire to have officers carry a firearm while on duty. RPCI wants to have officers in the Safety Department be required to have a valid NYS pistol permit in order to carry while on the job. This would entail having a new title created by the Merit Board (the entity that acts as Civil Service for RPCI), which includes the requirement of a NYS pistol permit. The parties are also discussing if and how they can transition the current employees to these new titles. We have done research, drafted discussion points, and reviewed draft MOUs. We are scheduled to attend a meeting on December 19, 2016.

**Sing Sing Correctional Facility (Residency Issue):** On November 21, 2016, we attended a meeting with Chief Sector Steward David Luther regarding the allegation that the member has been residing outside the State. At the meeting, the member was able to provide sufficient information that he is, in fact, a residence of New York State. The member will be supplying his New York State tax return to Director of Personnel Darren Ayotte and once he does this, we will be closing our file on this matter.

**Sing Sing Correctional Facility (Weapons Privileges):** We met with this member on November 14, 2016 to review the October 2014 incident that led to the rescission of his off-duty carrying privilege. We then prepared a letter to OSI setting forth the details of the matter and urging that the privilege be restored, citing various factors that it appeared OSI was either unaware of or had simply misunderstood.

As always, please feel free to contact our office regarding any questions or concerns.

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## Lippes Mathias Wexler Friedman LLP

Attorneys at Law

### OCTOBER 2016 LEGAL REPORT TO THE EXECUTIVE ASSEMBLY

This is our report for the October 2016 Executive Assembly regarding the recent developments in some of the cases and legal matters we are handling for NYSCOPBA. For the matters cited, we have described activity occurring since the last report and scheduled future activity.

#### Legislative

With the fall season upon us, we have begun the process of attending the union's Legislative/PAC seminars. As you know, these seminars provide the union with an opportunity to educate the members of NYSCOPBA on both the Executive Budget process and the Legislative process in New York State. We explain the impact of the historic case, *Silver v. Pataki*, as it pertains to the Governor's constitutional powers to implement the State's Executive Budget and the role of the Legislature post the *Silver v. Pataki* decision. We explain to the members our role in reviewing all proposed legislation—both Executive Budget legislation and traditional legislation—and the manner in which we convey to the Executive Board any bills of significance to the organization. We explain the process of our formal support/opposition for certain proposals and the way in which we seek to carry out NYSCOPBA's legislative agenda during any given year. Moreover, these seminars provide members of the organization with an opportunity to provide input into NYSCOPBA's legislative agenda for the forthcoming year and to meet some of the hired professionals who work closely with the Executive Board in carrying out your legislative and political goals.

We have attended several Legislative/PAC committee seminars in recent weeks, including:

- On September 26, 2016, we attended the union's first seminar of the year in Cheektowaga, NY.
- On September 27, 2016, we attended a seminar in Waterloo, NY.
- On September 28, 2016, we attended a seminar in Elmira, NY.
- Finally, on September 29, 2016, we attended a seminar in North Sonyea, NY. (It should be noted that all of the above-referenced seminars were very well attended by the membership.)

In addition to these meetings, we formally advocated for the Governor to sign one of NYSCOPBA's priority bills into law (A.9620-A/S.6916-C)—the union's Law Enforcement "assault reporting" proposal. We are happy to report that the Governor indeed signed this critical measure into law which benefits all of NYSCOPBA's members who work within the State's four forensic psychiatric centers (Chapter 375 of the Laws of 2016). We continue to monitor other bills that have passed both houses of the Legislature that have not yet been delivered to the Governor for executive action and have prepared letters of support to be delivered to Governor Cuomo once these bills are on his desk.

We have engaged in some of the following activities on behalf of NYSCOPBA since our last report to the Executive Assembly:

- On August 25, 2016, along with President Powers, we met with Senate Majority Leader John Flanagan to discuss the union's legislative priorities and major areas of concern. We voiced our deep concern about the lack of additional officers being brought into the system, the significant rate of attrition due to members retiring, and the seeming lack of desire on the part of the second floor to address this impending crisis. We spoke about conditions inside our state's prison walls, the growing level of violence against our officers, the increase of contraband and illegal drug use, and the inability of our officers to properly discipline those inmates who violate prison rules. As expected, the Senate Republican Conference is very supportive of NYSCOPBA and walks lock-step with the union in terms of their support for law enforcement generally.
- On September 7, 2016, along with President Powers, we met with IDC leader Jeff Klein and Senator Diane Savino in the Bronx, NY. As we did in our meeting with the Leader of the Senate Republicans, we took the opportunity to voice NYSCOPBA's concerns regarding the prison system overall with Leader Klein and Senator Savino. Both Senators, along with their colleagues in the IDC, appear to be very supportive of NYSCOPBA as we begin preparing for the 2017 Legislative Session.
- Both of the above referenced meetings come on the heels of a meeting earlier this summer with Speaker Heastie. We attended this meeting along with President Powers and utilized our time with Speaker Heastie not only to discuss our concerns about the prison system as a whole but to also voice our extreme displeasure with the current Chair of the Assembly Corrections Committee, Daniel O'Donnell.

In addition to these meetings with members of the New York State Legislature, we have also conducted meetings with the Director of State Operations, Jim Malatras, regarding our concern over the lack of funding for additional correction officer

academy classes, as well as the failure of the Commissioner of OMH to implement peace officer status for the union's Security Hospital Treatment Assistant members.

At the request of the Executive Board we have drafted various letters to elected officials, agency heads, and Executive Chamber personnel relating to NYSCOPBA's political and legislative agendas.

### **Litigation**

**Retiree Health Insurance Litigation (NYSCOPBA v. State, et al., USDC, NDNY):** Magistrate Judge Christian Hummel scheduled a court conference on October 14, 2016, regarding scheduling and discovery issues raised by counsel in all of the related union cases. Upon consent, the State received additional time until September 23, 2016, to respond to our discovery demands, upon the condition that our responses to the State's discovery demands are extended to November 9, 2016, including all of the related union cases. Depositions will be scheduled following receipt of the discovery responses and review of the State's document production.

**USERRA Litigation (Andrews v. State, et al., Appellate Division, Third Department):** By Order dated August 30, 2016, the Court of Appeals denied our motion for leave to appeal the adverse determination from the courts below dismissing our USERRA claims. There is no further relief that we can seek on behalf of the plaintiffs in this case.

**NYSCOPBA v. DOCCS:** On May 10, 2016, we submitted a Brief and Record on Appeal to the Appellate Division, Third Department, challenging the failure of the court below to confirm Arbitrator Dais' arbitration award in the above matter. The State will be filing its brief on October 14, 2016. After Briefs are submitted, this matter will be scheduled for oral argument.

**NYSCOPBA v. DOCCS Class Action (Attica Correctional Facility):** This office initiated an Article 75 special proceeding to confirm the arbitration award requiring Attica to submit for bidding certain arsenal and construction jobs. Honorable Gerald Connolly of the Supreme Court, Albany County, confirmed the arbitration decision in an Order in late August. It is our understanding that Attica CF has already complied and made these positions available for bid.

**Matter of Hearst Corporation v. New York State Department of Corrections and Community Supervision and NYSCOPBA, as Proposed- Intervenor – Respondent:** On September 25, 2016, we received the Decision/Order/Judgment of the court which granted the Motion of NYSCOPBA to intervene in this Article 78 Proceeding and which denied the relief sought by the Petition. In this proceeding, the Albany Times Union was seeking to obtain, through FOIL, inmate grievances and disciplinary records of officers regarding allegations of staff abuse.



## Negotiations

We attended a negotiations session with the State on September 27. We drafted various proposals for the committee. We worked with NYSCOPBA's forensic economist, Kevin Decker, concerning his analysis of New York State correction officer compensation compared to that of state correction officers in contiguous states. We are also evaluating and "costing" some of the various proposals that are being discussed at the table.

## Discipline

**Interrogations:** For the months of August and September 2016, we represented seventy-three (73) members who were interrogated by DOCCS.

**Auburn Correctional Facility:** This matter is scheduled for arbitration before Arbitrator Samuel Butto on November 22, 2016.

**Bedford Hills Correctional Facility:** This matter is scheduled for arbitration before Arbitrator Joel Douglas on November 21, 2016. This case involves an Officer who allegedly failed to properly secure a Department weapon.

**Broome DDSO:** This matter is scheduled for arbitration before Arbitrator Ira Lobel on October 21, 2016. This case involves a SSO who allegedly stole from a coworker.

**Downstate Correctional Facility:** A third day of hearing has been scheduled for November 9, 2016, before Arbitrator Ira Lobel.

**Fishkill Correctional Facility:** This matter is scheduled for arbitration before Arbitrator Louis Patack on November 18, 2016. This case involves an arrest for the off-duty possession of cocaine and the creation and/or submission of a false memorandum to the lieutenant regarding the alleged cocaine possession.

**Greene Correctional Facility:** On August 22 and September 12, 2016, we represented the Officer in disciplinary arbitration hearings. The record closed on September 12, 2016 after nine (9) days of hearings. Briefs will be due 30 days after the last transcript is issued.

**Mid-Hudson Forensic Psychiatric Center:** On August 24, 2016 we represented an SHTA in a disciplinary hearing at MHFPC. The SHTA had been accused of physically redirecting a patient without proper authorization. The matter settled for loss of one (1) day of accruals.

**Shawangunk Correctional Facility:** On April 6, 2016, the Officer received an NOD, and was suspended, for using unnecessary and excessive force on an inmate on July

15, 2015. The NOD was served two days before the incident would have been timed out. The first two days of this arbitration were held July 14 and 15, 2016. The third hearing day was held on August 11, 2016, and the arbitration was completed on September 7 and 8, 2016.

**Shawangunk Correctional Facility:** On April 6, 2016, the Officer received an NOD and was suspended for using unnecessary and excessive force on an inmate on July 15, 2015. The NOD was served two days before the incident would have been timed out. The first three days of this arbitration were held July 27, 28 and 29, 2016. The arbitration was completed on August 29 and 30, 2016. Closing Briefs were due on October 7, 2016.

**Sing Sing Correctional Facility:** We have had three days of hearing in this Expedited Disciplinary Arbitration before Arbitrator Taylor. The hearings were held on August 12, 2016, August 23, 2016, and September 7, 2016. The member is charged with failure to respond to an alarm in the arsenal and failure to properly perform security rounds of the facility. These charges stem from an incident where a civilian cook was accidentally locked in the mess hall overnight. This hearing involved a total of five witnesses, a site visit at the facility, and many pieces of documentary evidence. The State requested transcripts. The hearing has been completed and briefs are being prepared.

**Sing Sing Correctional Facility:** This is an expedited disciplinary grievance arbitration in which the Officer worked the Arsenal for the last hour of his shift. His job was to man two Arsenal windows. Several "unauthorized transmitter" civilian PAS alarms came into the Arsenal and no one investigated. A cook was locked in the Storehouse area over night. The first day of the arbitration was held on August 10, 2016. The next two days were held on September 13 and 27.

**Sing Sing Correctional Facility:** Following the first day of the expedited disciplinary arbitration before Arbitrator Bruce Trachtenberg on August 19, 2016, additional hearing dates were held on September 14, 15, and 16, regarding charges contained in the NOD related to failure to respond, report, or record multiple calls for assistance from a CPAS.

**Sing Sing Correctional Facility:** On August 28, 2016, we attended the disciplinary hearing for a member regarding charges contained in the NOD related to the alleged failure to respond, report or record multiple calls for assistance from a CPAS. Additional hearing dates were held September 20 and September 28, 2016.

**Upstate Correctional Facility:** The five days of hearing in this matter were heard by Arbitrator James Cooper on August 30 and 31, September 15, September 21, and October 5, 2016. This case involves an allegation that the Officer failed to properly perform his duties when he did not provide an inmate with a number of meals over a six-day period.

**Watertown Correctional Facility:** On September 27, 2016, we met with the Officer, as well as regional and local representatives, to prepare for a disciplinary hearing on October 6, 2016. Following the meeting, where testimony was discussed and prepared and documents were reviewed, the member chose to accept a settlement offer. The settlement agreement was signed on September 29, 2016, and the matter is now closed.

### **Justice Center**

**Central New York Psychiatric Center:** We attended a pre-hearing phone conference for this member on July 28, 2016. This member has a Category 3 neglect allegation against him stemming from a January 23, 2015, incident, wherein a patient was alleged to have swallowed a pencil. We are currently in the process of scheduling an administrative hearing to contest the allegation.

**Central New York Psychiatric Center:** On August 30, 2016, we attended a conference for an SHTA in a Justice Center Staff Exclusion List matter.

**Central New York Psychiatric Center:** On September 1, 2016 we attended a conference for an SHTA in a Justice Center Staff Exclusion List matter.

**Mid-Hudson Forensic Psychiatric Center:** On August 23, 2016, we represented an SHTA in a Justice Center Staff Exclusion List hearing at the Adam Clayton Powell building, New York, NY.

**Kirby Forensic Psychiatric Center:** We participated in a pre-hearing phone conference in this case on July 28, 2016. This case involves a Category 3 allegation that the member committed physical abuse when he grabbed a service recipient, pushed the service recipient against a wall, and punched and/or kicked the service recipient in the face. A hearing before ALJ Keely Parr has been scheduled for February 22, 2017, in Brooklyn.

### **Improper Practice Charges**

**Central New York Psychiatric Center (Access to On-Duty Medical Treatment):** This office received OMH's answer and attended a PERB conference before Administrative Law Judge Nancy Burritt regarding the improper practice charge against OMH for unilaterally implementing a policy that denies members' access to facility physicians in the event they are injured on duty at CNYPC. Previously, if a member was injured while on duty as a result of restraining a patient, that member could seek medical treatment from the facility physician or other medical staff. Now, facility physicians can only administer medical care to staff members in the event of a dire emergency and, even then, only until outside medical professionals arrive. NYSCOPBA members will be denied medical treatment by facility physicians

for all injuries not considered an emergency. The matter is on a sixty-day hold to gather additional information to present to the ALJ.

**Livingston Correctional Facility (Travel Meal Allowance):** On August 15 we filed a charge challenging the facility's unilateral change in the eligibility standards for the travel meal allowance, which pays \$5 for breakfast and \$12 for dinner. We contend that the change in practice limits the availability of the allowance and is inconsistent with the Comptroller's Travel Manual, DOCCS's Employee Travel Manual, and prior practice at Livingston. A conference is scheduled for November 29, 2016.

**Sing Sing Correctional Facility (Retaliation and Interference):** On September 22, the parties resolved this case by a Stipulation of Settlement. The charge alleged that a union steward was refused his request to go "out of service" to represent a member then being questioned about a potential disciplinary matter. We contended that the refusal was motivated by anti-union animus rather than any legitimate security or operational concerns. In the settlement, DOCCS agrees to refrain from interfering with members in the exercise of their Taylor Law rights and further agrees not to refuse a member the right to representation when it appears that he or she may be the subject of a potential disciplinary action.

**SUNY Albany (CPSOs and SSAs):** The conference scheduled for October 6, 2016, before has been adjourned as the parties are attempting to resolve this matter.

**SUNY Brockport (Scheduling Changes):** On September 15, 2016, we filed an Improper Practice Charge on behalf of SSOs employed at the SUNY Brockport Rochester Educational Opportunity Center. The charge alleges that the employer made unilateral changes to the SSOs' summer schedule, specifically changes to the length of tour, start and end times, and length of lunch period. A conference has been scheduled for January 11, 2017, before ALJ Kenneth Carlson. The State requested an extension of time to file their answer to the Improper Practice Charge, and that answer is now due December 2, 2016.

**Use of Force Directive (DOCCS – Statewide):** On September 26, this case was resolved by mutual agreement of the parties. The charge challenged certain aspects of DOCCS's recent revisions to Directive 4944. In return for NYSCOPBA's withdrawal of the charge, DOCCS agreed to revise the directive to create a procedure whereby members who provide a memorandum following a use of force may request an opportunity to review any available video of the incident and may, following such a review, submit a supplemental memorandum clarifying or explaining his or her original memorandum.

**Wash-Up and Scheduling Changes (New York State Department of Labor):** A conference was held in this case with PERB ALJ Kenneth Carlson on September 7, 2016. The case has been placed on PERB's hold calendar until October 28, 2016, while the parties continue discussions regarding potential resolution of this matter.

## **Contract Enforcement**

**Appeals to Arbitration:** We received twenty-five (25) requests from NYSCOPBA's grievance department to appeal contract grievances to arbitration during the months of August and September. We have reviewed those grievance files and drafted and submitted arbitration appeals to the Governor's Office of Employee Relations (GOER).

**Attica Correctional Facility:** On August 26, 2016, Justice Gerald Connolly signed an Order to confirm an arbitration award (construction bid posting) at Attica CF.

**Auburn Correctional Facility:** An expedited contract grievance arbitration was held before Arbitrator Joel Douglas on September 22, 2016. The issue before the Arbitrator was whether the State violated Article 8.7 of the contract when they forbid the Officer from working any resource post in the Mental Hygiene Unit (MHU). The State argued that this issue is not arbitrable, and that a settlement agreement entered into by the Officer precluded him from being placed at any MHU post as a resource officer. We await the arbitrator's decision.

**Bedford Hills Correctional Facility:** On August 26, 2016, we represented the Officer in an expedited contract grievance arbitration hearing.

**Central New York Psychiatric Center:** On August 4, 2016, we represented the Class in a full arbitration before Arbitrator Thomas Rinaldo. The grievance regarded delayed step raises. Several SHTAs began their service at CNYPC in non-graded positions. We contended that these members did not receive timely step raises as the facility did not include their non-graded time. The record is closed and the matter is being briefed. Briefs were due on September 30, 2016.

**Mohawk Correctional Facility:** This class action grievance was heard in an expedited arbitration before Arbitrator Joel Douglas on June 10, 2016. Arbitrator Douglas found in favor of the Union, holding that the State violated Article 27 of the Collective Bargaining Agreement when they removed the Officer, who wore a goatee at that time, from a "clean shaven" post on or about March 10, 2012. The decision focused on the language of OSHA regulations about respirator safety, and OSHA opinion letters addressing the issue, which state that a user can obtain a safe seal on a respirator mask so long as the user's face is clean shaven where the respirator seals against the face. The Arbitrator found that Mohawk Correctional Facility's designation of certain posts as "clean shaven" was overly broad, and that members of the affected Mohawk class who have facial hair are permitted to work certain clean-shaven posts if they can pass the necessary "fit test" with a respirator mask.

**Sing Sing Correctional Facility:** On August 12, 2016, we represented the Officer in an expedited contract grievance arbitration hearing.



**Wende Correctional Facility:** We recommended closing this contract grievance in light of timeliness issues, and the Board voted to close the grievance. It was formally withdrawn on September 23, 2016.

### **Civil Service Law – Employee Health Services**

**Cape Vincent Correctional Facility:** We appealed the Department's August 23, 2016 determination finding the member unfit for duty, and requested a hearing pursuant to Civil Service Law Section 72(5). After submitting new medical documentation on August 26, 2016, Employee Health Services determined that the member was fit for full and unrestricted duties. However, he was moved from involuntary leave to administrative leave pending a review by Labor Relations for possible disciplinary action. We are still pursuing our appeal based on the Department's original determination.

**Fishkill Correctional Facility:** We previously appealed the Department's determination finding the Sergeant unfit for duty, and requested a hearing pursuant to Civil Service Law Section 73. On July 6, 2016, we submitted a request for reinstatement and submitted medical documentation indicating that the Sergeant was fit for full and unrestricted duty. Employee Health Services examined the Sergeant for reinstatement in August and September 2016 and he is waiting for their determination. We are still pursuing our appeal based on the Department's original determination.

**Shawangunk Correctional Facility:** We appealed the Department's July 29, 2016, determination finding the member unfit for duty, and requested a hearing pursuant to Civil Service Law Section 75(5). The Officer has since submitted new medical documentation indicating that she is fit for full and unrestricted duty. On September 2, 2016, the Officer was found fit for full and unrestricted duty and returned to work the following day.

**Southport Correctional Facility:** We appealed the Department's August 12, 2016 determination finding the member unfit for duty, and requested a hearing pursuant to the Civil Service Law. We also reaffirmed the Officer's entitlement to a hearing stemming from the Department's April 22, 2016 determination finding him unfit for duty.

**Sullivan Correctional Facility:** We appealed the Department's July 8, 2016, determination finding the Officer unfit for duty, and requested a hearing pursuant to the Civil Service Law.

## General

**Central New York Psychiatric Center:** We have been reviewing and addressing a change in policy with respect to transportation (and other outside facility duties) of an SHTA.

**Central New York Psychiatric Center (Discrimination based on Workers' Compensation):** On August 14, 2016, we reviewed complaints from members at CNYPC regarding the Workers' Compensation "scorecard" and its use for promotions. It is alleged that CNYPC maintains a "scorecard" on the amount of workers' compensation leave and sick leave that each member uses. This scorecard is in turn used for promotional purposes. We recommend the filing of complaints with the Workers' Compensation Board. Workers Compensation Law section 120 protects employees who participate in that program. That law provides that it shall "be unlawful for any employer . . . to discharge . . . or in any other manner discriminate against an employee . . . because such employee has claimed . . . claim compensation from such employer." We believe this would include denial of promotions. Moreover, the section specifically authorizes the board to restore any *privileges* lost due to the discriminatory practice. The sole remedy for a violation of Workers' Compensation Law section 120 is to file a complaint with the Workers' Compensation Board. Other actions, such as EEOC or Human Rights Claims will be dismissed because a complaint to the Board is the exclusive remedy. We have interviewed those employees who were affected and/or may have witnessed the relevant events. The next action would be to draft complaints for those members who were clearly affected by the alleged discrimination.

**CERT Training Memo:** We drafted a letter to DC Bellnier regarding concerns with respect to his announcement of advanced CERT training. NYSCOPBA supported the training, but raised concerns with respect to language in the memorandum that indicated that no overtime would be paid, even if long hours were worked. Following our letter indicating that this language disregarded clear contract language, a revised notice was issued by DC Bellnier.

**Civil Rights of Institutionalized Persons Act (CRIPA):** This office is providing a report on CRIPA as it applies to our membership in DOCCS/OMH/OPWDD. CRIPA is a federal law that grants the U.S. Attorney General (AG) the power to independently investigate and prosecute state correctional and mental health facilities for alleged systemic abuses of inmate and patient civil rights. CRIPA's main goal is to have the AG and the facility cooperate to fix systemic facility issues. The AG can sue the facility and the correlating department in the event the issues are not resolved. However, no money damages can result from the lawsuit, only judgments ordering the facility to fix the issues. CRIPA investigations can be triggered by individual inmate complaints, news articles, or other lawsuits, etc. and its findings are often published on its website. CRIPA does not authorize the AG to personally sue individual employees for any findings of wrongdoing, but findings are shared with the facility and the facility can then conduct its own disciplinary

investigations. NYSCOPBA members are not contractually required to cooperate with any AG investigations, but the AG does have its own federal subpoena power to compel members to cooperate with any investigation. Although NYSCOPBA members are not the primary focus of the investigations, they will undoubtedly be involved and such exposure can provoke departmental investigations and affect the public's opinion of the membership.

**Institutional Safety Officers:** On August 22, 2016, we met with Tammy Sawchuk and CSS for the ISOs, Alan Ohms, and prepared a proposed agenda to submit to DOCCS for a Statewide Labor Management meeting.

**Kirby Forensic Psychiatric Center (Pre-shift Briefing):** We reviewed new pre-shift briefing attendance procedures at Kirby Forensic Center. A contract grievance has been filed and we are monitoring the time period in which we have to file an IP while we gather more information about the changes.

**Kirby Forensic Psychiatric Center (Disability):** The first hearing in this matter was held on September 6, 2016, when the member's treating physician testified. The matter has been continued to set a date for the member to testify in New York City. The application was denied by the Retirement System which found that the member was not permanently disabled. The application was based on injuries to the member's neck and back. The Retirement System has now conceded that the member is permanently disabled from performing SHTA duties. The remaining issue is whether or not the permanent disability was caused by the act of patient confined in a facility under the jurisdiction of OMH.

**Legal Opinion re: New York Times Article:** On September 19 we provided the Board with an opinion concerning NYSCOPBA's legal options against DOCCS concerning the contents of an article appearing in the New York Times on April 11, 2016, and an article in the New York Daily News on March 20, 2016.

**Moriah Shock Correctional Facility (Disability Retirement):** This hearing was held on August 8, 2016. Closing Briefs were submitted on September 30, 2016. The Officer was injured when an inmate let go of a branch that struck the Officer in the knee. The Retirement System denied the Officer's application for disability retirement, pursuant to Retirement and Social Security Law Section 507-b, on the grounds that the incident was not inmate related. The only issue on this hearing is whether or not the incident was the act of an inmate.

**NYSCOPBA Employees – Overtime Eligibility:** We researched and analyzed the appropriate classification for various NYSCOPBA employees under the federal Fair Labor Standards Act and under New York's Labor Law.

**NYSCOPBA Foundation Committee Meeting:** On September 29, 2016, we met with Dave Viddivo, Mike Dildine, Clarence Fisher, Ken Gold, Jim Miller, and Dave Yule.

**Poughkeepsie Journal Editorial Board Meeting:** On September 26, 2016, we attended an Editorial Board meeting at the Poughkeepsie Journal with President Powers and James Miller. The Journal subsequently published an editorial titled “Staffing Shortage a main concern for correction officer union.”

**Reimbursement for Worker’s Compensation Schedule Loss of Use Awards:** This office was asked to research the State’s recent change in practice regarding Workers’ Compensation (WC) schedule loss of use awards and will be submitting a legal opinion with the findings shortly. A WC schedule loss of use award is granted to members who suffer a permanent loss of use of certain body parts. The WC Board has a pre-determined list of the value of such loss and pays a corresponding value. For example, if an arm is worth 300 weeks of the injured member’s pay, and the injured person has lost 50% of the use of that arm, the injured person is entitled to 150 weeks’ worth of pay (numbers are for demonstrative purposes only). That payout contemplates all past and future loss of use for that injury. The problem is that such loss of use award is not typically determined for a year or longer, in order to accurately assess the loss. All the while, the SIF is paying members based on either the member’s choice of contractual WC benefits (full pay) or WC statutory benefits (two-thirds pay). Those members who have traditionally elected contractual WC benefits, receive full pay while they are out on leave. Eventually, the member would also receive a loss of use award. Though the member received full pay AND a loss of use award, SIF would only seek reimbursement for the statutory benefits (two-thirds pay). Now, SIF is seeking reimbursement of the full pay, not the two-thirds pay, from members who eventually receive a loss of use award, because such members received contractual full pay before the loss of use was determined.

**Retirement Brochures:** This office worked closely with retirement specialist Bill Naylor, who has created retirement information brochures for COs, SHTAs, SSOs, and Law Enforcement members. Mr. Naylor has created the brochures and this office has verified the content’s compliance with applicable state pension and retirement laws and regulations.

**Retirement System:** On August 26, 2016, we met at the New York State Retirement System with Bill Naylor and Kathy Nowak, Director of Disability Services, as well as Jason Cooper.

**Rochester Psychiatric Center (Improper Termination):** This office is drafting an Article 78 special proceeding to rescind the Officer’s termination. The Officer was terminated from Rochester PC in August during the final weeks of his probation. The main issue is whether the Officer had actually completed his probation prior to the termination. Upon review by this office, OMH/Rochester PC may have improperly extended the Officer probation, before terminating him, by placing him in a temporary/provisional position, which cannot count towards probation. Rochester PC placed the Officer in such a temporary/provisional position when it delayed the results of the physical examination he had completed. The results of the physical

examination were the only outstanding requirements needed to fully qualify the Officer for the position, and thus begin his probation. The Officer's placement in the temporary/provisional position is improper and should not be used to delay the start of an employee's probation.

**Roswell Park Cancer Institute (Overtime and Swapping Agreements):** We have reviewed two Memoranda of Understanding proposed by RPCI management regarding overtime and swapping policies for public safety officers. We are in the process of reaching out to a facility steward for more information, for the ultimate purpose of providing comments, questions and proposing changes to the MOUs.

**Roswell Park Cancer Institute (Private Security Officers):** We reviewed an issue that arose where private security officers were hired to work at RPCI and NYSCOPBA public safety officers were required to relieve the private security officers for 30 minutes per day. The private security officers have not filled positions once held by NYSCOPBA members. We reviewed the private security job guidelines for any potential improper practice charge and/or contract grievance. We determined that pursuant to CBA Article 25.8 and PERB precedent, there is no improper practice charge or contract grievance as a result of RPCI hiring private security. Pursuant to Article 9.1(a) of the CBA, we also determined that there is no valid out-of-title grievance as a result of NYSCOPBA members relieving the private officers for 30 minutes per day.

**SHU Taskforce:** On August 24, 2016, we met with the NYSCOPBA SHU taskforce to discuss the prior Statewide L/M meeting with DOCCS on SHU topics and drafted a letter to DOCCS in response to that meeting, asking for an update on particular topics.

**Sing Sing Correctional Facility (Civil Rights Issue):** We are currently looking into a possible civil rights action stemming from an incident at Sing Sing Correctional facility in June 2016, wherein a civilian employee was locked inside of the facility. Following this incident, disciplinary action was taken against several NYSCOPBA members. Preliminarily, the issue appears to be whether the Department's actions during the course of their investigation and imposition of discipline had a discriminatory basis. We are evaluating both the merits of a potential action and procedural issues that may arise.

**Utica Observer Dispatch Editorial Board Meeting:** On September 28, 2016, we attended an Editorial Board meeting at the Utica Observer Dispatch with President Powers and James Miller. The UOD subsequently published an editorial, attached, titled "Don't turn good guys into bad guys."

**Warrant and Transfer Officers – Title Structure Change:** On September 22, we sent DOCCS a copy of the finalized memorandum of understanding between NYSCOPBA and DOCCS, signed by Mike Powers, after negotiating various outstanding issues. The MOU establishes procedures for assignment, transfer,



seniority, and other aspects of the WTOs' working conditions now that they have been merged into the correction officer title effective August 25, 2016. We await the return of a fully executed copy of the MOU.

**Watertown Correctional Facility:** On August 25, 2016, a Jefferson County grand jury cleared 3 Watertown CF officers of all felony charges over allegations that they falsified attendance at training events, but returned misdemeanor official misconduct charges against each. The charges will now be answerable in Watertown Town Court, rather than County Court. There have been no plea discussions. The attorneys for the members indicated that they would **NOT** be willing to accept a plea to official misconduct. Unless the charges were dismissed, it is likely this matter will proceed to a jury trial.

If you have any questions regarding this report, please feel free to contact us.



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### AUGUST 2016 LEGAL REPORT TO THE EXECUTIVE ASSEMBLY

This is our report for the August 2016 meeting of the Executive Assembly regarding the recent developments in some of the cases and legal matters we are handling for NYSCOPBA. For the matters cited, we have described activity occurring since the last report and scheduled future activity.

#### Negotiations

We attended negotiating sessions with the State on June 23 and June 29. We met with the Collective Bargaining Committee on June 15, June 28 and July 7. We continue to work with the committee on the various aspects of negotiations, including research, document preparation and communication with the forensic economist, Kevin Decker.

#### Litigation

**Article 75 Petition to Confirm (Attica Correctional Facility):** On July 1, 2016, we commenced an Article 75 special proceeding to confirm a contract grievance arbitration award by Dr. Joel Douglas. The award found that DOCCS violated the contract by not bidding, in the appropriate manner, three posts. Attica complied with two of the posts, but expressly refused to bid the third. After receiving the petition, the State put the third post up for bid.

**Central New York Psychiatric Center:** At the request of the State this matter is now scheduled for July 29, 2016. On May 31, 2016, we filed an Article 78 Proceeding on behalf of a SHTA who was injured by a patient on June 19, 2014. OMH terminated the member's employment on April 22, 2016, on the grounds that the member had been out of work for a cumulative total in excess of one year on Workers' Compensation leave as a result of the June 19, 2014, injury. We believe that the SHTA was injured by a patient assault and should, pursuant to Civil Service Law Section 71, be entitled to a leave of absence of at least two years. Our Article 78 was initially returnable on July 1, 2016.

**Appeal from Article 78 Proceeding (Civil Service 71 Termination) (Central New York Psychiatric Center):** On July 18, 2016, we received a responding brief from OMH and CNYPC, arguing that the member received proper notice of his termination and asking for the Supreme Court's decision to be affirmed. On August 1, 2016, we

filed a brief in reply, further reiterating that the member did not receive proper final notice of his termination and that the delay in advising him of his rights under the Civil Service Law was unreasonable and a violation of due process. Oral argument before the Appellate Division is scheduled to be held for the November term of Court, which commences on Monday, November 28, 2016.

**Retiree Health Insurance Litigation (NYSCOPBA v. State, et al., USDC, NDNY):**

On June 20, 2016, the State Attorney General's Office served its discovery demands on NYSCOPBA and the other related public employee union plaintiffs. We previously consented to the State's requested extension until August 1, 2016, to respond to our joint combined discovery demands, and will be seeking a concomitant extension from the State to respond to its discovery demands. Upon consent of all counsel, the State's request for additional time to respond to our discovery demands was granted until August 26, 2016, upon the condition that our responses to the State's discovery demands were extended to September 23, 2016, including all of the related union cases. Depositions will be scheduled following receipt of the discovery responses and review of the State's document production.

**Sing Sing Correctional Facility:** On July 21, 2016, we received a Decision and Order/Judgment from Judge O'Connor, which granted our Petition to confirm the arbitration award. The Court gave DOCCS sixty days to comply with Arbitrator Lande's Award. DOCCS has decided not to appeal Judge O'Connor's decision. The Officer has finally been reinstated by DOCCS.

**SUNY College of Optometry:** On May 26, 2016, the Appellate Division, Third Department, issued its Decision which granted our petition to compel arbitration. This was a 3 to 2 decision with two Justices dissenting. On June 30, 2016, the State filed a Notice of Appeal. On July 27, 2016, we received a letter from the Court of Appeals advising us that the Court has elected to consider this case using the expedited appeals process. Essentially, this means that the Court will decide this case on the Appellate Division Record and Briefs. The State has until August 23 to file the Appellate Division Record and Brief and its Letter Brief with the Court of Appeals. We will then have twenty days to file our Letter Brief with the Court. By way of background, the member was serving a probationary period as provided in a prior disciplinary arbitration award and his employment was terminated as if he was if were on a general probation. The probation was not defined in the arbitration award, which the member did not wish to try to vacate because he was concerned that his employment could be terminated if we were successful in vacating the award. On June 17, 2014, we filed an arbitration demand from the letter terminating his employment and treated the termination letter as a notice of discipline. SUNY refused to arbitrate the termination of the member's employment. Any petition on our part to vacate the arbitration award would not have been timely so we filed a Petition pursuant to CPLR Article 75, seeking to compel arbitration, and a Petition pursuant to CPLR Article 78, seeking to vacate the termination on the grounds that the member was fired in bad faith. On March 9, 2015, we received a Judgment and Order from the Hon. Thomas J. McNamara, Acting Justice of the Supreme Court. The court elected to treat our application as a motion to confirm the arbitration award and ordered the parties to seek clarification of the underlying arbitration award from the arbitrator. We appealed, and on May 26, 2016, the Appellate

Division, Third Department, issued its Decision which granted our petition to compel arbitration.

**NYSCOPBA v. DOCCS (Ulster Correctional Facility):** On May 10, 2016, we submitted a Brief and Record on Appeal to the Appellate Division, Third Department, challenging the failure of the court below to confirm Arbitrator Dais' arbitration award in this matter. Once we receive the State's Brief, oral argument will be scheduled before the Appellate Division, Third Department. The State requested additional time to file its Brief from the Appellate Division, Third Department. The State's Brief is now due on September 1, 2016. After Briefs are submitted, this matter will be scheduled for oral argument.

**USERRA Litigation (Appellate Division, Third Department):** We are still awaiting a decision from the Court of Appeals on our motion for leave to appeal that was filed on May 23, 2016, and made returnable before the Court on June 8, 2016.

**Article 75 Petition to Vacate (Wende Correctional Facility):** On July 1, 2016, we commenced an Article 75 special proceeding to vacate an arbitration award relative to two Officers. The basis for the proceeding was that the arbitrator exceeded his authority by issuing an award that included a 12 month probationary period. On July 6, 2016, we received calls from both Officers requesting that the proceeding be withdrawn. The risk that the award be vacated and arbitrator terminate them was unacceptable. On July 6, 2016, sent the members a confirming letter. Based upon the request of the members, we withdrew the proceeding.

### **Discipline**

**Interrogations:** For the months of June and July 2016, we represented 106 members who were interrogated by DOCCS.

**Auburn Correctional Facility:** On June 24, 2016, we received the disciplinary arbitration award for an Auburn CF member. The Officer had been accused of workplace violence and threatening conduct regarding an off-duty incident. The Officer had been suspended since February 18, 2016. Although the arbitrator found him guilty of some of the charges, he found that termination was not appropriate. The arbitrator imposed a two month suspension. As the Officer had already served 4 months, he will received two months back pay.

**Capital District Psychiatric Center:** Sergeant received a Notice of Discipline for allegedly failing to report the physical abuse of a patient and lying during a Justice Center interrogation. The NOD was prosecuted by an attorney from the Justice Center and sought eight weeks' suspension. The arbitration of this matter was scheduled for June 27, 2016. On June 24, 2016, the parties reached a settlement agreement of a ten day suspension satisfied through accruals.

**Downstate Correctional Facility:** The Officer was issued an NOD on March 4, 2016, alleging that she had unauthorized communication with an inmate while he was

incarcerated at Riker's Island; had unauthorized communication with an inmate's family member; and deposited money into two inmates' accounts while those inmates were incarcerated at Riker's Island. The arbitration is scheduled for October 17, 2016, before Arbitrator Dennis Campagna.

**Expedited Disciplinary Arbitration:** We contacted GOER Interim Director Mike Volforte requesting that the State extend the Expedited Disciplinary Procedure as it was set to expire on June 30, 2016. By letter dated June 29, 2016, Mike Volforte wrote “. . . to confirm that the State agrees that the provisions of Article 8.8 of the collective bargaining agreement (Expedited Disciplinary Procedures) are hereby extended until September 30, 2016, unless otherwise extended by the State and NYSCOPBA.”

**Greene Correctional Facility:** The case arises out of the March 2014 incident concerning inmate Matthew Thorton in which five other members received NODs. Unlike most of those other members, this Officer worked the afternoon shift and thus had very limited contact with inmate Thorton. On June 24 we filed our brief in this case, in which the Officer was charged with filing a false memorandum and failing to report injuries concerning inmate Matthew Thorton. Hearings were held on January 22 and April 1. The Officer was not suspended and has remained on the payroll throughout the hearing process. On July 22, the arbitrator issued his award in this case, finding the Officer guilty of the first charge (filing a false memorandum) and not guilty of charges 2 and 3 (failing to report injuries concerning inmate Matthew Thorton). The penalty imposed was a \$1,000 fine.

**Mid-Hudson Forensic Psychiatric Center:** On October 13, 2015, the SHTA was served with an NOD for abusing a patient who had attacked a fellow SHTA. On July 5, 2016, we received a decision from Arbitrator Sirefman dismissing the NOD because the State did not have any witnesses to testify against the SHTA.

**Riverview Correctional Facility:** On June 27, 2016, the member resigned from his position as a correction officer. The member had been accused of being under the influence of an intoxicating substance while on duty. When directed to a blood test, he disobeyed the order, fled the facility and went to his home.

**Shawangunk Correctional Facility:** On April 6, 2016, the Officer received an NOD, and was suspended, for using unnecessary and excessive force on an inmate on July 8, 2015. The NOD was served two days before the incident would have been timed out. The first three days of this arbitration were held July 27, 28 and 29. The next three days are scheduled for August 29, 30 and 31.

**Shawangunk Correctional Facility:** On April 6, 2016, the Officer received an NOD, and was suspended, for using unnecessary and excessive force on an inmate on July 8, 2015. The NOD was served two days before the incident would have been timed out. The first two days of this arbitration were held July 14 and 15, 2016. The next hearing days are scheduled for August 11, and September 7 and 8, 2016.

**Sing Sing Correctional Facility:** We received the Arbitration Award on June 24, 2016. The Arbitrator found the Officer guilty and terminated his employment. The Officer



was charged with owning and possessing four handguns which he did not report to the Facility. He pled guilty to a violation of Penal Law §400(12-c), which makes it a Class A Misdemeanor for a peace officer to take possession of a handgun and not report ownership thereof to his or her employer. One of the four weapons in the Officer's possession had a defaced serial number and the New York City Police Department was able to trace the gun to an August, 2010, shooting.

**Sing Sing Correctional Facility:** The member is a Correction Officer at Sing Sing Correctional Facility who received a Notice of Discipline alleging that he agreed to a one-on-one fight with an inmate. The first day of hearing was held at the Tarrytown Marriott. A second day of hearing needs to be scheduled. The Officer, although charged with misconduct, is currently working and has not been suspended.

**Sing Sing Correctional Facility:** On August 19, 2016, an expedited disciplinary arbitration hearing is scheduled before Arbitrator Bruce Trachtenberg regarding charges contained in the NOD related to failure to respond, report or record multiple calls for assistance from a CPAS.

**Sing Sing Correctional Facility:** This expedited disciplinary arbitration was held August 10, 2016. The Officer received an NOD for, while working in the Arsenal, not responding to a civilian personal alarm and clearing the alarm without authorization.

**Sing Sing Correctional Facility:** An expedited disciplinary arbitration in this matter was heard before Arbitrator Timothy Taylor on August 12, 2016. This suspension NOD involves allegations that the member failed to perform duties with respect to an emergency alarm and rounds.

**Sing Sing Correctional Facility:** An expedited disciplinary arbitration in this matter has been scheduled before Arbitrator Samuel Butto for August 18, 2016. This suspension NOD involves allegations that the member failed to report, investigate or respond to calls from a Civilian Personal Alarm System and cleared the alarm without authorization.

**Sullivan Correctional Facility:** On June 9, 2016, we received the Arbitration Award. The Officer was found not guilty of all charges and DOCCCS was ordered to make the Officer whole. The second and final day of this arbitration was held on May 27, 2016. The first day of the disciplinary grievance arbitration was held on April 26, 2016. The Officer was charged with using unnecessary and excessive force in taking down an inmate.

**Sullivan Correctional Facility:** On June 15, 2016, Arbitrator Timothy Taylor issued a Decision and Award that dismissed the charge, found no probable cause for suspension without pay, reinstated the Grievant to duty, awarded full back pay and benefits, and restoration of annual leave credits.

**Taconic Correctional Facility:** We have received a tentative arbitration date from Arbitrator Ira Lobel for September 12, 2016. The Officer is facing a forty-five-day

suspension for allegedly failing to remove restraints from an inmate over the course of several days while the inmate was off-site receiving medical attention.

**Ulster Correctional Facility:** On June 21, 2016, we received a clarification of the Award from Arbitrator Battisti. The Officer is entitled to grieve any alleged violation of his disciplinary probationary period pursuant to Article 8 of the CBA. Previously, on June, 2, 2016, we received the Arbitration Award in this case. The Arbitrator dismissed all of the Charges except for one Charge which we believe was time barred. The Arbitrator found the Officer guilty of this charge and imposed a nine-month suspension and a one-year general probation which requires that the Officer not violate any DOCCS rules or directives. The probation is subject to Article 8 of the CBA, which we believe requires DOCCS to arbitrate any alleged probation violation. We sought clarification from the arbitrator.

**Upstate Correctional Facility:** The Officer was issued an NOD on February 26, 2016, alleging that he failed to provide an inmate with meals and made false statements during an interrogation. The arbitration is scheduled for August 30 and 31, 2016, before Arbitrator James Cooper.

### **Justice Center**

**Mid-Hudson Forensic Psychiatric Center:** On February 10, 2016, we represented the SHTA in a Staff Exclusion List appeal hearing. At the hearing, the Administrative Law Judge offered the attorney from the Justice Center an adjournment and told the attorney that he did not believe that the Justice Center met its burden of proof. On August 1, 2016, we received the Final Determination from the Justice Center in which both the ALJ and the Justice Center substantiated the report of abuse. This was a Category 3 case. The standard of review in an Article 78 Proceeding is "substantial evidence." Substantial evidence is anything but substantial. Substantial evidence means any evidence in the record which supports the administrative determination.

**Mid-Hudson Forensic Psychiatric Center:** On June 23, 2016, we appealed the Category 3 Substantiated Finding of Abuse against a Sr. SHTA. The Justice Center is contending that the Sr. SHTA used unnecessary force on a patient. As a result of the incident, the member's probationary promotion to Sr. SHTA was vacated.

### **Improper Practice Charges**

**Access to Non-Emergency Medical Treatment (Central New York Psychiatric Center):** On behalf of our members at CNYPC, we filed an Improper Practice Charge against the facility, OMH, and the State on June 29, 2016. Until recently, SSOs and SHTAs received the benefit of emergency and non-emergency medical treatment from facility physicians when they were hurt on the job. Through changes in injury report forms and policy, CNYPC and OMH no longer allowed our SSOs and SHTAs to have access to non-emergency medical treatment if they were injured on the job. In fact, facility physicians were only directed to intervene in the most significant emergency

injuries and were told to stand down upon arrival of local ambulance and EMTs. The improper practice charge alleges that CNYPC violated the Taylor Law by denying members the opportunity to consult with a health care provider at the facility. The State's Answer is due August 31, 2016 and the conference will be held on September 21, 2016.

**Unilateral Change to State Housing Policy (DOCCS Statewide):** On June 14, 2016 we attended a conference at PERB in this case, which challenges the unilateral change to Directive 4005 that now subjects members to removal from state housing when they are suspended from employment, whereas the prior language only referred to termination of employment as a basis for termination of state housing privileges. The State maintains that the new language only reflects current practice. PERB has placed the case on the hold calendar while we investigate the extent of the prior practice.

**Directive 4944 (Use of Force) (DOCCS Statewide):** The PERB conference scheduled for July 27 was canceled and the case has been placed on PERB's hold calendar until September 16. The charge challenges several aspects of the recently-revised use of force directive, including the non-collaboration requirement that would prohibit members involved in a use of force from conferring with other involved members, or their union representatives, before preparing a memorandum. There is a scheduled meeting with the Department on August 11 to discuss, among other things, a possible resolution of the case.

**State Education Department:** On July 15, 2016, the State served an answer to this improper practice charge. An initial conference was held at PERB on August 4, 2016. The State claims that the question and answer session between the Officer and his supervisor was not an interrogation, but a counseling session, for which he was not entitled to union representation. The State indicated that settlement may be possible and PERB has put the case on a temporary hold to explore settlement options.

**Unilateral Changes to Length of Day and On-Post Time (State Education Department):** On July 29, 2016, an Improper Practice Charge was filed against the State Education Department (Cultural Education Center) alleging that they unilaterally changed a term or condition of employment when it lengthened the work day of all employees. Specifically, the new post descriptions issued by the Department unilaterally require an employee to remain on post for a longer period of time, thus subsequently lengthening the work day, as duties are required following leaving a the post (including, but not limited to, handing in equipment, doing paperwork, and changing out of uniform). We are awaiting a letter from PERB establishing a conference date and a date for the State to submit its answer.

**Daily Job Selection Procedures (Marcy Correctional Facility):** At the request of the Marcy membership, with whom we met on July 13, the scheduled August 4 hearing was adjourned and the case has been placed on PERB's hold calendar until September 19. The charge challenges the facility's unilateral change in the daily job selection process; however, after we filed the charge the facility returned to the prior practice. We anticipate that if there are no further changes to the now-restored practice, we will eventually be able to withdraw the charge.

**Unilateral Change to Time & Attendance Policies (Pilgrim Psychiatric Center):**

On July 25, 2016 we attended a conference at PERB in this case, which challenges Pilgrim's unilateral imposition of new time and attendance guidelines that differ in many respects from the prior practice. At the conference, Pilgrim agreed to revise its guidelines to address some of our issues. The case has been placed on the hold calendar until September 26 while the parties see if they can reach a mutually acceptable resolution.

**Refusal to Produce Documents Prior to a Demand for Arbitration (Sullivan Correctional Facility):**

On June 24, 2016, we filed a brief in this case. The charge was filed on April 2, 2015, and heard by ALJ Kenneth Carlson on January 15, 2016. This improper practice charge deals with the Department's refusal to turn over documents related to a NOD prior to a demand for arbitration. We await a decision from the ALJ.

**Unilateral Change to Work Schedule and Direct Dealing (SUNY Albany):**

This Improper Practice charge challenges SUNY Albany's unilateral change in the work schedule and direct dealing with unit members. NYSCOPBA has been discussing this matter with SUNY Central and is attempting to resolve this matter with a statewide Agreement between SUNY and NYSCOPBA. We are in the process of drafting the agreement and will be meeting with SUNY to discuss the elements of the agreement. A PERB conference was initially scheduled for June 20, 2016, however since the parties are attempting to resolve this matter, it has been placed on PERB's hold calendar until July 20, 2016.

### **Contract Enforcement**

**Appeals to Arbitration:** We received six (6) requests from NYSCOPBA's grievance department to appeal contract grievances to arbitration during the months of June and July. We have reviewed those grievance files and drafted and submitted arbitration appeals to the Governor's Office of Employee Relations (GOER).

**Attica Correctional Facility Class Action:** The arbitrator sustained the Attica CF class action grievance alleging that the facility should post for bid certain arsenal and construction positions. The positions were ordered to be placed for bid for the benefit of our members. We submitted an Article 75 petition in the Supreme Court, Albany County, to confirm the arbitration award. The Attorney General's office informed us that it would not be opposing the petition to confirm the award. We await court action on the petition, however, we expect it to be confirmed.

**Central New York Psychiatric Center Class Action:** We represented NYSCOPBA in a Class Action Full Contract Grievance Arbitration before Arbitrator Thomas Rinaldo on August 4, 2016. In the arbitration we asserted that the Office of Mental Health – Central New York Psychiatric Center violated Article 11.3 of the Agreement by not paying a class of employees their performance advancements despite those employees meeting the contractual requirements. The State argued that the members were not "grade" and therefore not eligible for the performance advancement. We

contended that because the members were 1) paid at an equivalent rate to grade 14; 2) performed grade 14 duties; and, 3) held a title equivalent to grade 14 all class members should have been treated as “in grade” for the purposes of Article 11.3 We closed the hearing. Briefs are due September 16, 2016.

**Mohawk Correctional Facility Class Action:** This matter was heard in an expedited contract arbitration on June 10, 2016. The issue before Arbitrator Douglas was whether the State violated Article 27 of the Agreement, specifically, OSHA regulations about respiratory safety, when it prohibited an Officer with facial hair from working a “clean shaven” post. A weapons training officer at Mohawk Correctional Facility testified that he was removed from a “clean shaven” post because he had a goatee, despite being able to pass the required fit testing and obtain a seal on his respirator mask. The Union argued that the OSHA regulations allow individuals with certain facial hair to take and pass a fit test, and thus, Mohawk Officers with facial hair should be allowed to undergo a fit test and if they pass, work posts currently designated as “clean shaven”. The State argued that Mohawk Correctional Facility did not violate the OSHA regulations, and that officer safety and facility security concerns preclude any type of facial hair at “clean shaven” posts, because facial hair changes daily and cannot be regularly monitored by facility management. We await the Arbitrator’s decision.

**Sing Sing Correctional Facility:** On July 12, 2016, an expedited arbitration hearing was held regarding this member from Sing Sing CF. An EHS examination cleared the Officer to return to work. However, notice was not sent to her residence. She did not report on the set date and therefore she was AWOL’d for approximately two months.

## **General**

**Cape Vincent QWL:** After discussing, with GOER, Cape Vincent’s inability to spend all of the allocated funds for its QWL project before the established deadline, we prepared a letter for President Powers seeking an extension and addressing concerns raised by GOER.

**Central New York Psychiatric Center Transportation Trips:** We have been addressing a number of concerns with respect to the manner in which CNYPC is handling patient transportation trips and staff assignment to hospital duties. A number of safety concerns have been raised. We have done research under the Taylor Law (no mandatory subject at issue) and have assisted in drafting an out-of-title grievance.

**Central New York Psychiatric Center SHTA Swapping:** We have reviewed the SHTA mutual exchange agreement and provided suggested courses of action to challenge individuals whose mutual exchange privileges were suspended due to failure to work a previously scheduled exchange due to a Workers’ Compensation absence.

**State Inspector General’s Investigative Report on Clinton Escape:** On June 29, 2016, we met with State Commission of Correction Chairman Thomas Beilein, Commissioner Thomas Loughren, and NYSCOPBA President Mike Powers to discuss the Inspector General’s Clinton Report and related issues in response to the Report.



**Constitution and By-Laws Committee:** On July 15, 2016, we attended the Constitution and By-Laws Committee meeting at NYSCOPBA.

**“D” Designation System:** On August 5, 2016, we had a discussion with DOCCS counsel, Kevin Bruen, regarding the “D” Designation system. This is a system which provides information on problematic inmates, i.e., assaults, contraband, etc. When the system comes on line, security staff will be able to view the inmate information screens. Mr. Bruen said that the system is going forward, but did not have a specific date for its implementation.

**Draft Directives:** DOCCS provided copies of draft directive changes for NYSCOPBA’s review and comment. The draft directives included: employee frisk procedures and facility staff allowable items list (front gate directive), earned housing units (#4023), control of and search for contraband (#4910), inmate property (#4913), tool control (#4930), inmate counts (#4945), facility population management (#4946). We reviewed and researched the directive changes for potential improper practice charges. We also drafted two letters to Commissioner Martuscello setting forth NYSCOPBA’s questions, comments and objections. NYSCOPBA requested a meeting with Commissioner Martuscello to discuss the proposed directive changes before they are implemented. On August 3, 2016, Commissioner Martuscello responded to NYSCOPBA’s letter regarding the front gate directive and also provided a draft of changes to Directive # 4936 (Search of DOCCS Employees). We are in the process of reviewing this response and draft directive in conjunction with the Executive Board.

**Leave of Absence (Great Meadow Correctional Facility):** We continue to work with this member and with the Retirement System to either get him the two-year leave of absence, based on his having been assaulted by an inmate in June of 2015, or, alternatively, insure that his disability retirement application is processed as soon as possible. As the Officer’s employment has now been terminated, we will be required to file an Article 78 to challenge the failure to provide him with the two-year leave of absence unless his disability retirement application is approved, which would make the leave of absence issue moot.

**State Commission of Correction (Questioning of Members at Green Haven Correctional Facility):** Addressing the Commission’s stated intention to question six members on July 21 and 22 at Green Haven concerning a 2014 inmate suicide, we spoke to Commission counsel Brian Callahan and obtained written assurance that all members would be afforded the right to union representation during the questioning.

**Pre-Shift Briefing (Kirby Forensic Psychiatric Center):** We are currently reviewing possible pre-shift briefing issues at Kirby Forensic Center from both a contract grievance and improper practice perspective.

**Inmate Foil Request (Livingston Correctional Facility):** On June 9, 2016, an inmate requested the names of all employees at Livingston CF through FOIL. Initially, DOCCS was going to release the information. After a phone conversation, the request was denied. On July 7, 2016, we drafted a letter to Deputy Counsel regarding the FOIL

request. This letter confirmed the denial and requested that all such future requests be likewise denied.

**Moriah Shock Correctional Facility:** The Officer was injured when an inmate let go of a branch that struck him in the knee. The Retirement System denied the Officer's application for disability retirement, pursuant to Retirement and Social Security Law Section 507-b, on the grounds that the incident was not inmate-related. The only issue on this hearing is whether or not the incident was the act of an inmate. A hearing in this matter was scheduled for August 8, 2016.

**Roswell Park Cancer Institute:** Roswell Park has public safety officers charged with securing the facility. These public safety officers are designated as peace officers and Roswell Park intends to arm them for safety and security purposes. Several of the public safety officers are NYSCOPBA members. It has come to our attention that these public safety officers will be required to obtain pistol permits in order to carry firearms while on duty. This is unlike the laws which exempt corrections officers, as peace officers, from requiring them to obtain a pistol permit in order to carry firearms while on duty. We are looking further into the matter to determine legal implications of this proposed employment change.

**Section 70.1 Transfers:** We were asked to provide research and input into potential challenges to Civil Service Law 70.1 transfers affecting out members. These transfers can be made without taking any kind of Civil Service exam, and despite the existence of applicants who have already taken a Civil Service exam. The 70.1 transfer is allowed if the position is substantially similar to the employee's current position and is only a two salary grade jump. This question came up when SHTAs began to use 70.1 to transfer to the Senior SHTA position though other qualified SHTAs had applied for the same Senior SHTA position by paying for/taking a Civil Service exam. Our research found that the 70.1 transfer is legal and we cannot challenge it on the grounds that it is unconstitutional, that a Civil Service exam exists, or that fees were paid to take the exam, and those exam candidates were not offered the position. This reiterates the long-held New York law that applicants do not have property interests in potential jobs and the State enjoys substantial discretion in choosing the best candidate for the position.

**Uniform and Schedule/Length of Day Issues (SUNY Brockport):** We have been asked to look into two issues related to SSAs employed by SUNY Brockport. First, the SSAs are required to wear certain items of clothing, although they are not provided with uniforms per se. We are researching whether or not this clothing nonetheless constitutes a uniform, and if so, whether or not the employer has any obligations to the members with respect to those uniforms. Second, although there is normally a summer schedule that commences earlier in the day, that summer schedule has not been implemented as usual this year. Additionally, the work day has been lengthened to 9 hours with a one-hour lunch; previously the day was 8.5 hours with a one-half hour lunch. We are looking into the appropriate mechanism(s) to address these changes to the SSAs' schedule.

**Workers' Compensation Scheduled Loss of Use Awards:** We are reviewing the Workers Compensation Law statute with respect to the reduction of Schedule Loss of

Use Awards by the amount of money that the employer paid to the employee for wages. Specifically, it has come to our attention that the State Insurance Fund may be seeking reimbursement (reduction in award paid to employee) in Scheduled Loss of Use cases for the full amount paid to the employee for wages, not simply for the statutory benefit. We will be reviewing the WC statute with respect to this issue, as it is a matter of Workers' Compensation Law and not the contractual benefit.

If you have any questions regarding this report, please feel free to contact us.



## Lippes Mathias Wexler Friedman LLP

Attorneys at Law

### JUNE 2016 LEGAL REPORT TO THE EXECUTIVE ASSEMBLY

This is our report for the June 2016 meeting of the Executive Assembly regarding the recent developments in some of the cases and legal matters we are handling for NYSCOPBA. For the matters cited, we have described activity occurring since the last report and scheduled future activity.

#### Legislative

Since the conclusion of the Executive Budget process, we have focused our efforts on the union's legislative agenda for the 2016 Legislative Session. We met with the Legislative/PAC Committee and NYSCOPBA's Legislative Director on several occasions to determine the organization's priorities for the 2016 Legislative Session. Following significant input from the Committee and the Executive Board, the union has prioritized several bills, including: "Death Gamble" legislation; Aggravated Harassment legislation; Assault Reporting legislation; and SSO Peace Officer Status legislation, among others.

Since our most recent Legislative Update to NYSCOPBA's Executive Assembly, we have been aggressively advocating for the enactment of those legislative proposals that constitute the union's legislative agenda for the 2016 Legislative Session. In addition to leading hundreds of correctional officers and law enforcement members with NYSCOPBA's Legislative Director during NYSCOPBA's "Lobby Days," we have also been walking the halls of the Capitol and the Legislative Office Building on a daily basis in an effort to carry out NYSCOPBA's legislative goals.

The 2016 Legislative Session came to a close in the early morning hours of Saturday, June 18, 2016. Provided below is a summary of NYSCOPBA's priority legislation considered during the 2016 Legislative Session.

**Military Buy-Back Extension:** Signed into law as Chapter 41 of the Laws of 2016, this proposal ensures that any veteran who was honorably discharged from the military is able to purchase up to three (3) years of retirement credit. On behalf of NYSCOPBA, we aggressively advocated for the enactment of this proposal with the assistance of the Executive Board, the Veterans Committee, the union's Legislative Director and the general membership of the organization. (S.7160/A.9531).



**“Death Gamble” Legislation:** A priority for the Correctional Officer and Correctional Sergeant members of the bargaining unit, this bill would protect the beneficiaries of a deceased Correctional Officer or Sergeant in certain instances. Specifically, where a member was retirement eligible but continued working and subsequently passed away, this bill would ensure that the beneficiaries of such Correctional Officer or Sergeant receive the deceased member’s pension reserve in lieu of the normal death benefit which is equal to three (3) times salary. Although this bill passed the Senate, it remained in the Assembly Ways and Means Committee. (S.5936-B/A.7801-C).

**Aggravated Harassment Legislation:** This bill would make it a felony for an inmate to intentionally expectorate on an officer. This proposal has been a priority for NYSCOPBA for several years and was amended in recent years to address concerns raised by certain members of the Assembly Democratic Conference. The Senate passed this proposal as it does each year; however, the Assembly failed to move the legislation out of the Assembly Codes Committee, despite aggressive advocacy by NYSCOPBA. (S.1900/A.1105).

**Assault Reporting Legislation:** This proposal, which was a priority for NYSCOPBA’s Law Enforcement members and was introduced for the first time during the 2016 Legislative Session, would require the Commissioner of OMH to develop detailed definitions of degrees of injuries that result from assaults against staff occurring in the State’s four (4) forensic psychiatric centers. This bill has passed both Houses of the Legislature and is awaiting delivery to the Governor. (S.6916-C/A.9620-A).

**SSO Peace Officer Status Legislation:** This proposal would ensure that NYSCOPBA’s SSO members have 24-hour peace officer status. The bill remained on the Senate floor and in the Assembly Codes Committee during the 2016 Legislative Session.

In addition to the above-referenced proposals, on behalf of NYSCOPBA we advocated for the passage or defeat of several other proposals, including:

- State Workforce Injury Reduction Act: (S.2842-A/A.2905-A);
- Pension Forfeiture: (S.8163/A.10739-A);
- Notice Before Closure of Mental Hygiene Facilities: (S.7627/A.10557);
- Aggravated Harassment of Forensic Center Employees: (S.5156); and
- Assemblyman O’Donnell Proposals

There are many other bills that NYSCOPBA has supported/opposed during the 2016 Legislative Session that we will cover during our presentation to the Executive Assembly.

As mentioned above, we have played a pivotal role in assisting the union in advancing its legislative agenda during “Lobby Days.” We completed successful Lobby Days for each of the Regions, as well as for Law Enforcement members, meeting with members of the Legislature as well as their respective staffs.





We assisted the members of NYSCOPBA's Veterans Committee with several meetings during the Committee's annual Lobby Day. We advocated for the enactment of two priority proposals for the Committee and the union: the expansion of the Military Buy-Back law; and legislation that would provide additional leave under New York's Military Law for veterans with combat experience.

### **Negotiations**

We attended negotiating sessions with the State on April 26, May 3, May 10, June 3, and June 9. We met with the collective bargaining committee on May 4, May 18, and June 7, and continue to work with the committee on the various aspects of negotiations.

### **Litigation**

#### **Central New York Psychiatric Center (Article 78 – Civil Service 71 Termination):**

On May 4, 2016, we filed a brief with the Appellate Division, Fourth Department, alleging that Hon. Samuel J. Hester acted in an arbitrary and capricious manner and contrary to law when he determined that the member received proper notice of termination from his employment at Central New York Psychiatric Center. We argued that the member did not receive a proper notice of termination letter and a proper final notice of termination letter pursuant to the Civil Service Law and its attendant Rules and Regulations, and therefore, he should be reinstated to service and made whole. Respondents OMH and CNYCP will have an opportunity to respond to our appeal on or before June 8, 2016. Oral argument before the Appellate Division is scheduled to be held for the November term of Court, which commences on Monday, November 28, 2016.

**Central New York Psychiatric Center:** On May 31, 2016, we filed an Article 78 Proceeding on behalf of an SHTA who was injured by a patient on June 19, 2014. OMH terminated the member's employment on April 22, 2016, on the grounds that she had been out of work for a cumulative total in excess of one year on Workers' Compensation leave as a result of the June 19, 2014, injury. We believe that the member was injured by a patient assault and should, pursuant to Civil Service Law Section 71, be entitled to a leave of absence of at least two years. Our Article 78 is returnable on July 1, 2016.

**Eastern Correctional Facility:** On April 29, 2016, we received a notice from the Appellate Division, Third Department, that the State's Brief is due on June 10, 2016. On June 5, 2016, we received the System's Brief and a notice from the Appellate, Division, Third Department, telling us that this matter would be heard during the October, 2016, Term of the Court. Our Record and Brief were filed in the Appellate Division, Third Department on March 15, 2016. On May 13, 2015, we filed an Article 78 Proceeding appealing the Final Determination of the Retirement System. Previously, on February 5, 2015, we received the Final Determination from the Retirement System denying the member's application for inmate related disability



retirement benefits. The Hearing Officer has the right to decide between conflicting medical opinions and chose to go with the System's IME physician. We have a strong argument that the opinion of the IME physician was not fact-based and should have not been adopted by the System.

**Fishkill (Matter of Harrell):** On May 6, 2016, we received notice that the U.S. Attorney did not intend to extend the stay of proceedings in the civil action brought by the estate of Samuel Harrell as against certain officers, DOCCS and NYSOPBA. The stay of proceedings in the civil action is set to expire on May 10, 2016. We will be answering the complaint.

**Mid-Hudson Forensic Psychiatric Center (Article 78):** On May 9, 2016, we drafted a petition for a former member at MHFPC. The member reviewed and verified the petition. The member was terminated as a probationary officer after a Justice Center investigation. We are commencing proceeding and filing the petition in Orange County because the operative facts in this case took place in Orange County.

**New York State Division of Human Rights v. DOCCS:** On April 29, 2016, we made an application for leave to appeal to the New York Court of Appeals in the matter of the New York State Division of Human Rights v. DOCCS. We requested review of the Appellate Division's decision which dismissed the member's complaint because of the Division's delay. The Third Department noted that the Division did not commence hearings on the 1995 complaint until 2004. Although the testimony was neither long nor complicated, the hearings were not concluded until 2006. Then, seven years passed before the ALJ determined, among other things, that DOCCS had discriminated against the member. In annulling the determination of the Division, the Court held "under these circumstances, we find that there is substantial prejudice to petitioner occasioned by this intolerable delay. Moreover, such delay is an abuse of SDHR's discretion, and its determination must be annulled."

In the underlying matter, we represented a Correctional Officer who filed his first verified complaint with DHR in 1995, when DOCCS denied him equal terms, conditions, and privileges of employment on the basis of a perceived disability. In a June 2013 Decision, DHR found DOCCS liable for unlawfully discriminating against the Officer on the basis of his actual and perceived disabilities, and in retaliation for his prior complaint, and further proposing that damages be awarded for lost wages, in an amount to be calculated by the Office of the New York State Comptroller, and for mental anguish and humiliation, in the amount of \$20,000.00. Since that time, the Officer filed for bankruptcy and has passed away. The decision of the Third Department means that his surviving spouse does not receive any payment. In the application, we argued that the Appellate Division, Third Department, erred in finding that the Estate should suffer the consequences for the "intolerable delay" of the State Division of Human Rights. We await the determination of the Court of Appeals as to whether we can appeal.

**Retiree Health Insurance Litigation (NYSCOPBA v. State, et al.):** On November 16, 2015, the Court issued a revised pretrial scheduling order lifting the stay of discovery, and providing for the completion of discovery by October 12, 2016, and the



filing of summary judgment motions by January 31, 2017. On April 18, 2016, together with the other related public employee union plaintiffs, we served joint combined discovery demands upon the State defendants seeking the production of documents and answers to our interrogatories. Responses were due May 21st, but the State has requested an extension until July 15, 2016. We have not consented to the requested extension, and are working on an agreement for a shorter extension until sometime in June.

**SHU Conditions/Guidelines Litigation (NYSCOPBA v. DOCCS, et al.):** On April 20, 2016, Supreme Court, Albany County, dismissed our Article 78 Petition challenging DOCCS' implementation of SHU guidelines and rules regarding inmate disciplinary proceedings, disciplinary penalties and conditions of confinement. The Court's Judgment dismissing the Petition found, in conclusory fashion, that to the extent the guidelines constituted rules, they were exempt from the SAPA rulemaking requirements because they concerned DOCCS internal affairs and prison management. The Court never addressed or distinguished the Jones decision by the Court of Appeals, which held that the specific Tier assignments and range of penalties for each Tier assignment, did not involve internal affairs and management, and were therefore rules subject to SAPA. Notice of Entry dated May 2, 2016, was received on May 4, 2016. As authorized by the Board, a Notice of Appeal was served on May 5, 2016, and filed on May 6, 2016. We will have nine months to perfect and file our appeal.

**SUNY College of Optometry:** On May 26, 2016, the Appellate Division, Third Department, issued its Decision which granted our petition to compel arbitration. This was a 3-to-2 decision with two Justices dissenting. What this means is that the State has an appeal as of right to the Court of Appeals. We served the order with notice of entry, by mail, on the Attorney General's Office on May 27, 2016. The State has 35 days from May 27 to file a Notice of Appeal. It may be quite a while before this case is heard by an arbitrator, assuming the State, in fact, appeals. The appeal was argued on March 23, 2016. By way of background in this matter, on August 4, 2015, we filed the Record and Brief with the Appellate Division, Third Department, after having filed a Notice of Appeal on April 23, 2015, because we did not have any direction from the Attorney General's Office as to whether or not it was willing to go back to Arbitrator Battisti. We were served with a copy of the underlying Judgment, by mail, on March 24, which meant that our Notice of Appeal was due before April 29. On April 29, 2015, we were served with the State's Notice of Appeal, which was filed on April 28, 2015. Previously, on March 24, 2015, we sent a letter to Arbitrator Battisti requesting a clarification of his Award. We were told by the Assistant Attorney General that SUNY was considering appealing from Judge McNamara's decision, but, since we have not received the Notice of Appeal, we decided to request the clarification of the Award. Arbitrator Battisti did not believe that he had the power to clarify his Award. On March 9, 2015, we received a Judgment and Order from the Hon. Thomas J. McNamara, Acting Justice of the Supreme Court. The court elected to treat our application as a motion to confirm the arbitration award and ordered the parties to seek clarification of the underlying arbitration award from the arbitrator. Any petition on our part to vacate the arbitration award would not have been timely so we filed a Petition pursuant to CPLR Article 75, seeking to compel arbitration, and a Petition pursuant to CPLR Article 78, seeking to vacate the termination of the member on the grounds that he was



fired in bad faith. The member was serving a probationary period as provided in a prior disciplinary arbitration award and his employment was terminated as if he was if were on a general probation. The probation was not defined in the arbitration award, which the member did not wish to try to vacate because he was concerned that his employment could be terminated if we were successful in vacating the award. On June 17, 2014, we filed an arbitration demand from the letter terminating the member's employment and treated the termination letter as a notice of discipline. SUNY refused to arbitrate the termination of the member's employment.

**Ulster Correctional Facility (NYSCOPBA v. DOCCS):** On May 10, 2016, we submitted a Brief and Record on Appeal to the Appellate Division, Third Department, challenging the failure of the court below to confirm Arbitrator Dais' arbitration award in the above matter. Once we receive the State's Brief, oral argument will be scheduled before the Appellate Division, Third Department.

**USERRA Litigation:** On April 14, 2016, the Appellate Division, Third Department, affirmed the dismissal of our USERRA complaint by the court below (Supreme Court, Albany County), and denied our appeal; the decision to dismiss our appeal was unanimous. Essentially, the Third Department found that military leave beyond the period covered under New York Military Law (30 days), when employees are no longer on the payroll, is not comparable leave to the other types of extended leave, such as workers' compensation leave, since employees remain on the payroll during such leave. Notice of Entry was served on April 19, 2016. On May 23, 2016, we served and filed a motion for leave to appeal to the Court of Appeals from the Appellate Division's order affirming State Supreme Court's dismissal of our USERRA claims. The motion is returnable on June 8, 2016. We have no right to appeal to the Court of Appeals; rather, any further appeal would be by permission of the Court. The motion for leave to appeal will be denied unless two judges on the Court of Appeals agree that the case involves significant statewide public policy issues and/or novel issues of law, and agree to grant us permission for leave to hear the appeal. Only about 1 to 2% are granted. Although a long shot, we believe the case involves significant issues of statewide concern and a novel issue of law, and that the Appellate Division's decision ignored language in the Federal Register, published upon the adoption of final rules and regulations by the U.S. Department of Labor, that provided guidance for determining comparable types of non-seniority leave, such as the claim we asserted for vacation and sick leave accruals, and expressly stated that it does not matter whether the leave is paid or unpaid leave. This distinction, between full-pay status while on Workers' Compensation leave, and not being in full-pay status while on military leave, seems to be the very basis of the Appellate Division and State Supreme Court decisions below. It is our position that this distinction based on full-pay status is not permissible under the USERRA regulations.





## Discipline

**Interrogations:** For the months of April and May 2016, we represented eighty (80) members who were interrogated by DOCCS.

**Auburn Correctional Facility:** On May 23, 2016, we completed the third and final day of hearings in the member's disciplinary arbitration. We submitted briefs on June 3, 2016, and we await the decision of the arbitrator.

**Bronx Psychiatric Center:** We appeared for the disciplinary grievance arbitration on May 3, 2016. The Officer received an NOD for a DWI and for removing, without authorization, his automobile from the police impound. We were able to settle this matter and the Officer will be returning to duty. By way of background, On March 17, 2015, the Officer contacted us and told us that OMH terminated his employment because he did not possess a valid New York driver's license. The Officer had a conditional license. We contacted GOER in an effort to get the Officer reinstated to his position. On April 2, 2015, GOER informed us that OMH would be contacting the Officer and reinstating him.

**Downstate Correctional Facility:** On April 26, 2016, we met with the grievant in preparation for arbitration. The arbitration scheduled for April 28, 2016, was adjourned due to illness of the DOCCS Labor Relations Representative. This a non-suspension case. We are in the process of rescheduling the arbitration.

**Downstate Correctional Facility:** On May 2, 2016, we received the Award in this case. The arbitrator found the member guilty of assaulting a Sergeant in the line of duty after he found an inmate out of place on her floor. The officer was charged criminally for harassment and assault, but those charges were adjourned upon contemplation of dismissal (ACOD) upon the basis that the officer pay restitution.

**Greene Correctional Facility:** On June 7 and 8, 2016, we represented the member in a disciplinary arbitration hearing. The next hearing dates are scheduled for June 28 and 29, 2016.

**Kirby Forensic Psychiatric Center:** The SHTA received a Notice of Discipline and was suspended on March 9, 2016. NYSCOPBA filed for expedited arbitration and the hearing was scheduled before Arbitrator J. Roger Rice on May 4, 2016. Prior to the commencement of the hearing at Manhattan Forensic Psychiatric Center, the parties settled the matter where the Grievant was suspended for the time period of March 9, 2016, up to and including April 6, 2016. Grievant was restored his accruals utilized for the time period of April 7, 2016, up to and including May 3, 2016. Additionally, it was agreed that neither the Notice of Discipline, the settlement agreement nor anything contained in the settlement agreement shall be used by the Justice Center in the Grievant's pending appeal of the substantiation of the VPCR Justice Center case.





**Mid-Hudson Forensic Psychiatric Center:** The SHTA received a Notice of Discipline dated October 8, 2015. Prior to the hearing, which was scheduled for June 13, 2016, we spoke to the Justice Center representative who advised that the State will be calling no witnesses to support the Notice of Discipline. We scheduled a conference call with Arbitrator Ira Lobel and the Justice Center confirmed our conversation. We made a motion to Arbitrator Lobel seeking that the matter be dismissed because Article 8 of the collective bargaining agreement requires that employees be disciplined and discharged for just cause and the State has the burden of proof of proving the charges against the employee. Without calling any witnesses or providing any corroborating evidence, the State cannot meet its burden. On June 3, 2016, Arbitrator Lobel granted NYSCOPBA's Motion to Dismiss and dismissed the charges against the grievant.

**Mid-Hudson Forensic Psychiatric Center:** On June 2, 2016, we drafted a Motion to Dismiss the Notice of Discipline for failure by the State to present evidence. The Arbitrator granted the motion to dismiss the Notice of Discipline in its entirety. The case was closed and the NOD withdrawn.

**Mid-Hudson Forensic Psychiatric Center:** The SHTA received a Notice of Discipline and was suspended on April 4, 2016, for allegedly slapping a patient while assisting nurses during a blood draw. NYSCOPBA appealed this matter to expedited disciplinary arbitration. The NOD was prosecuted by an attorney from the Justice Center. The arbitration was scheduled before Arbitrator Mary Crangle on May 20, 2016. The morning of the arbitration, the parties settled the matter for suspension served to date and six weeks suspension held in abeyance for one year pending same or similar conduct. The grievant was able to return to work immediately.

**Mid-Hudson Forensic Psychiatric Center:** On June 6, 2016, we submitted to the Arbitrator a Motion to Dismiss the NOD, because the Justice Center does not have any available witnesses. This matter had been scheduled for arbitration on May 9, 2016, but was adjourned without date. The NOD charges the grievant with striking a patient during a manual restraint.

**Sing Sing Correctional Facility:** Day 3 of this arbitration was held on April 27, 2016. Closing Briefs were due on May 27, 2016. Day 2 of this arbitration was held on March 10, 2016. The first day of this disciplinary grievance arbitration was held on January 13, 2016. The grievant is charged with owning and possessing four handguns which he did not report to the Facility. The grievant pled guilty to a violation of Penal Law §400(12-c), which makes it a Class A Misdemeanor for a peace officer to take possession of a handgun and not report ownership thereof to his or her employer. One of the four weapons in the grievant's possession had a defaced serial number and the New York City Police Department was able to trace the gun to an August 2010 shooting.

**Sullivan Correctional Facility:** An expedited arbitration hearing was completed on May 10 & 11, 2016, for this alleged excessive force NOD. On May 21, 2016, we submitted our closing brief to Arbitrator Timothy Taylor. Hard copies were due and mailed to DOCCS on May 24, 2016.



**Sullivan Correctional Facility:** On April 26, 2016, we received the Award in this case. The arbitrator found the officer not guilty of the charges, returned him back to work, and restored all accruals.

**Sullivan Correctional Facility:** On May 2, 2016, we received the award in this disciplinary matter involving a use of force on an inmate. This case is related to the disciplinary cases of other members involving the same inmate. The arbitrator found this officer not guilty of the charges and ordered him back to work with full back pay and benefits. The grievant was suspended without pay on January 6, 2016, and returned to work on May 3, 2016.

**Sullivan Correctional Facility:** The first day of this disciplinary grievance arbitration was held on April 26, 2016. The second and final day of this arbitration was held on May 27, 2016. We are waiting for a decision from the arbitrator. The grievant is charged with using unnecessary and excessive force in taking down an inmate.

**SUNY Binghamton:** We appealed this matter to expedited disciplinary arbitration. The matter was scheduled for arbitration before Arbitrator Timothy Taylor on May 4, 2016. On April 12, 2016, prior to the hearing, the parties entered into a Stipulation of Settlement whereby the Grievant received a suspension from March 4, 2016 through March 25, 2016. Grievant had all leave accruals restored to him from March 26, 2016 through April 11, 2016.

**SUNY New Paltz:** We filed for expedited arbitration for the grievant, which was scheduled for arbitration before Arbitrator Richard Curreri. Prior to the hearing, we received a proposed settlement agreement resolving this matter as well as a previous Notice of Discipline. We reached a settlement agreement in this case on May 13, 2016. SUNY had sought termination for an instance of sleeping on the job, but the case was settled for suspension served to date, which was approximately one month.

**Ulster Correctional Facility:** This arbitration was held on March 22 and 23, 2016. Closing briefs were submitted on May 9, 2016. On June 2, 2016, we received the Arbitration Award in this case. The Arbitrator dismissed all of the Charges except for one Charge which we believe was time barred. The Arbitrator found the grievant guilty of this charge and imposed a nine-month suspension and a one-year general probation which requires that the Officer not violate any DOCCS rules or directives. The probation is subject to Article 8 of the CBA, which we believe requires DOCCS to arbitrate any alleged probation violation. We will seek clarification from the arbitrator. The grievant was issued a second Notice of Discipline, dated May 15, 2016, which, for the most part, seeks to re-litigate the events of July 22, 2015, which involved an incident with an inmate who claims that he was kicked in the testicles. The Officer was found guilty in the prior arbitration, and was suspended for 120 days. DOCCS is not satisfied with the prior arbitration award. The second NOD also charges the Officer with 3 earlier uses of force, between 2011 and 2013, as well as the July 22, 2014, use of force. DOCCS is now contending that the July 22, 2014, incident was a denial of the inmate's constitutional rights and a violation of PREA. On July 19, 2015, we served a motion seeking to dismiss the entire NOD as time barred and seeking to dismiss the new July 22, 2014, claims as barred because the July 22 incident has already been fully litigated.



During January, 2016, the criminal charges brought against the Officer were dismissed after a non-jury trial.

**Upstate Correctional Facility:** On June 13, 2016, we received the arbitrator's Opinion and Award. The Arbitrator found the Officer guilty of the first specification, sexual assault, and upon that basis, upheld the penalty of termination.

### **Improper Practice Charges**

**Refusal to Turn Over Video (Albion Correctional Facility):** On May 4, 2016, we received a decision from ALJ McNally in this case. The ALJ ruled in favor of NYSCOPBA, finding that the State violated the Act when it refused to provide NYSCOPBA, upon request, with videotape of an incident upon which an NOD was based. The State had refused to turn over the video prior to a demand for arbitration being filed. The ALJ ordered the State to "[p]rovide to NYSCOPBA on demand in the future a copy of a video tape capturing alleged misconduct of a unit member so as to allow NYSCOPBA to evaluate whether it should file a demand to arbitrate any disciplinary charge filed against the member." The State requested an extension of time to file exceptions to the ALJ's decision; their exceptions are due July 7, 2016. If or when the State files exceptions, we will have the opportunity to file a response, and cross-exception(s) if necessary.

**Transfer of Unit Work (Livingston Correctional Facility):** On May 4 we attended a conference at PERB in this case, which challenges the facility's use of lieutenants to cover sergeants' posts during a two-week period when there were numerous vacancies in the rank of sergeant caused by a variety of factors (attending sergeants' school in Albany, long-term sick leave, etc.). The case has been placed on a 60-day hold as we explore a possible settlement.

**Daily Job Selection Procedures (Marcy Correctional Facility):** PERB has scheduled a hearing for August 4 in this charge, which challenges the facility's unilateral change in the daily job selection process. Although, after we filed the charge, the facility returned to the prior practice, the local union has elected to go forward with the hearing, concerned that there could be a subsequent unilateral change.

**Schedule and Meal Period Changes (New York State Department of Labor):** On June 16, 2016, we filed an improper practice charge against the New York State Department of Labor, regarding recent changes to Security Officers' schedules. Security Officers had previously been allowed to change into and out of their uniforms during the fifteen-minute pre-shift briefing period prior to their shifts, and during the last fifteen minutes of their shifts. DOL instituted a new policy that requires officers to change into and out of their uniforms prior to the pre-shift briefing, and after their shifts end. Security Officers are not being compensated for the extra time they must now spend at their facilities changing into and out of their uniforms. The agency also announced that lunch breaks would be shortened from one hour to thirty minutes. We await an answer from the State and a conference date at PERB on this matter.



**New York State Education Department:** On June 1, 2016, we filed an improper practice charge against the New York State Department of Education, stemming from an interrogation of a member by his supervisor. The member was denied union representation during the interrogation. We await an answer from the State and a conference date at PERB on this matter.

**Take-home vehicle (Office of Parks, Recreation and Historic Preservation):** On November 13, 2015, we filed exceptions to the ALJ's unfavorable decision in this take-home vehicle case. On March 11, 2016, we received the State's response to our exceptions, as well as a cross-exception filed by the State on the issue of timeliness. We responded to the timeliness issue on April 15, 2016. This case is now fully submitted and we await a decision from the Board.

**Retaliation and Interference (Sing Sing Correctional Facility):** On May 18 we participated in a conference call with the assigned administrative law judge in this case to discuss the scheduling of a hearing and various evidentiary issues. The charge alleges that the Officer was removed from his long-time bid job as trainer at Sing Sing in retaliation for having offered expert testimony in use of force procedures on behalf of C.O. Lamar Thomas at a disciplinary arbitration proceeding. A hearing is scheduled for September 20.

**Unilateral Change to Travel Arrangements Policy (Southport Correctional Facility):** On April 22 we submitted our brief in this case following a hearing at PERB on December 9, 2015. The charge alleges that Southport unilaterally rescinded the prior practice of making travel arrangements (such as hotel reservations) for officers who go on overnight trips on official business. We await the determination of the administrative law judge.

**Directive 4944 - Use of Force (Statewide):** On May 16 we filed a charge in this case challenging several aspects of the recently-revised use of force directive, including the non-collaboration requirement that would prohibit members involved in a use of force from conferring with other involved members, or their union representatives, before preparing a memorandum. A conference at PERB is scheduled for July 27.

**Promotional Examination Fees (Statewide):** On April 15, 2016, we submitted our closing brief in this matter subsequent to the remand hearing regarding the charging of application fees for promotional/transitional examinations. This was a consolidated proceeding with similar charges filed by CSEA, PEF and DC-37. This case was remanded to the Administrative Law Judge (ALJ) by a decision of the full Board, after the unions filed Exceptions to the ALJ's initial determination. We await a decision on the remand from ALJ Wlasuk.

**CPSOs and SSAs (SUNY Albany):** The SUNY Albany Campus Public Safety Officers (CPSO) and Security Services Assistants (SSAs) have worked an 8 hour day with two fixed pass days off per week. The SUNY Albany Deputy Chief of Police sent a memorandum to the field training staff with a copy to each individual CPSO and SSA, asking our members whether they are for or against a 10-hour work schedule. NYSCOPBA advised SUNY that this is a mandatory subject of bargaining. Despite





NYSCOPBA's objection, SUNY Albany implemented a 10-hour schedule on December 31, 2015. The SUNY Albany Deputy Chief of Police indicated that the move was temporary unless/until it was approved by the union. We met with Al Christian, who provided all the background information in this matter. On February 2, 2016, the Charge was received by PERB. The Charge alleges that by unilaterally changing the schedules of CPSOs and SSAs, SUNY Albany has unilaterally altered a mandatory subject of bargaining in violation of Section 209-a.1(d) of the Taylor Law. We also alleged that SUNY Albany's action constitutes "direct dealing" in violation of the Taylor Law. The April 19, 2016 conference, scheduled before ALJ Nancy Burritt, has been re-scheduled for June 20, 2016.

### **Contract Enforcement**

**Appeals to Arbitration:** We received fifteen (15) requests from NYSCOPBA's grievance department to appeal contract grievances to arbitration during the months of April and May. We have reviewed those grievance files and drafted and submitted arbitration appeals to the Governor's Office of Employee Relations (GOER).

**Albion Correctional Facility:** On April 7, 2016, we settled this Contract Grievance.

**Albion Correctional Facility:** On April 21, 2016, the matter was withdrawn at NYSCOPBA's request.

**Class Action (Auburn Correctional Facility):** On May 5, 2016, we settled this Contract Grievance regarding improper distribution of overtime.

**Sergeants' Incidentals (Bare Hill Correctional Facility):** On May 9, 2016, we received a Stipulation of Settlement and annexed Agreement from the State, signed by GOER and DOCCS. Once the Agreement is signed by Sergeants' Representative David Viddivo, the sergeants at Bare Hill CF will be guaranteed 260 incidental leave days per year, with the possibility of additional time off pursuant to the collective bargaining agreement. This matter is anticipated to serve as a model to resolve the remaining sergeants' incidental cases, subject to the preferences of the sergeants at each facility and exact numerical figures for resolution at each facility, i.e. compliment of sergeants and number of guaranteed incidental days. This resolution represents the culmination of extensive negotiations with GOER, DOCCS, SISU and with the assistance of David Viddivo and Mike Marro, NYSCOPBA Staffing.

**Cayuga Correctional Facility:** On June 2, 2016, we represented the grievant in a summary arbitration proceeding. We await the decision of the arbitrator.

**Mid-State Correctional Facility:** This grievance involved damage to a member's personal cellular phone while it was in the possession of DOCCS, having been confiscated by IG. On or about April 18, 2016, we received an expedited arbitration award in this matter. While the Master Arbitrator held this grievance to be timely filed, he found there to be no contractual violation in that he held, "there is no record of the





phone being damaged in accordance with the CBA Article 23 standard of being involved in actions unique to the performance of law enforcement duties.”

**Orleans Correctional Facility:** This matter was scheduled to be heard on May 20, 2016, at expedited arbitration. After opening statements, Arbitrator Douglas requested that we conference this in an attempt to resolve this case, because he did not believe that a written decision was in anyone’s interest. This matter is currently adjourned without date. The facts are simple. This grievance involves the State’s recoupment of the sum of \$10,386.27 from the grievant. The grievance contends that this recoupment was in violation of Article 27 of the Collective Bargaining Agreement (Preservation of Benefits) and State Finance Law §200(3).

NYSCOPBA’s then Chief Sector Steward, Jeff Chevacci, met with then Deputy Superintendent for Security Labriola and made an agreement whereby officers could volunteer to cover the grievant’s shifts, and the grievant would receive paychecks for the time worked by these other officers. This procedure was not authorized in any DOCCS policies or directives. This modified swapping/leave donation program had been used at Orleans Correctional Facility prior to the grievant’s accident.

There is very little reported case law construing State Finance Law §200. State Finance Law §200(3)(a) provides as follows:

In any case where a state employee has, **as a result of an administrative error** by the state, received salary or other compensation payments in excess of that to which he or she was entitled, the state will not attempt to recover such overpayment, except in those cases described in paragraph (b) of the subdivision. Notwithstanding the foregoing, the state will, where such overpayment is still continuing, immediately reduce such employee’s current salary so that the salary paid to such employee prospectively is the salary which the employee is entitled to receive. (Emphasis added.)

The first issue is what constitutes an “administrative error.” If the overpayment was not made as the result of an administrative error, the State has the clear right to recover the overpayment. In this situation, the employee’s knowledge, or lack of knowledge, is not relevant. In the *Matter of Smith v. Hudacs*, 158 Misc. 2d 149 (Sup. Ct., Alb. Co. 1993), the court indicated that the overpayment of monies caused by submission of fraudulent timesheets did not result from an administrative error. In the case involving the grievant, the timesheets indicated swaps. These swaps were never to be repaid. Directive 2223 (Intershift/RDO Swaps), in effect on September 14, 2009, required all swaps to be paid back within one year. Section 200(3)(a) of the State Finance Law only applies in the case of an administrative error. In view of the purposeful circumvention of the written policies involving leave donations and swaps, it would be reasonable for the arbitrator to conclude that there was no administrative error. An administrative error is generally a clerical error or error in computation. See, *Matter of Jackson v. Triborough Bridge & Tunnel Authority*, 155 Misc.2d 715 (Sup. Ct. N.Y. Co. 1992); *Matter of McLaughlin v. Berle*, 71 A.D.2d 707 (3d Dept. 1979).



**Sing Sing Correctional Facility:** This grievance alleged that DOCCS improperly placed the member in Leave Without Pay (LWOP) status. On April 21, 2016, a consent award was issued resolving this grievance. The State will convert two and one half (2 ½) days of LWOP to Sick Leave (SL), and the member will receive pay commensurate therewith. If sick leave is unavailable, the member will be allowed to select alternate leave accruals to cover the time frame.

**Sing Sing Correctional Facility:** On June 9, 2016, we represented the grievant in a summary arbitration proceeding. We await the decision of the arbitrator.

## **CSL Section 72**

**Section 72 Appeal:** On May 26, 2016, we filed a Section 72 Appeal for an officer who works out of Mohawk Correctional Facility.

## **General**

**Article 24 Seniority:** On May 10, 2016, we drafted an Opinion regarding when Seniority under Article 24 begins to accrue. We conclude that it begins to accrue on the first day of employment.

**Central New York Psychiatric Center policy updates:** The CNYPC Administrative Manual was updated to include additions to the contraband and clearance room policies. Those changes include (1) the addition of language conferring Safety Officers with the powers of Peace Officers; (2) changes to search procedures requiring all individuals entering the facility to pass through a metal detector and/or hand wand search; allowing a pat frisk to be conducted if an individual cannot pass a metal detector and hand wand search, assuming there is probable cause and supervisor approval; all items carried into the facility must pass through an x-ray machine; (3) rather than relinquish all medication in their possession in the clearance room, employees now only need to relinquish more than two shifts worth of prescription medication; (4) e-cigarettes have been included as an example of an everyday use item which is considered contraband. These updates have been reviewed and researched for potential improper practice challenges. Many of the changes confer greater rights upon CNYPC employees. As the new search procedures apply to all individuals entering the facility uniformly, they are likely not mandatory subjects of bargaining and not challengeable.

**Civil Service Law Section 71 (Greater Binghamton Health Center):** We reviewed an OMH determination that a member was entitled to a one year leave of absence, rather than a two year leave of absence in the context of an assault, and whether NYSCOPBA should file an Article 78 Petition pursuant to Civil Service Law Section 71. Based upon the documentation provided to us regarding the incident as well as the standard that must be met in an Article 78 proceeding, we determined that there was not a viable challenge to the designation under this specific set of facts.



**Clinton State I.G. Report:** On June 6, 2016, the State Inspector General issued a report regarding the investigation of the June 5, 2015 escape of inmates David Sweat and Richard Matt from Clinton Correctional Facility. We analyzed the report and met on June 7, 2016 with members of the Executive Board and other professionals hired by NYSCOPBA to discuss the State IG's findings and NYSCOPBA's response.

**Constitution and By-Laws Committee:** On May 26, 2016, we attended the Constitution and By-Laws Committee meeting.

**DOCCS Statewide Workplace Violence Meeting:** On May 5, 2016, we attended the DOCCS Statewide Workplace Violence meeting with Western Region Vice President Joe Miano and Southern Region Vice President Clarence Fisher.

**Great Meadow C.F. – leave of absence:** We are working with this member and with Sue Cunningham to try to get him the benefit of the two-year leave of absence based on his having been assaulted by an inmate in June of 2015. DOCCS had sent him a letter of termination effective June 9, 2016, and the case is complicated by an IME report that “apportions” his current disability equally between the 2015 assault and a prior injury in 2012 that was not inmate-related. We are attempting to gather sufficient documentation to support an Article 78 proceeding if that becomes necessary.

**Labor Relations Participation in Q&As:** On April 21 we provided an opinion to the Board addressing the legality of DOCCS's current practice of having representatives of the Bureau of Labor Relations occasionally attend, and participate in, questioning of members by representatives of the Office of Special Investigations. In short, this practice is permissible. The Bureau of Labor Relations possesses a commonly-found combination of investigative and prosecutorial powers that is not prohibited by state or federal law. DOCCS Directive 2114 (“Functions of the Bureau of Labor Relations”) also does not prohibit Labor Relations representatives from participating in the investigative process. Therefore, participation of Labor Relations representatives in interrogations of NYSCOPBA members does not provide adequate ground for a lawsuit against DOCCS to prohibit this practice.

**Leave Donations:** On May 2, 2016, we issued an opinion that it was consistent with the side letter to the Agreement that an SHTA was not entitled to a leave donation due to previous NODs and unsatisfactory evaluation.

**Inmate FOIL Request (Livingston Correctional Facility):** We received a phone call from NYSCOPBA Western Region Business Agent Al Mothershed regarding a FOIL request by an inmate seeking the names of all employees who work at Livingston Correctional Facility. Initially, Livingston Correctional Facility was going to release this information to the inmate. We researched this issue and noted the exception of Public Officers Law §87(f), which allows an agency to deny access to records because “if disclosed, could endanger the life or safety of any person.” We contacted DOCCS' counsel and advised them of a very similar case involving the State Police on this same issue. After our conversation with DOCCS' Counsel's Office, we were advised on June 9, 2016 that DOCCS will not be releasing this information to the inmate. Al Mothershed is confirming that the information is not being released.



**NYSCOPBA Annual Audit:** On April 21 we provided NYSCOPBA's auditors with a formal written description of legal claims and assessments involving the organization, as required in connection with the preparation of the annual audit.

**NYSCOPBA/OMH Statewide Labor Management Meeting:** On April 14, 2016, we attended the NYSCOPBA/OMH Statewide Labor Management meeting with Law Enforcement Vice President John Harmon and Business Agents Tom Sawyer and Doug Trotter.

**PPO Pilot Program:** On May 2, 2016, we met with Mike Dildine and Susan Cunningham regarding discussions with GOER regarding a possible PPO pilot program in conjunction with the Workers' Compensation Committee. It was determined that the matter would more appropriately fall within the purview of Contract Negotiations, rather than the WC Committee.

**Use of Rainy Day Fund:** On May 4, 2016, we issued a memo regarding a request for advice regarding use of the Rainy Day Fund to compensate officers that may be suspended for refusing to shave. The Brief Answer was "No," the Fund should not be used. With respect to eligibility, the Rainy Fund states: "[t]he fund will be available to any active member who is suspended and receives a notice of discipline for incidents other than off-duty conduct. The NYSCOPBA Executive Board, in its discretion, shall determine whether the conduct alleged in the Notice of Discipline occurred while the member was engaged in the performance of his or her duties." Accordingly, the critical determination in a Rainy Day Fund application is whether the NOD "*occurred while the member was engaged in the performance of his or her duties.*" In the present case, the answer is Negative.

It is a well-established principle that employees must obey management's orders and carry out their job assignments, even if those orders are believed to violate the agreement, and then turn to the grievance procedure for relief. Moreover, the members may bring an action under *Title VII of the Civil Rights Act of 1964* and/or the *New York Human Rights Law*. Given that there are processes to address the denial of accommodation, to include the pending grievance, and a potential legal action, it is difficult to see how refusing to shave could have "occurred while the member was engaged in the performance of his or her duties." We believe that the proper course of action is the "obey now-grieve later" doctrine. Although there are exceptions to the doctrine, such as where the order is unlawful, or in situations which present an unusual threat to the health or safety of the employee, these exceptions do not apply to the instant set of facts.

**Workplace Violence Prevention Program Compliance:** On April 13, 2016, we met at NYSCOPBA HQ to discuss preliminary results from our survey and next steps regarding agency compliance with the Workplace Violence Prevention Law (Labor Law § 27-b; 12 NYCRR Part 800.6). We will continue to review survey results as received and prepare for a meeting with the State Department of Labor to address specifically identified compliance issues and seek agency compliance.

If you have any questions regarding this report, please feel free to contact us.





## **Lippes Mathias Wexler Friedman LLP**

Attorneys at Law

### **FEBRUARY 2016 LEGAL REPORT TO THE EXECUTIVE ASSEMBLY**

This is our report for the February 2016 meeting of the Executive Assembly regarding the recent developments in some of the cases and legal matters we are handling for NYSCOPBA. For the matters cited, we have described activity occurring since the last report and scheduled future activity.

#### **Legislative**

On January 6, 2016, the Legislative Session officially commenced. This is the second year of a two-year term for members of the Legislature. As such, in November of 2016 each and every Senate and Assembly seat is up for re-election.

We have been continually reviewing all bills that have been introduced for purposes of the 2016 Legislative Session and have begun the process of crafting the union's 2016 legislative agenda with the assistance of the Executive Board, the Legislative/PAC Committee Members and the organization's Legislative Director. However, the vast majority of our governmental relations time and resources has been dedicated to the Governor's 2016-2017 Executive Budget proposal. The Executive Budget was presented to the Legislature on January 13, 2016.

As we do each and every year for the benefit of NYSCOPBA, we have reviewed the Governor's budgetary proposal and provided you with a summary memorandum highlighting the major issues of significance to your organization. We have also crafted more detailed explanations of certain specific proposals that seem to be garnering significant member attention. For example, we provided an in-depth summary of the Governor's proposed initiative to increase healthcare contributions for certain retirees, beginning October 16, 2016. We will continue to provide additional summaries of specific proposals as they become necessary.

In addition to reviewing the proposed Executive Budget, we have also reviewed both the Senate and Assembly's staff analysis of the Executive Budget in an effort to learn about additional details that aren't otherwise discoverable through reviewing the budget text itself. We have requested a meeting with the Division of Budget to be briefed on the DOCCS, OMH and OPWDD proposals since the important details of a budgetary proposal can sometimes be "embedded" within an agency's proposed allocation.

We will continue to keep the Executive Board apprised of any new developments with respect to the Executive Budget for fiscal year 2016-2017 and will continue with our lobbying efforts on The Hill for the benefit of NYSCOPBA.





## Negotiations

We attended the collective bargaining committee meeting on December 14 and the initial meeting with the State on December 15, 2015. Thereafter, we attended additional collective bargaining committee meetings on January 5, 25 and 26, 2016. We continue to draft bargaining proposals and information demands for the committee.

## Litigation

**Matter of the Application of the Hearst Corp. v. New York State Department of Corrections and Community Supervision.** This is an Article 78 Proceeding commenced by the Times Union newspaper, which, by agreement between the Times Union and the Attorney General's Office, has been adjourned to March 25, 2016. Our motion to intervene as a Respondent and our Opposition to the Petition was served on February 1, 2016. As required by the *Civil Practice Law and Rules*, our motion is returnable on the return date of the Petition, March 25. This proceeding arises out of two (2) Freedom of Information Law (FOIL) requests served by the Times Union on DOCCS. The Times Union is seeking documents having to do with inmate grievances alleging assault or physical abuse by correction officers, Inspector General Reports involving allegations of inmate abuse, and disciplinary arbitration awards, among other documents. DOCCS has refused to provide these records to the Times Union contending, primarily, that the requested documents are personnel records that are exempt from disclosure pursuant to Section 50-a of the Civil Rights Law. NYSCOPBA is seeking to intervene to protect the interests of its members.

**DOCCS Gender Specific Directive.** On January 15, 2016, we commenced two special proceedings in state court to challenge the Division of Human Rights' Determination that Directive #2230 is not an unlawful discriminatory practice. We challenge the Division's determination as being arbitrary and capricious in that the determination of a Bona Fide Occupational Qualification (BFOQ) is very fact specific and could not be sufficiently determined without a full hearing.

In the federal action before the federal Equal Employment Opportunity Commission (EEOC) regarding the same Directive, we also received the federal right to sue letter on Title VII. We have 90 days from January 22, 2016 (the date the Commission's ruling on the review), to commence an action in federal court.

By way of background, previously, on December 3, 2015, we appealed, to the EEOC, the determinations of the New York Division of Human Rights cases 10175290 and 10175288, which alleged that DOCCS' changes to Directive #2230, entitled Guidelines for Assignment of Male and Female Correction Officers, constituted an unlawful discriminatory practice based upon gender. Specifically, on January 5, 2015, DOCCS updated Directive #2230 to require that special watches and suicide watches must be conducted by same gender staff members.

As relevant to this specific case, at Albion Correctional Facility, hiring for overtime is based upon seniority. On April 27, 2015, C.O. Malinowski was on the list to be hired for overtime. As conceded by DOCCS, however, Albion CF applied the above



referenced directive to deny C.O. Malinowski the opportunity for overtime based upon his gender. A female correction officer with less seniority than C.O. Malinowski was hired for overtime instead. Officer Malinowski and another male officer were both ahead of the female officer based upon terms of seniority, but both officers, including C.O. Malinowski, were skipped over based on the gender specific directive.

In the appeal to the EEOC, we argued that the Division was incorrect because a prima facie case of discrimination was established. First, DOCCS Directive #2230 clearly discriminates upon the basis of gender. Second, based upon that discriminatory practice, Officer Malinowski suffered an adverse action – he was not permitted to perform the overtime to which he was entitled based upon his seniority under the Collective Bargaining Agreement between NYSCOPBA and the State. The application of this directive deprived Officer Malinowski of material benefits in that he was denied overtime opportunity. Therefore, C.O. Malinowski was directly impacted by Directive #2230, suffered damages based upon this Directive, and will continue to suffer damages in the future, based upon this Directive.

**USERRA Litigation (*Andrews v. State, et al.*).** On January 4, 2016, we received a calendar from the Appellate Division, Third Department, that scheduled oral argument before the Court on February 9, 2016.

**SUNY College of Optometry.** On December 9, 2015, we filed our reply brief in this matter before the Appellate Division, Third Department. This was in reply to the State's Brief that was filed on November 30, 2015. This case will be scheduled for the April, 2016, Term of the Court for oral arguments before the Third Department.

This matter involves a member who was serving a probationary period as provided in a prior disciplinary arbitration award and his employment was terminated as if he were on a general probation. The probation was not defined in the arbitration award, which award the member did not wish to try to vacate because he was concerned that his employment could be terminated if we were successful in vacating the award. On June 17, 2014, we filed an arbitration demand from the letter terminating his employment and treated the termination letter as a Notice of Discipline. SUNY refused to arbitrate the termination of the member's employment.

Any petition on our part to vacate the arbitration award would not have been timely so we filed a Petition pursuant to CPLR Article 75, seeking to compel arbitration, and a Petition pursuant to CPLR Article 78, seeking to vacate the termination of this member's employment on the grounds that he was fired in bad faith. On March 9, 2015, we received a Judgment and Order from the Hon. Thomas J. McNamara, Acting Justice of the Supreme Court. The court elected to treat our application as a motion to confirm the arbitration award and ordered the parties to seek clarification of the underlying arbitration award from the arbitrator. Therefore, on March 24, 2015, we sent a letter to Arbitrator Battisti requesting a clarification of his Award. We were told by the Assistant Attorney General that SUNY was considering appealing from Judge McNamara's decision, but, because we had not received the Notice of Appeal, we decided to request the clarification of the Award. Arbitrator Battisti did not believe that he had the power to clarify his Award.



We were served with a copy of the underlying Judgment, by mail, on March 24, which meant that our Notice of Appeal was due before April 29. On April 29, 2015, we were served with the State's Notice of Appeal, which was filed on April 28, 2015. Then on August 4, 2015, we filed the Record and Brief with the Appellate Division, Third Department, after having filed a Notice of Appeal on April 23, 2015, because we did not have any direction from the Attorney General's Office as to whether or not it was willing to go back to Arbitrator Battisti.

***NYSCOPBA and Tierney v. GOER, et al.*** Oral arguments before the State's highest court, the New York State Court of Appeals, have been scheduled for February 9, 2016. We previously filed and served our Court of Appeals Record on Appeal and Brief in this out-of-title work matter regarding an SSO 2 who was designated as the "Acting Chief" for a period of seven (7) months and received the State's brief in opposition. Although the Appellate Division, Third Department, affirmed the lower court's decision denying the grievance, the decision was split, with two justices dissenting. Therefore, we were granted an appeal as of right to the Court of Appeals.

### **Discipline**

**Interrogations.** For the months December 2015 and January 2016, we represented seventy-nine (79) members who were interrogated by DOCCS.

**Kirby Forensic Psychiatric Center.** On January 22, 2016, we appeared at the disciplinary arbitration for this SHTA. This member was alleged to have made inappropriate statements to a patient. At the outset of the hearing, we inquired as to the witnesses the State intended to call and asked for a short Offer of Proof as to their testimony. We were advised that the State's only witness would be the Director for Human Resources who was present at Grievant's interrogation but who did not witness any of the events giving rise to the instant Notice of Discipline. We made a motion to dismiss pursuant to theory of fairness of the proceeding and the basic due process rights to which all employees are entitled. We argued that if the State was allowed to proceed with only the introduction of hearsay statements, and if the arbitrator was able to accept such documents and make a ruling in this case based only on such documents, the member would be denied due process rights because the member has the due process right to confront her accuser. The arbitrator agreed with our argument, and found that the Grievant has every right to expect to be afforded a fair and impartial hearing. In this regard, a fair hearing includes the opportunity to be heard, the right to cross-examine adverse witnesses and impartiality in ruling upon the evidence. The arbitrator granted NYSCOPBA's motion to dismiss and directed that any and all references of the Notice of Discipline be removed from all files.

**Bedford Hills Correctional Facility.** The third hearing day in this matter was held on December 28, 2015. Closing briefs in this case are due on February 4, 2016. This member was charged with being inattentive to duty while an inmate was being beaten in the shower at the Facility. This officer is also charged with falsifying logbook entries by documenting rounds which he did not make.



**Coxsackie Correctional Facility.** On January 12, 2016, we represented this correction officer in an expedited arbitration before Arbitrator Mary Crangle. The member was alleged to have received a pack of cigarettes from an inmate and passed the cigarettes to another inmate. The arbitrator concluded that the member was guilty of the charges. Arbitrator Crangle, however, found that dismissal from state service was not the appropriate penalty to be imposed. Arbitrator Crangle found the appropriate penalty to be a sixty-day suspension to be served commencing on November 30, 2015, and ending on January 29, 2016, and shall include the time during which the Grievant was suspended, even though he used accruals for some or all of this time. We had met with the grievant and union representatives on January 6, 2016, to prepare for the hearing.

**Downstate Correctional Facility.** On January 29, 2016, we represented this member at the second day of his disciplinary hearing before Arbitrator Ira Lobel. A third day will be necessary, but a date has not been established.

**Greene Correctional Facility.** On December 21, 2015, we received a decision in this use of force Notice of Discipline (suspension, no settlement offer made) from Arbitrator Currier, finding the grievant not guilty of all charges, and ordering reinstatement with full back pay and benefits. Specifically, the arbitrator held that the State had not met its burden of proof as to any of the four charges involving the use of force and allegations of false and misleading statements. The member has returned to duty. We expect back pay to be paid shortly.

**Greene Correctional Facility.** On January 22, 2016, the first day of this case was heard before Arbitrator Ira Lobel. The grievant is charged with submitting a false memo and failing to report an injury to an inmate in the S-block on March 12, 2014. The charges arise out of an incident for which four members at Greene CF have previously been disciplined. The next scheduled hearing date is April 1, 2016.

**Sing Sing Correctional Facility.** The first day of this disciplinary grievance arbitration was held on January 13, 2016. Day 2 is scheduled for February 23, 2016. The member is charged with owning and possessing four handguns which he did not report to the Facility. The officer pled guilty to a violation of Penal Law § 400 (12-c), which makes it a Class A Misdemeanor for a peace officer to take possession of a handgun and not report ownership thereof to his or her employer. One of the four weapons in officer's possession had a defaced serial number and the New York City Police Department was able to trace the gun to an August, 2010, shooting.

**SUNY Albany.** On December 14, 2015, we attended the disciplinary grievance arbitration for this member who was charged with not appearing for mandatory overtime. This matter was settled for a Letter of Reprimand.

**Upstate Correctional Facility.** On January 7 and 8, 2016, we represented this member in a disciplinary arbitration in Canton, New York. The next arbitration dates are March 17 and 18, 2016. Previously, on December 23, 2015 we met in our offices, with the grievant and union representatives to prepare for the hearing.





**Ulster Correctional Facility.** This member was issued a second Notice of Discipline, dated May 15, 2015, which, for the most part, seeks to re-litigate the events of July 22, 2015, which involved an incident with an inmate who claims that he was kicked in the testicles. The member was previously found guilty of the allegation following a prior arbitration, and was suspended for 120 days. DOCCS is not satisfied with the prior arbitration award. The second NOD charges the member with three earlier uses of force, between 2011 and 2013, and the July 22, 2014, use of force. DOCCS is now contending that the July 22, 2014, incident was a denial of the inmate's constitutional rights and a violation of the Prison Rape Elimination Act (PREA). On July 19, 2016, we served a motion seeking to dismiss the entire NOD as time barred and seeking to dismiss the new July 22, 2014, claims as barred because the July 22 incident has already been fully litigated.

**Justice Center (Central New York Psychiatric Center).** On December 8, 9, 10, and 23, we represented a member in a Staff Exclusion List hearing. A prior disciplinary arbitration award terminated his employment on April 27, 2015. In August 2014, the Justice Center filed a report of substantiated findings against this member alleging sexual contact with three (3) patients at CNYPC. This was a category "1" allegation which means that, if substantiated, the member could never again work with individuals classified as "vulnerable" by the law. We filed an appeal and requested an amended report. After our appeal was denied, we requested a hearing before an Administrative Law Judge. The Justice Center's evidence consisted of 53 exhibits and 3 live witnesses. In the presentation of its case, the Justice Center focused on the 3.5 hour interview conducted by the New York State Police Bureau of Criminal Investigation (BCI). The interview was recorded by the BCI and presented in full during the Justice Center hearing. At the conclusion of its case, the member testified, as well as two other witnesses. The parties presented extensive closing arguments. We await the ALJ's decision.

**Justice Center (Kirby Psychiatric Center).** On December 22, 2015, we appealed a Justice Center Report of substantiated abuse/neglect with respect to a member. The abuse/neglect alleged is a category "3" finding.

**Justice Center (Rockland Psychiatric Center).** Hearings were held in this Staff Exclusion List Case on December 7 and December 15, 2015, before ALJ Carney. The case involves allegations of abuse and neglect under Category 3. There was a previous disciplinary matter stemming from the same incident. The record has now been closed and we await the decision of the ALJ.

**Justice Center (Rochester Psychiatric Center).** A pre-hearing conference was held in this matter on December 16, 2015, and a hearing has been scheduled for April 13, 2016.





## **Improper Practice Charges**

**Information Demand (Sullivan Correctional Facility).** A hearing was held on January 15, 2016, in this Improper Practice charge before PERB. This charge involves DOCCS' refusal to provide documentation that NYSCOPBA requested in connection with a disciplinary grievance. Specifically, documents and a video were requested prior to the Agency level hearing on the matter. They were denied at that time (although later provided when we demanded the case to arbitration). The hearing was completed in one day. Once we receive copies of the transcripts, a briefing schedule will be set by PERB.

**Suspension of SSO Tour Exchange Privileges (Central New York Psychiatric Center).** On December 21, 2015, we filed an Improper Practice due to CNYPC unilaterally suspending all tour exchange privileges for members of the safety department. There has been an extensive practice of allowing Tour Exchanges between Safety and Security Officers. This practice was unilaterally suspended. A conference has been scheduled for February 29, 2016. In the meantime, it is our understanding that the facility has indicated a return to prior practice is forthcoming.

**DOCCS Employees' Manual.** On January 27, 2016, we attended a resolution conference at PERB on this matter.

**Transfer of Unit Work (Livingston Correctional Facility).** On January 19, 2016, we filed an Improper Practice Charge at PERB challenging the facility's use of lieutenants to cover sergeants' duties during a two-week period in October when the facility was short-staffed for sergeants for various reasons. We contend that long-standing practice provides that only employees in the Security Services Unit perform sergeants' duties at Livingston CF. We are waiting for PERB to schedule a conference.

**Retaliation and Interference (Sing Sing Correctional Facility).** On January 21, 2016, we attended a PERB conference in this case, in which the facility is charged with retaliation and interference in connection with the refusal to allow Steward Frank Ortega, on duty at the time in question, to represent a member subject to potential discipline. We contend that the refusal, by Lieutenant Pinker, was motivated by anti-union animus rather than any legitimate security or operational concerns. The case is on the hold calendar as we try to reach a settlement agreement.

**Denial of Union Representation (Greene Correctional Facility).** On December 16, 2015, we filed an improper practice charge against DOCCS for refusing to allow union representation during an interrogation of a NYSCOPBA member. The underlying event occurred at Albany Medical Center when the Department alleged that two officers were sleeping while guarding an inmate at the hospital. This particular member relieved the officers who were alleged to have been sleeping at the hospital. Subsequently, the member was interviewed by DOCCS OSI. Although he requested representation, his request was denied by OSI. We filed the improper practice upon the denial of representation. The preliminary conference is scheduled for February 8, 2015.



**Resource Pool Job Bidding (Marcy Correctional Facility).** On December 22, 2015, PERB held a conference in this case, which challenges the facility's unilateral change in the bidding process at Marcy CF. Previously, all officers who were resource or assigned to work overtime on a shift bid their daily jobs as a group, based on seniority. The facility unilaterally dictated a new and different job selection procedure where resource selects first, with volunteer overtime officers, and then officers who are "stuck," following them. We contend that the job selection process is a mandatory subject that must be negotiated. The facility has now returned to the prior practice, and we are seeking a written settlement insuring that practice will continue. As we pursue that settlement, the case is on PERB's hold calendar.

**Swapping (Orleans Correctional Facility).** On December 23, 2015, we requested to withdraw this Improper Practice Charge which was filed alleging that Orleans CF unilaterally changed its policy and practice with respect to approving swaps for positions which include particular job qualifications. The matter had been resolved, in writing, at the local level, following the filing of the charge.

**Travel Arrangements (Southport Correctional Facility).** On December 9, 2015, a PERB hearing was held in this case, which alleges that Southport CF unilaterally rescinded the prior practice of making travel arrangements for officers who go on overnight trips on official business, such as testifying in court on behalf of the State. We await the transcript of the testimony, at which point briefs will be prepared and filed.

**Retaliation (Sing Sing Correctional Facility).** A conference on this case was held at PERB on December 8, 2015. The hearing in this matter has been scheduled for March 29, 2016. GOER served its Answer to this IP on November 23, 2015. A use of force trainer, on September 30, 2015, testified for the Grievant in a disciplinary case which involved a use of force and a video which the Department did not like. The long time training officer, testified, that, in his opinion, the use of force was justified and not excessive. On October 13, 2015, the Department removed the training officer from his bid job as a training officer. We filed an Improper Practice Charge on October 15, 2015, contending that the Department retaliated against the training officer for engaging in a protected activity, which is, testifying in a disciplinary arbitration.

### **Contract Enforcement**

**Appeals to Arbitration.** We received thirty (30) requests from NYSCOPBA's grievance department to appeal contract grievances to arbitration during the months of December 2015 and January 2016. We have reviewed those grievance files. We drafted and submitted twenty-four (24) arbitration appeals in these matters to the Governor's Office of Employee Relations (GOER). The remaining six (6) are being processed and will be submitted shortly.



**Upstate Correctional Facility.** This contract grievance, regarding an inappropriate assignment of resource officers to a transportation trip (when transportation officers were available), is tentatively scheduled for expedited arbitration on March 4, 2016.

**Sing Sing Correctional Facility.** A consent award was signed in this matter on January 28, 2016. The State will convert fourteen (14) days of Leave Without Pay (LWOP) status to Workers' Compensation Leave (WC) status without charge to the member's accruals. The member will receive pay commensurate therewith, less all usual and mandatory deductions, and less any statutory Workers' Compensation benefit directly paid to the member, if any.

**Otisville Correctional Facility.** On January 29, 2016, we represented a member in this expedited arbitration. We asserted that the department improperly placed him on sick leave status, instead of Workers' Compensation for a period of 22 days. We await a decision.

**Clinton Correctional Facility.** This contract grievance, regarding a denial of two days of pay for allegedly non-conforming medical documentation, has been tentatively scheduled for expedited arbitration on February 19, 2016.

**New York State Psychiatric Center.** This grievance alleges a violation of Articles 11 and 27 of the collective bargaining agreement. Specifically, the grievance alleged that the State failed to promote the grievant to the position of Safety and Security Officer (SG-12), after serving one year as a Safety and Security Officer Trainee (SG-9), and failed to compensate her as a Safety and Security Officer (SG-12) for the period of November 10, 2010, until February 2, 2012. The parties agreed that the grievant shall be compensated in an amount equal to the salary grade for the position of Safety and Security Officer 1, effective August 3, 2011, and calculate and pay any additional compensation to which the grievant would be entitled based upon the August 3, 2011, placement. The calculation and payment will result in a lump sum payment equivalent to the difference between the compensation she received as a Safety and Security Officer Trainee (SG-9) and the compensation to which she would have received as a Safety and Security Officer 1 (SG-12) for the period of August 3, 2011, through February 2, 2012. The parties shall adjust grievant's seniority and service dates for all relevant purposes pursuant to the collective bargaining agreement to August 3, 2011, as well as any other compensation and/or benefits to which she would be entitled based upon her adjusted seniority date in accordance with the relevant, applicable contractual provisions.

**Class Action Attica Correctional Facility.** On December 18, 2015, a second day of hearing was held in this contract grievance alleging violations of Article 24.2 with respect to certain posts that are filled daily, with set pass days and shifts, without being put up for bid. This case involved a lot of documents, as well as testimony from four union witnesses and three state witnesses. Closing arguments were presented and we await the decision of the arbitrator.



**Woodbourne Correctional Facility.** On January 8, 2016, Arbitrator Douglas signed a consent award to resolve this grievance. The member will receive restoration of one (1) day of vacation accruals.

**Bedford Hills Correctional Facility.** Summary Arguments, with the testimony of one witness, on the issue of timeliness of the filing of the grievance in this matter was held before Arbitrator Douglas on January 28, 2016. We await a decision.

### **General**

**Constitution and By-Laws Committee.** On January 8, 2016, we attended a meeting of NYSCOPBA's Constitution and By-Laws Committee.

**DOCCS Statewide Labor/Management meeting.** On January 26, 2016, we attended the Labor/Management meeting at DOCCS with the Executive Board. Prior to the meeting, we prepared talking points and a binder of documents to be prepared to discuss with DOCCS. We also reviewed DOCCS' draft minutes from the prior meeting and drafted a response to the minutes prior to their completion and signature.

**OMH Statewide Labor/Management Meeting.** On January 20, 2016, we attended a Statewide Labor/Management meeting at OMH with NYSCOPBA Law Enforcement Vice President John Harmon, Business Agents Thomas Sawyer and Doug Trotter and Mary Gulino.

**Special Meeting of Executive Assembly.** On January 21, 2016, we attended a special meeting of the Executive Assembly relating to the Clinton CF escape and the anticipated State Inspector General report.

**Review of Proposed DOCCS Revisions to Various Policies and Directives.** In recent weeks, DOCCS has been providing NYSCOPBA with draft revisions to policies, memoranda and directives for review and comment. We have engaged in review of these documents, with NYSCOPBA, and have prepared formal responses which encompass NYSCOPBA's position, questions and response on the revisions.

**OPWDD Employee Handbook.** We reviewed the draft of the updated OPWDD employee handbook that was provided to NYSCOPBA for comment, and we prepared a memorandum to Law Enforcement Vice President John Harmon summarizing the changes to the handbook and identifying areas of possible concern with the substantive material that was added, omitted or modified. We also provided VP Harmon with a chart showing all changes that were made to the old handbook and the corresponding sections in the new version.

**NYSCOPBA/State Disciplinary Arbitration Panel.** On January 26, 2016, we sent a letter to Michael Volforte, Interim Director of the New York State Governor's Office of Employee Relations pertaining to the problems of retaining arbitrators on the NYSCOPBA/State Disciplinary Arbitration Panel. We indicated that one of the main reasons arbitrators are leaving the panel, and why it is hard to attract new arbitrators, is



the \$800 fee that arbitrators are currently receiving. We believe that having the best arbitrators on the panel is critical to the integrity of the arbitration process. In the letter, we articulated that NYSCOPBA wishes to meet with his office, outside of the negotiations process, to discuss increasing the arbitrators' daily rate. We are waiting for a response from Michael Volforte.

**Double-Bunking Variances.** On January 20, 2016, we attended the State Commission of Correction monthly meeting regarding DOCCS' request for a one year extension of the double bunking variances for Wallkill Correctional Facility (72 variance beds for area of preference transfers in the NYC metro area), and at Clinton Correctional Facility Annex (11 variance beds for its Sex Offender program). The number of double bunk beds at Clinton Correctional Facility was further reduced from 44 to 11 beds. The Commission conducted site visits and recommended the continuations. We raised NYSCOPBA's overall concerns regarding increased prison violence and assaults, recognized DOCCS' efforts in further reducing double bunking and supported any further efforts it can make to reduce double bunking and double celling to improve prison safety. The requests were granted.

**NYCLU SHU Settlement Agreement (*Peoples v. Fischer*).** DOCCS issued a Memorandum to All Superintendents dated January 8, 2016, regarding the final Settlement Agreement in the *Peoples* SHU litigation, including Notice to Inmates of the agreement and an opportunity to submit comments/objections until March 14, 2016, prior to a Fairness Hearing by the Court on March 28, 2016. The final agreement does not become effective until so approved, and implementation of its terms regarding SHU conditions and disciplinary penalty guidelines are not required to be implemented until 3 to 12 months thereafter. Significantly, the final agreement specifically provides for the adoption or modification of existing regulations by DOCCS to implement the terms of the Settlement Agreement, upon notice to plaintiffs' counsel. This language was not contained in the Interim Settlement Agreement, and provides recognition of our pending litigation against the Department challenging its implementation of the Interim Settlement Agreement without formally adopting necessary regulations.

**SHTA Classification Revisions.** On January 22, 2016, Civil Service notified NYSCOPBA of a tentative, revised, classification standard for the SHTA series. We are reviewing the changes and will be putting together a formal response opposing many of the changes and proposing other revisions and submitting to Civil Service in the required 45 day time frame.

**Rochester Psychiatric Center Overtime Policy.** We have reviewed and revised a number of different drafts of an overtime policy for the SHTA titles at Rochester Psychiatric Center.

**Taconic Correctional Facility.** On January 25, 2016, DOCCS contacted us regarding this member's residency status. DOCCS was awaiting confirmation of the member's New York State residency. The member provided some documentation to us that she asked us to forward to DOCCS Personnel, Central Office. On February 8, 2016, DOCCS indicated to our office that the member's documentation was sufficient, that DOCCS would update its records and send a confirmation letter to the member.





**Fishkill Grand Jury Matter.** The federal grand jury investigating the death of inmate Harrell at Fishkill Correctional Facility was very active. We spent significant time meeting with the Assistant U.S. Attorney handling the matter in White Plains. Also, we represented 10 members before the U.S. Attorney in this matter.

**Recall Panel Hearing.** On December 29, 2015, we provided legal advice and counsel to the panel in connection with a hearing convened by the panel on that day.

**Meeting Regarding Gender Specific Issues at Albion Correctional Facility.** On December 17, 2015, a meeting was held at Building 9, DOCCS' central office, to address staffing challenges facing Albion Correctional Facility, given the imbalance between female and male correction officers. This results in females being mandated to work overtime at an exhausting rate, resulting in burn out of these officers, and, hence, causing them to move to different facilities and exacerbating the problem.

The current staffing at Albion CF is 423 officers. This includes 331 men and 92 women. DOCCS indicated that most of the women are assigned to non-female only posts. Presently, there are 21 female only posts at Albion CF. The latest staffing review added another 9 female only posts. This will only serve to increase the staffing pressures upon Albion CF.

To address the staffing issues, DOCCS indicated that there were several measures possible:

1. DOCCS could implement a 28-day staff hold. This may serve in a short term to alleviate some pressures but would not be a long term solution.
2. There is no staff housing at Albion CF. This is significant because Albion CF is not close to a major city such as Buffalo. Buffalo is approximately 90 minutes away. Having no staff housing at an isolated location discourages the practice of swapping and doing 2s and 4s. Staff housing at Albion CF may make that facility more attractive to all officers, not just females.
3. DOCCS indicated that a geographical pay increase was a possibility. This could be a one-time pay incentive or a continuing pay increase for females to be voluntarily assigned to Albion Correctional Facility. We asked if this could be implemented outside of the collective bargaining agreement and DOCCS answered in the negative. DOCCS indicated that this could only be implemented through a collective bargaining provision.

4. DOCCS indicated that they could implement an expedited reassignment list. The standard reassignment list would be in place, however, DOCCS would hand-select females to go to Albion CF outside of the order of the list to satisfy staffing requirements. This measure would be a break in the seniority rule, allowing more junior females to transfer to Albion CF over more senior males.
5. DOCCS indicated that the contract requires only bidding of shift and squad. To eliminate manning pressures, especially at female only posts, DOCCS could allow the work (job bids) to be assigned locally. Thus, officers would bid on shift and squad but their posts would be assigned locally by Albion Correctional Facility.

At the conclusion of the meeting, DOCCS agreed to provide us with a written summary of potential options.

**Officers' Privacy Concerns.** We prepared a memorandum discussing the applicability of Civil Rights Law § 50-a to privacy concerns that were raised by a recent New York Times column which recommended that DOCCS track inmate grievances and lawsuits filed against individual officers.

**CNYPC Time and Attendance Questions.** We reviewed and responded to a set of questions posed to us by the local at CNYPC regarding the existing Time and Attendance policies at the facility.