



# Lipps Mathias Wexler Friedman LLP

Attorneys at Law

## DECEMBER 2018 LEGAL REPORT TO THE EXECUTIVE ASSEMBLY

This is our report for the December 2018 NYSCOPBA Executive Assembly, regarding the recent developments in some of the cases and legal matters we are handling for NYSCOPBA.

### Negotiations

NYSCOPBA continues to negotiate for a successor agreement with NYS. Mediation sessions have been and are ongoing.

### Litigation

**Statewide – Retiree Health Insurance Litigation (NYSCOPBA v. State, et al., USDC, NDNY, 11-CV-1523):** On October 22, 2018, we filed a Notice of Appeal to the Second Circuit Court of Appeals seeking a reversal of the U.S. District Court’s September 24, 2018 decision that granted the State defendants’ summary judgment motion dismissing all claims, including those in all of the related public employee union cases. All other public employee unions in the related cases likewise appealed the decision.

In dismissing our claims, the District Court took a strict construction interpretation of the collective bargaining agreements, and found that there was no explicit language contained in the contracts to support our claims that the health insurance contributions rates were promised to employees in retirement. The only promise was to continue health insurance benefits in retirement, which the State continues to provide to retirees. Using traditional collective bargaining agreement case law, the Court found that contract benefits expired upon the termination of the collective bargaining agreement, and that any presumption under prior case law (Yardman) to resolve contract ambiguities in the context of open-ended contract provisions for retiree insurance benefits in labor negotiations to provide for employee benefits in retirement, had been effectively overruled and made inapplicable as the result of a 2015 US Supreme Court decision in Tackett. This finding appears to ignore the general rule of contract construction and interpretation based upon a reliance of existing case law at the time the original contract was negotiated in 1982 to determine the parties' intent, including the Yardman presumption, and deposition testimony from GOER that similar language was used in subsequent negotiations during the 1990’s when the State intended to continue health insurance contribution rates for employees in retirement based upon a sliding scale of number of years of service. As a result, we believe that the decision is affected by error of law and raises issues of material fact requiring a trial. The Court further found that even had the State promised to continue contribution rates for employees in retirement, the small increases in contribution rates was not a substantial impairment of contract rights and was necessary to further an important State government interest in

addressing the State's fiscal crisis as part of a budget gap closing plan in the Executive Budget. As a result of this finding, even if the State had agreed to provide continued health insurance contribution rates for employees in retirement, the State could nevertheless refuse to honor its contractual obligations to implement necessary fiscal measures to address the budget crisis. We believe these findings lack sufficient support in the record and are contradicted by deposition testimony from the State's chief negotiator, Joe Bress, that it was his idea to include increased contribution rates for retiree health insurance, and that these are genuine issues of material fact requiring a trial. Additionally, as a matter of law, we believe that the State did not sufficiently demonstrate that it met the heightened legal standard necessary to permit the State to violate its contractual obligations based upon fiscal crisis and necessary emergency fiscal measures. While we have several grounds to raise on appeal regarding the collective bargaining contract claims, and the legal issues are substantial issues worth litigating in the long term, the Court's findings regarding the fiscal crisis exception presents a challenging hurdle to overcome in the context of the 2008 Great Recession and the State's Executive Budget gap-closing measures, including the across-the-board increases in health insurance contribution rates for employees and retirees, and the Court's characterization of the increases as legally insubstantial for purposes of stating a contract impairment claim.

On November 2, 2018, we filed an acknowledgement and notice of appearance, civil appeal pre-argument statement, and transcript statement. On November 6, 2018, we filed our scheduling request seeking to schedule the filing of our record and index on appeal and supporting legal briefs by February 4, 2019. In an attempt to coordinate the briefing schedules in all of the related union cases and the State defendants, we met with union counsel and acted as liaison with the State Attorney General's Office to reach agreement on a motion to the Second Circuit to designate the CSEA appeal as the lead case (as the District Court had below), provide for a coordinated filing of CSEA's brief on February 2, 2018, with all other appellants filing their brief 30 days thereafter, and otherwise providing for a universal briefing schedule and timeframes for the entire appeal in all related cases. The motion is presently pending before the Second Circuit. We are now reviewing the record and preparing the record and appendix on appeal, and legal brief in support of the appeal.

**Correction Sergeant, Spanish Language:** On May 4, 2018, we filed an Article 78 petition in Supreme Court, Albany County, challenging the Correction Sergeant Spanish Language civil service title and separate eligible list, and the appointments made by DOCCS to that title from the eligible list. We also included an application for a preliminary injunction, which was denied by the Court by Decision and Order dated June 28, 2018. The litigation was subsequently transferred to the law firm of Harris, Conway & Donovan, PLLC (Ryan Donovan, Esq.) based upon a potential conflict of interest involving NYSCOPBA and its members who are named respondents in the proceeding, including those remaining on the separate eligible list for the Correction Sergeant Spanish Language title. The lawsuit is ongoing, as previously unnamed respondents (named as "John Doe" and "Jane Doe" in the Petition) are now being named/discovered and the presiding Judge has granted respondents' request to extend the time to answer the petition.

**Edgecombe Correctional Facility:** This is another Article 78 Proceeding arising out of the termination of the member's employment by DOCCS because he was out of work for a period in excess of one year. The sergeant was injured restraining a parolee/inmate who was attempting to swallow contraband. We contend that the member should have been given a two-year leave pursuant to Section 71 of the Civil Service Law. This proceeding is also based upon the definition of Assault in the Second Degree contained in Section 120.05(3) of the Penal Law. Our Article 78 was returnable on October 26, 2018, but, at the request of the State, was adjourned to November 23, 2018. Our Reply Memorandum was filed on November 21, 2018. We are waiting for a decision.

**[Member] v. NYS Justice Center:** We filed an Article 78 petition challenging the decision of the Justice Center in the SHTA's case. The petition argues a legal issue specifically that the Justice Center failed to give *res judicata* or collateral estoppel preclusive effect to a favorable disciplinary decision involving the same exact allegations. The State, in response to our petition, moved to have the case immediately transferred to the Appellate Division, based upon a question of substantial evidence after a hearing. We submitted responsive papers on May 23, 2018, arguing that there was a question of law that must first be decided by the lower court. On June 29, 2018, we received a decision and order of transfer from the Judge assigned that the whole case would be transferred to the Appellate Division for a decision on the legal questions regarding *res judicata* as well as the substantial evidence question. The State's Answering Brief must be served by December 21, 2018. We will have seven days to serve and file a Reply Brief.

**Five Points Correctional Facility:** The officer received a letter from DOCCS, dated October 2, 2018, terminating his employment pursuant to Section 71 of the Civil Service Law, because the member had been out on Workers' Compensation Leave for a cumulative period in excess of one year. The termination date is November 1, 2018. The member was injured in an inmate-related incident on October 25, 2017. An inmate started his mattress on fire. The inmate was given orders to move to the back of his cell, which he refused. A supervisor ordered responding officers, including the member, to enter the cell to remove the inmate. The inmate resisted and was forced to the back of his cell and removed from the cell. The member sustained smoke inhalation, injuries to both wrists, and an injury to his right knee.

The inmate started a fire in his cell and refused orders to move to the back of his cell. The inmate's actions constituted Assault in the Second Degree pursuant to Penal Law §120.05(3). The inmate was interfering with the performance of an official duty by a peace officer which resulted in an injury to the peace officer. Attempt to cause injury is not an element of this crime under Penal Law § 120.05 (3). DOCCS has extended the member's termination date until December 1, 2018, to reconsider this issue. Any Article 78 proceeding must be filed on or before February 1, 2019.

**Clinton Correctional Facility v. NYS DOCCS:** This is another Civil Service Law Section 71 case. We commenced an Article 78 Proceeding challenging DOCCS' determination that the member was entitled to only a one-year leave, as opposed to two-year leave, when he was injured restraining a combative inmate. Our Reply Brief was served on August 28,

2018. The return date of the Article 78 Proceeding was August 31, 2018. We are waiting for a decision.

**[Member] and NYSCOPBA v. DOCCS:** The member received an arbitration award dated January 19, 2018. In that Award, Arbitrator Samuel Butto found that Grievant was guilty of Charge #3 and issued a penalty of dismissal from service. Regarding the suspension, the arbitrator found that the suspension was not in accordance with Article 8.4 (a)(2) of the collective bargaining agreement because of the acquittal of the criminal charges. He awarded that Grievant shall receive full back pay from the date of his suspension from duty. This matter was handled by W. James Schwan, who wrote to DOCCS Director of Labor Relations John Shipley requesting that DOCCS follow the award and pay the member the back pay money owed to him. Since the member was not made whole pursuant to Arbitrator Butto's January 19, 2018, Award, on March 29, 2018, we filed a Notice of Verified Petition and Verified Petition to confirm the arbitration award. By Decision and Order dated October 3, 2018, Judge Kimberly O'Connor granted NYSCOPBA's Petition to confirm the arbitrator's award and denied the State's Cross-Petition to partially vacate the arbitration award. The Order and Notice of Entry were filed with the Clerk and we served a copy of that filing pursuant to CPLR 2220 on Respondents on October 16, 2018. On November 19, 2018, DOCCS filed a Notice of Appeal.

**[Member] and NYSCOPBA v. DOCCS (Albany County Index Number 04662-18:** The member (Cayuga Correctional Facility) was injured while restraining an inmate who was in possession of a weapon. The member was notified by DOCCS that his employment was being terminated effective July 27, 2018, because he has been absent for more than one cumulative year because of a work related injury. The member stopped an inmate for a pat frisk and saw a weapon in the inmate's left pants pocket. The inmate pulled the weapon out of his pocket and tried to move away from the member who was injured during the restraint. DOCCS now defines an assault as injury sustained as the result of an intentional physical act of violence directed towards an employee by an inmate or parolee. Assault in the Second Degree, as defined in Penal Law §120.05(3), occurs when a person, with intent to prevent a peace officer from performing a lawful duty, causes physical injury to the peace officer. What happened to the member is an Assault in the Second Degree according to the Penal Law. On July 20, 2018, we filed an Article 78 Proceeding challenging DOCCS' definition of an assault and requesting that the court give the member a two-year leave. The Article 78 return date, pursuant to a request from the Attorney General's Office, was adjourned to September 14, 2018. Our Reply Brief was filed on September 13, 2018, and we are waiting for a decision.

**[Member] v. Justice Center (Supreme Court, Albany County):** On February 8, 2018, we received an order from the New York Supreme Court transferring the case to the Appellate Division. By way of background, on August 3, 2017, we commenced a special proceeding pursuant to CPLR article 78 to review a determination of the Justice Center which denied the member's request to amend and seal a report of alleged abuse. The challenged decision was issued after an administrative hearing conducted before Administrative Law Judge Sharon Golish Blum on March 8, 2017, at the Adam Clayton Powell Jr. State Office Building in New York, New York. In the Decision after Hearing, the Administrative Law

Judge denied the member's request to amend the substantiated finding of abuse and to seal the file.

The case resulted from an incident on July 4, 2015, at the Kirby Forensic Psychiatric Center in which it was alleged that the member conducted a restraint with excessive force and improper technique, which included grabbing a service recipient by his shirt, lifting him up by his collar, pushing him to the floor, dragging him into the hallway, and/or punching him in the face. On July 4, 2015, during the lunch time, two service recipients started fighting while seated at one of the cafeteria tables. Although other staff members were present, they were not in the immediate area to provide assistance to the member. The fight escalated and both patients began exchanging closed fist blows. After standing up, one patient grabbed a plastic knife and attempted to stab the other patient in the face. At that time, the member intervened, grabbed the patient with the knife to restrain him in an OMH approved maneuver called a "standing wrap." However, in doing so, the member backed into the table behind him, causing both the member and the patient to fall to the floor.

The ALJ found that allegation unsubstantiated because the member's actions were reasonable emergency interventions to prevent the imminent risk of harm to a person—he had to prevent the other patient from being stabbed in the face. While the patient was on the floor, the member observed that the knife previously used in the attack was on the floor, and within reach. The member reasonably believed that the patient might harm someone—another patient, another staff member, or himself—so with no staff assistance immediately available, he grabbed the patient, who had previously possessed the knife, and dragged him 6 to 8 feet, out of the dining room and into the hallway. With respect to that allegation, the Administrative Law Judge found the abuse allegation substantiated because dragging the patient out of the cafeteria was not a reasonable emergency intervention.

In the Article 78, we allege that the finding in the Recommended Decision after Hearing, that the act of dragging the Service Recipient out of the dining room by the back of his shirt was not a reasonable emergency intervention to prevent imminent risk of harm, was irrational and not supported by substantial evidence. We filed the Record on Review and Brief in Support on September 10, 2018. The State's Brief was due November 8, 2018.

### Discipline

**Interrogations:** For the months of October 2018 and November 2018, we represented seventy-eight (78) members who were interrogated by DOCCS.

**Auburn Correctional Facility:** Three officers are accused of spraying a fire extinguisher on an inmate and participating in other abuse of the inmate. Two NODs have been assigned to Arbitrator Timothy Taylor and one NOD has been assigned to Arbitrator Samuel Butto. No dates have been scheduled.

**Bare Hill Correctional Facility:** This NOD is for allegedly using improper and racial language in front of inmates. Hearing dates were held before Arbitrator Edward Battisti on July 11 and 12 and October 3 and 4, 2018. Closing Briefs were served on November 26, 2018.

**Bedford Hills Correctional Facility:** The NOD in this case alleges that the member, while off-duty, cut and/or stabbed an individual, for which the member was subsequently arrested and criminally charged. Two days of hearing in this matter were held on October 26, 2018, and November 6, 2018, before Arbitrator Timothy Taylor. Briefs are due December 20, 2018.

**Bedford Hills Correctional Facility:** The officer in this NOD is accused of falsifying information on his Sergeant's canvass letter. The case has been assigned to Arbitrator Samuel Butto and is scheduled for hearing on December 5, 2018.

**Buffalo Psychiatric Center:** The member received a notice of discipline alleging that in the course of his job duties, he filed an accusatory instrument with Buffalo City Court containing false statements, unlawfully imprisoned an individual, improperly acquired an electronic stun gun during a traffic stop and inappropriately called in sick to work when he was working another security job. OMH is seeking termination. Hearing dates were held before Arbitrator Thomas Rinaldo on August 6 and 27, September 10, and October 1, 5 and 31. The parties are to submit closing briefs by January 11, 2019.

**Central New York Psychiatric Center:** The NOD in this case alleged that the member was insubordinate when she refused to allow staff from the CNYPC Safety Department to complete a contraband pat frisk and violated the facility's Respect and Interpersonal Behavior Policy when she made certain comments to another staff member. Two days of hearing were scheduled for November 19 and 20, 2018, before Arbitrator Trachtenberg. On the first day of hearing, prior to the commencement of the proceeding, the member chose to accept a settlement.

**Coxsackie Correctional Facility:** The NOD alleges that the member used racial and profane language while instigating a use of force on an inmate. Day one of arbitration took place on October 16, 2018, before Arbitrator Cooper. The second and third days of hearing took place on December 5 and 6, 2018. The final day of hearing will take place on December 18, 2018.

**Cultural Educational Center:** This member has received three Notices of Discipline involving his conduct. He is charged with, on multiple occasions, using his personal cell phone and a personal laptop computer as well as using chewing tobacco in the Security Console. Hearings have been scheduled before Arbitrators Butto and Trachtenberg on February 13, February 21 and February 28, 2019.

**Downstate Correctional Facility:** On August 11, 2017, the member received an NOD resulting from an arrest for an alleged sexual assault. This matter was scheduled for September 11, 2018. The Complainant did not appear on September 11, and the matter

was adjourned until November 26, 2018, with the understanding that the NOD would be dismissed if the Complainant did not appear. The Complainant again failed to appear on November 26, and the State requested an adjournment to obtain a court ordered subpoena compelling the Complainant's testimony. Over our objection the Arbitrator granted the request for an adjournment. An Interim Award was made placing the Grievant back on the payroll as of September 11, 2018.

**Downstate Correctional Facility:** The member received a notice of discipline alleging that on or about August 8, 2017, he failed to appropriately supervise and report staff's inappropriate treatment of an inmate; failed to ensure that inmates were seen by medical personnel; failed to ensure that use of force paperwork was completed; and failed to ensure that a blood spill was appropriately cleaned. The member is not suspended from duty. DOCCS is seeking dismissal from service. The arbitration of this matter is scheduled for December 7, 2018, in Fishkill, NY, before Arbitrator Lise Gelernter.

**Fishkill Correctional Facility:** The officer in this NOD was charged criminally. When the criminal matter is resolved the NOD may proceed.

**Fishkill Correctional Facility:** This NOD is for allegedly leaving the facility with a canister of OC spray without permission and failing to cooperate with the facility's efforts to retrieve the canister. We have submitted our arbitrator requests and are awaiting the assignment of an arbitrator.

**Fishkill Correctional Facility:** The NOD alleges that the member unlawfully discharged a firearm and shot a raccoon while the member was off duty at his residence, and arrested and charged with violating NYS Penal Law § 120.20 (reckless endangerment 2°), a Class A Misdemeanor, and NYS Agriculture and Markets Law § 353-a, Article 26 (aggravated cruelty to animals), a Felony, and seeks dismissal from State service. The matter will not be scheduled for a hearing until the underlying criminal charges are resolved, which may lead to automatic dismissal from service by operation of law upon a felony conviction.

**Fishkill Correctional Facility:** A hearing in this matter was scheduled for October 18 and 19, 2018. The NOD in this non-suspension case alleges that the member provided false statements and reports when he reported that an inmate was trying to "fish" an item from his cell and when he reported that a fellow security staff member placed the inmate in mechanical restraints. The hearing was adjourned due to a scheduling conflict. A new hearing date has not yet been finalized, but will likely be scheduled for January 2019.

**Fishkill Correctional Facility:** The member received a Notice of Discipline when she was arrested for possession of Suboxone. The member's arbitration was scheduled for November 29, 2018, and has been adjourned because of the pendency of the criminal charges.

**Fishkill Correctional Facility:** This Sergeant is accused of falsely stating that restraints were placed on an inmate by another officer. The NOD has been assigned to Arbitrator David Lande.

**Fishkill Correctional Facility:** This member has been charged with using unnecessary and excessive force. Four (4) days of hearings were held on September 8, 2017, December 19, 2017, May 9, 2018, and July 31, 2018, before Arbitrator Lise Gelernter. The final transcript has been received and briefs were submitted on October 19, 2018. We await the decision from the Arbitrator.

**Franklin Correctional Facility:** This termination NOD alleges that the member was involved in an off-duty incident that led to his arrest for a violation of NYS Penal Law § 120.00 (Assault 3<sup>o</sup>), a Class A Misdemeanor, NYS Vehicle and Traffic Law § 1192(2), (3) and 1194(1)(B) (DWI common law and .08% or more BAC, refusal to take breath test), Misdemeanors, and bringing discredit upon the Department as a result of his arrest being reported in several local newspapers. The matter will not be scheduled for a hearing until the underlying criminal charges are resolved, which may lead to dismissal from service by operation of law based upon a criminal conviction involving lack of honesty or integrity violating the officer's oath of office pursuant to Public Officers Law § 30.

**Great Meadow Correctional Facility:** The member received an NOD dated November 20, 2017. This is another Herman Bell case. The member is charged with failing to report an excessive and unjustified use of force and making false statements during his interrogation. The first two days were heard on July 18 and 19, 2018. The final hearing day was held on November 7, 2018. Closing briefs are due on January 11, 2019.

**Great Meadow Correctional Facility:** This NOD is for allegedly failing to report another officer's alleged excessive force and providing false information. The NOD has been assigned to Arbitrator Edward Battisti. Hearing dates occurred on October 11, 12, and 24, 2018. Closing Briefs are due on December 21, 2018.

**Great Meadow Correctional Facility:** The member has received two Notices of Discipline arising out of the Herman Bell use of force. The NODs are dated October 4, 2017, and November 27, 2017. Charges 2 and 3 of the First NOD, which charged the member with lying when he stated that he passed his assigned OC Spray to another officer, were being withdrawn by DOCCS. The remaining charge alleges that the member withheld the name of staff that were physically restraining Inmate Bell, withheld information as to what he saw regarding the force used on Inmate Bell, and withheld the names of staff who responded to the Level 2. The Second NOD charges the member with failing to report an unjustified and excessive use of force on Inmate Bell. Days 1 and 2 of this case were held on May 2 and 4, 2018. Day 3 was held on August 17, 2018. On Day 3, the Department presented testimony from Deputy Commissioner Kirkpatrick and then called the member. At the conclusion of the member's testimony, the State requested an adjournment. The fourth hearing day was held on September 27, 2018. The State rested after the testimony of Herman Bell, and the Grievant rested as well. Closing Briefs were submitted on November 16, 2018.

**Great Meadow Correctional Facility:** This NOD alleges utilizing unjustified and excessive force on an inmate, completing and signing an Inmate Misbehavior Report



containing false and misleading information, and making false and misleading statements during an interrogation. The matter has been scheduled for a hearing before Arbitrator Timothy Taylor on December 5 and 6, 2018.

**Great Meadow Correctional Facility:** On November 2, 2018, we received the decision in the member's case. This case involved the Herman Bell incident. The member was found guilty of not securing the gates, but not guilty of dereliction of duty and lying to the OSI. The Arbitrator found that termination was not appropriate and gave him six months' suspension. He also found that the Department lacked probable cause to suspend him. With respect to the facts of the case, September 5, 2017, Inmate Herman Bell was involved in a use of force with several officers. The member was not involved in the actual use of force. Instead DOCCS claimed that the member failed to secure the gates during a level 2 incident, failed to take proper actions during a level 2 incident and withheld information from the Department on what he saw, who was involved, and who responded to the use of force, essentially lying to the OSI. The arbitrator found the member guilty of charge 1, because he admitted he did not lock the gates. He found him not guilty of charge 2, finding that the member was extremely busy during the incident and that it seemed relatively under control. Thus, the member performed his duties. Most importantly, he found the member's testimony to the OSI credible and consistent. Therefore, he was not guilty of charge 3.

**Great Meadow Correctional Facility:** The NOD in this case alleges that the member failed to report the use of unjustified and excessive force by other staff members and provided false statements in his interrogation with OSI. The first two days of hearing in this case were held August 6 and 7, 2018, before Arbitrator Taylor. The third and fourth days of hearing were held on November 28 and 29, 2018. Briefs are due February 4, 2019.

**Green Haven Correctional Facility:** The officer in this NOD is charged criminally. When the criminal matter is resolved the NOD may proceed.

**Green Haven Correctional Facility:** The NOD alleged that the member made a racist joke in front of multiple staff members (a joke which the member heard from an African American inmate). The matter was heard on November 20, 2018, before Arbitrator Lise Gelernter. This was a "penalty only" case, as the member did not dispute the underlying conduct in the NOD. The Arbitrator found the member guilty of the charges, determined that the member was repeating what he had heard without racial malice, and issued a two-month suspension without pay. The Arbitrator also found that the Department improperly suspended the member without pay pending the results of the NOD and issued the member back pay, minus the two-month penalty. The member has since returned to duty.

**Griffin Laboratories, Department of Health:** This termination NOD alleges that on two occasions the member improperly handled a bat specimen brought to the laboratory, and on one occasion allowed the bat to get loose and failed to report it, and in both incidents, risked potentially fatal exposure to rabies in violation of Mutual Aid Protocol, Emergency Protocol, and Post Instructions General Orders after he was previously instructed and directed not to handle any specimens. Awaiting arbitrator selection and hearing dates.

**Marcy Correctional Facility:** The officer in this NOD is charged criminally. When the criminal matter is resolved, the NOD may proceed.

**Moriah Shock Incarceration Correctional Facility:** The member charged in this NOD has a criminal action pending. When the criminal matter is resolved, the NOD may proceed.

**NYS Department of Education:** The member received a Notice of Discipline for insubordination. The arbitration was scheduled for November 14, 2018, but has been adjourned to January 11, 2019.

**NYS Department of Education:** The member is charged with numerous counts of disrespectful behavior to supervisors and insubordination. The NOD has been assigned to Arbitrator Bruce Trachtenberg and is scheduled for hearing dates on January 23 and 24, 2019.

**New York State Psychiatric Institute/Washington Heights:** In this NOD, the SSO is accused of failing to follow orders when he refused to let a patient's service dog see his provider for a scheduled visit. We have submitted our arbitrator requests and are awaiting the assignment of an arbitrator.

**Shawangunk Correctional Facility:** The member in this NOD was charged criminally. When the criminal matter is resolved, the NOD may proceed.

**Sing Sing Correctional Facility:** The NOD alleges that the member, while off duty, operated a motor vehicle while under the influence of alcohol. The matter involves associated criminal charges. The matter was scheduled for a hearing on October 18, 2018, before Arbitrator Timothy Taylor, but has been adjourned while the member resolves criminal charges.

**Sing Sing Correctional Facility:** This officer is charged with misconduct for escorting an inmate to a cell without another officer present, failing to use a retention strap when escorting the inmate and failing to remove mechanical restraints from the inmate. A hearing has been scheduled for January 9, 2019 before Arbitrator David Lande.

**Sing Sing Correctional Facility:** The NOD alleged that the member, while off duty, operated a motor vehicle while intoxicated. This matter involves associated criminal charges. The matter was scheduled for a hearing on November 1, 2018, before Arbitrator Lise Gelernter. The matter settled prior to the hearing and the member returned to duty.

**Sullivan Correctional Facility:** The Officer in this NOD is accused of possessing and testing positively for marijuana.

**Ulster Correctional Facility:** A hearing in this matter was scheduled for October 30, 2018. The NOD in this case was for time and attendance policy violations and was issued on April 21, 2017. This NOD, along with another NOD for time and attendance policy

violations issued to the member on August 15, 2018, were resolved by a settlement agreement prior to the hearing.

**Upstate Correctional Facility:** This officer in this NOD is accused of repeatedly spending hours inattentive while on duty. The NOD has been assigned to Arbitrator James Cooper. Hearing dates were scheduled for November 28 and 29, 2018. This matter has since settled.

**Upstate Correctional Facility:** The officer in this Notice of Discipline is accused of failing to remain alert and attentive to his duties. The Notice of Discipline has been assigned to Arbitrator Timothy Taylor. This matter was scheduled to be heard on December 20 and 21, 2018. This matter has since been resolved.

**Wallkill Correctional Facility:** The NOD alleges that during the execution of a search warrant at the member's home, the member was found in possession of a picture on his personal cell phone, and arrested and charged with violating NYS Penal Law § 263.16 (possessing a sexual performance by a child), a Class E Felony, and seeks dismissal from State service. The matter will not be scheduled for a hearing until the underlying criminal charge is resolved, which may lead to automatic dismissal from service by operation of law upon a felony conviction.

**Washington Correctional Facility:** The officer in this NOD is charged criminally. The criminal matter was resolved and the NOD was settled.

**Washington Correctional Facility:** The Officer in this NOD was charged criminally. The criminal charges have been resolved and settlement negotiations are ongoing.

**Woodbourne Correctional Facility:** The officer in this NOD is charged criminally. When the criminal matter is resolved the NOD may proceed.

### Justice Center

**Bernard Fineson Developmental Center:** This Category 2 and 3 report of physical abuse and neglect alleges that the member committed neglect when she prevented a service recipient from moving about the Chauncey Residence IRA and placed her arm on the service recipient's neck. We submitted a request for amendment on September 18, 2018, and await a response.

**Kirby Forensic Psychiatric Center:** This Category 2 report of neglect/abuse stems from allegations from a service recipient that he was choked and scratched by the member. The matter was heard before ALJ Requets on September 19, 2018, in Brooklyn. ALJ Requets issued a decision finding the member not guilty of all charges, directed that the report of substantiated finding be unsubstantiated, ordered that the case be sealed immediately, and ordered that the member's name be removed from the VPCR.

**Kirby Psychiatric Center:** This Category 3 report of physical abuse and neglect alleges that the member directed a derogatory comment toward a service recipient and placed a service recipient in a room and/or pushed a pen in his back. We submitted a request for amendment on August 15, 2018, and await a response.

**Mid-Hudson Forensic Psychiatric Center:** This Category 2 report of neglect alleges that the member fell asleep or was less than alert while on duty, and/or otherwise failed to provide a service recipient with proper supervision. An administrative hearing was scheduled for September 18, 2018 in Schenectady, and has been rescheduled for November 9, 2018.

**Mid-Hudson Forensic Psychiatric Center:** A report of Category 3 abuse (deliberate inappropriate use of restraints) and Category 3 physical abuse was issued on February 12, 2018. The report alleges that on October 14, 2017, the member conducted a restraint with excessive force and improper technique, during which time a service recipient was thrown on his bed and punched. The administrative hearing of this matter is scheduled for January 30 and 31, 2019, in Poughkeepsie, NY.

**Mid-Hudson Forensic Psychiatric Center:** A report of Category 3 abuse (deliberate inappropriate use of restraints) and Category 3 physical abuse was issued on February 12, 2018. The report alleges that on October 14, 2017, the member used excessive force and restrained a service recipient with improper technique, including by initiating a restraint without the assistance of another staff member, during which time a service recipient was thrown on his bed and punched. The administrative hearing of this matter is scheduled for January 30 and 31, 2019, in Poughkeepsie, NY.

**Mid-Hudson Forensic Psychiatric Center:** A report of Category 3 abuse (deliberate inappropriate use of restraints) and Category 3 physical abuse was issued on February 12, 2018. The report alleges that on October 14, 2017, the member conducted a restraint with excessive force and improper technique, during which time a service recipient was thrown on his bed and punched. The administrative hearing of this matter is scheduled for January 30 and 31, 2019, in Poughkeepsie, NY.

**Mid-Hudson Forensic Psychiatric Center:** This Category 2 report of neglect alleges that the member fell asleep or was less than alert while on duty, and/or otherwise failed to provide a service recipient with proper supervision; a Category 3 report of abuse also alleges that the member falsified records related to a service recipient's safety and supervision. An administrative hearing was scheduled for September 18, 2018 in Schenectady, and has been rescheduled for November 9, 2018.

**Mid-Hudson Forensic Psychiatric Center:** This Category 2 report of physical abuse and abuse (deliberate inappropriate use of restraints) alleges that on August 21, 2017, the member conducted a restraint with excessive force and/or improper technique, including scraping a service recipient's face on concrete, kicking and/or punching him. The Justice Center denied our request for amendment and we await a pre-hearing conference date.

**Mid-Hudson Forensic Psychiatric Center:** This Category 2 report of physical abuse and abuse (deliberate inappropriate use of restraints) and Category 3 abuse (obstruction of reports of reportable incidents) alleges that on May 15, 2017, the member choked a service recipient, conducted an unwarranted restraint with improper technique and excessive force and falsified records related to a service recipient's safety or supervision. On November 26, 2018, we filed a motion for res judicata/ collateral estoppel, arguing that the Justice Center should be precluded from re-litigating issues of fact already determined by an arbitrator during the disciplinary arbitration of this matter, for which the member was found not guilty of all charges. We await the Justice Center's response and a decision by Judge Devane prior to the January 11, 2019, administrative hearing date.

**Mid-Hudson Forensic Psychiatric Center:** A report of Category 3 abuse (deliberate inappropriate use of restraints) and Category 3 neglect was issued on February 12, 2018. The report alleges that on October 14, 2017, the member approved the use of a four-point restraint for a service recipient without approval. The administrative hearing of this matter is scheduled for January 30 and 31, 2019, in Poughkeepsie, NY.

**Mid-Hudson Forensic Psychiatric Center:** This Category 2 report of physical abuse and abuse (deliberate inappropriate use of restraints) alleges that on August 21, 2017, the member conducted a restraint with excessive force and/or improper technique, including scraping a service recipient's face on concrete, kicking and/or punching him. The Justice Center denied our request for amendment and we await a pre-hearing conference date.

**New York City Children's Center:** This Category 3 report of neglect/abuse alleged that SSO Charles improperly used handcuffs on a service recipient in order to gain therapeutic compliance, despite the fact that this action was at the direction of the service recipient's doctor and treatment team leader. The matter was scheduled for a hearing on November 7, 2018, before the Justice Center in Brooklyn, but settled prior to the hearing.

### **Improper Practice Charges**

**Statewide - Civil Service Promotional Exam Fees (U-29179):** NYSCOPBA, along with other unions, filed an IP alleging that the State unilaterally changed its policy/procedure with respect to the fees charged for promotional civil service examination. The case was heard by an ALJ, went up to the Board, and was remanded back to the ALJ for further proceedings. Ultimately, ALJ Sargent found that the State, specifically the Department of Civil Service, violated § 209-a.1 (d) of the Act when it unilaterally began requiring employees to pay a fee for promotional/transition examinations, and ordered the State to make whole employees for any fees paid. Subsequently, the State filed exceptions to the Board on this decision. On behalf of NYSCOPBA, this office submitted a response to the exceptions. The State has since served on NYSCOPBA a petition for an Article 78 special proceeding to challenge PERB's determination. This office is preparing responsive documents.

**Statewide – DOCCS (Clear Bag) (U-35624):** The hearing in the Improper Practice Charge relative to the clear bag was completed on July 11 and 12, 2018. We had a total of four days of hearing in this matter before ALJ Sergent at PERB. In total, the union presented seven witnesses and the State presented two witnesses for their case (former D.C. Bellnier and Dan Martuscello) who we had an opportunity to cross examine. The record is now closed. We have just received the transcripts from the hearing and will be provided with a date to submit briefs soon. The ALJ sets the initial briefing schedule, usually 30-60 days. Once briefs are submitted, the ALJ will issue her decision. There is no set timeframe for PERB decisions and it can take quite some time for a decision.

**Statewide – Commissioner Annucci’s Memorandum (U-35773):** This office filed an Improper Practice Charge in response to Acting Commissioner Annucci’s May 3, 2017, memorandum. The memorandum was read at lineup to correction staff for ninety-six (96) hours, which, among other things, effectively accused the Union of disseminating “half-truths” and perpetuating a “negative outlook” about the Department. We received the State’s Answer in response. An initial conference took place on October 19, 2017. This matter has been complicated by GOER indicating that it will consider issuing strike notices to members for alleged job actions that occurred at Auburn CF, Clinton CF, and Great Meadow CF in April-May 2017 if this IP is not withdrawn. That is because the Annucci memo was (in DOCCS’ words) a “knock-it-off” response to the job actions. On January 8, 2018, this office met with NYSCOPBA Executive VP Tammy Sawchuk, Northern Region VP John Roberts, Business Agent Ricky Brunelle, and Stewards from Clinton CF and Great Meadow CF to present and discuss the facts surrounding the IP and possible strike notices, and its potential impact on members at Clinton CF. The matter was scheduled for a hearing, but has since been placed on the PERB hold calendar pending negotiations with GOER.

**Statewide – Duty of Fair Representation (Harrington – now retired) (U-36027):** We submitted our Answer on behalf of NYSCOPBA in an Improper Practice charge filed by a member (who has since retired), alleging that NYSCOPBA breached its duty of fair representation in the manner in which it allegedly withheld union representation from CO Harrington at Fishkill Correctional Facility. A conference was held at the Albany PERB Office on March 14, 2018, at 11 am. A second pre-hearing conference took place by phone on June 12, 2018, to discuss evidence and issues to be resolved at hearing, with hearing dates of July 30 and 31, 2018. The hearing was adjourned on July 30, 2018, at the request of CO Harrington, as he was physically incapable of appearing at the hearing due to his recent surgery. Judge Reich adjourned the hearing scheduled a phone conference to further discuss scheduling and the matter. The matter was heard on November 7 and 28, 2018, before Judge Reich. The parties rested and await transcripts in order to submit closing briefs on the matter.

**Statewide – Employee’s Manual (U-33638):** On February 23, 2018, we discussed settlements with GOER to resolve this charge. This IP is from 2014 and involves changes in the Employee’s Manual. Specifically, the changes include: section 2.2 regarding a change in the licensure practice; section 2.3 regarding reporting requirements in domestic violence situations; section 4.9 regarding copying documents; section 4.15 regarding

dissemination of criminal history; section 6.3 regarding official stationary; and section 2.44 regarding alerting of supervisory rounds. We will keep you informed regarding progress of negotiations.

**Statewide – Office for People with Developmental Disabilities (U-35979):** On September 26, 2017, we filed an Improper Practice Charge with PERB, stemming from a statewide OPWDD job posting for specialized SSO1 positions as Family Care Inspectors. The job posting requires interested candidates to submit a cover letter and resume. Past practice has been to bid these positions regionally and award them by seniority. The charge alleges that OPWDD violated the Act by unilaterally changing the posting and bidding procedures without negotiating with NYSCOPBA. The initial conference of this matter was held December 20, 2017. An improper practice charge was filed after a statewide OPWDD job posting for specialized SSO1 positions as Family Care Inspectors required applicants to submit a resume and cover letter and did not award the jobs by seniority. This matter has been placed on PERB's hold calendar in order for both parties to investigate it further.

**Statewide – Outside Employment Directive (U-36646):** This office filed an improper practice charge to challenge recent changes to Directive 2218 regarding Department employees' ability to engage in outside self-employment. The Department's recent revision to the directive prohibits employees from freely engaging in outside self-employment. Now, employees must request and obtain authorization from the Department prior to engaging in such outside self-employment, and the Department enjoys the discretion to deny any requests. There had previously been no requirement to do so and employees engaged in outside self-employment at will. The matter is scheduled for a pre-hearing conference on January 31, 2019, at 10 am at PERB in Albany.

**Albany Training Academy (U-36266):** We filed an improper practice charge with PERB after Albany Training Academy Assistant Director James Huff threatened and refused to provide the member with Union representation during investigatory questioning that took place during a chemical agents instructor school at the Albany Training Academy in November 2017. The charge alleges that Assistant Director Huff denied the member Union representation during questioning which could result in discipline, and that Assistant Director Huff's behavior constituted interference and retaliation, all in violation of the Act. An initial conference was held on June 11, 2018, before Administrative Law Judge William Weisblatt. The parties engaged in settlement discussions.

**Albany Training Academy/ Office of Diversity Management (U-36639):** We filed an Improper Practice Charge with PERB, after DOCCS Office of Diversity Management Affirmative Action Administrator Dennis Brandow refused to provide the member with the Union representative of his choice during investigatory questioning that took place at the Albany Training Academy on September 14, 2018. The Charge alleges that Mr. Brandow's actions, in light of the member's request for Union representation constituted retaliation and interference in violation of the Act. A preliminary conference at PERB has been scheduled for January 7, 2019.

**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 injured 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. During that time, the Union will continue to review various assault alert forms completed by members in order to ascertain whether they received medical treatment or were ignored by facility physicians.

**Central New York Psychiatric Center (U-35970):** A conference was held on January 17, 2018 in U-35970 NYS-OMH. On September 21, we filed an Improper Practice Charge alleging that Central New York Psychiatric Center, (“CNYPC”) interfered, restrained, retaliated against and coerced employees in the exercise of their rights guaranteed under the *Taylor Act*. Specifically, we alleged that on August 27, 2017, the member, a NYSCOPBA member, Union Steward, and a Central Service Staff member, was directed to cover a mandatory overtime post at SUNY Upstate Medical Center. On September 13, 2017, NYSCOPBA filed a grievance regarding the mandating of overtime to the member and the change in overtime policy generally. After the grievance was filed, on September 15, 2017, Mr. Paparella confronted Central Service Staff members regarding the grievance on overtime mandating and distribution. During the discussion, Mr. Paparella stated, among other things: 1) Things are going to happen if [the grievance] goes through; 2) That he is sick and tired of all the whining and complaining; 3) That he planned to remove responsibilities from those who filed the grievance; 4) That Central Staff SHTA’s duties would be changed such that, upon entering the building, they would be assigned different posts and locations. On September 19, 2017, in further retaliation to the grievance, Mr. Paparella directed supervisory staff to assign Central Service Staff members to cover all Mandatory Overtime at the SUNY Upstate Medical Center. Such direction is inconsistent past practice, as well as the local Labor/Management agreement. The case is on hold pending further discovery.

**Central New York Psychiatric Center (U-36192):** This office filed an Improper Practice Charge in response to CNYPC’s reinterpretation of the existing call-in procedure that changes how an ill employee reports an illness-related absence and how such absence is counted for discipline purposes. The matter was heard at a pre-hearing conference with ALJ Weisblatt on March 26, 2018. The Judge placed the matter on PERB’s hold calendar until June 1, 2018, to give the parties the opportunity to discuss possible settlement. The matter has been scheduled for a hearing on March 14, 2019.

**Mid-Hudson FPC Bag Restriction (U-36147):** We filed an Improper Proper Practice Charge alleging a failure to negotiate regarding a mandatory subject of bargaining. Mid-Hudson FPC unilaterally changed a significant work rule, impacting the comfort and convenience of employees. Specifically, the facility implemented a new rule restricting all employees to entering the facility with only one bag (of restricted size) for clothing, etc. and one small cooler for food. The prior practice at the facility did not limit employees in the size and number of bags they could bring into the facility for each shift. We appeared



at a conference on March 21, 2018, before ALJ Weisblatt. The parties had a substantive conversation about settling this case. The ALJ placed the matter on the hold calendar so that the discussions could continue.

**Rochester Psychiatric Center (U-36177):** We filed an improper practice charge with PERB, after Rochester PC announced a new paycheck distribution policy whereby employees will no longer be able to pick up live paychecks at Rochester PC. Judge Burritt held a conference call between the parties on June 5, 2018, to discuss resolution. A second conference call to discuss the resolution of this charge took place on July 9, 2018.

**Roswell Park Cancer Institute (U-36525):** We filed an improper practice charge after RPCI unilaterally changed the work schedules and pass days of several members' bidded posts without prior negotiations. This resulted in some members losing their rotating three-day-weekends and other members having weekday pass days instead of weekend pass days. A pre-hearing phone conference took place on October 4, 2018. A second phone conference took place on November 16, 2018. The ALJ requested that the parties draft written submissions on various procedural topics that may impact the case irrespective of the merits. Those submissions are due January 18, 2019. The matter will likely be scheduled for a hearing.

**Sing Sing Correctional Facility (U-36471):** A conference was held with ALJ Burritt on October 4, 2018. This improper practice charge alleges that the State violated the Taylor Law when it refused to provide video of an incident upon request by NYSCOPBA. A hearing in this matter was scheduled for January 17, 2019. Based on instruction from the Executive Board, this charge will be withdrawn and the matter closed.

**Southport Correctional Facility (U-34184):** On December 12, 2017, we participated in a conference call initiated by PERB on this charge, which 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. A hearing in the case was held in December of 2015 and briefs were later filed, but the administrative law judge who heard the case left PERB before issuing a decision. The case is now assigned to another judge who, if a settlement is not otherwise reached, will review the record and briefs and issue a decision. On the conference call, the judge asked the attorneys to present their legal arguments in support of their respective positions and she also asked the parties to consider whether there was a possibility of settling the case. We are exploring that.

### **Contract Enforcement**

**Appeals to Arbitration:** We received sixteen (16) requests from NYSCOPBA's grievance department to appeal contract grievances to arbitration during the months of October and November 2018. We have reviewed the grievance files and drafted and submitted the arbitration appeals to the Governor's Office of Employee Relations (GOER).

During the months of October and November 2018, we have triaged ninety-nine (99) grievances; two (1) were settled and twenty-one (21) were withdrawn. We held four (4) expedited arbitration proceedings and eight (8) summary hearings.

**Albion Correctional Facility:** This matter was heard in an expedited arbitration proceeding on November 9, 2018. The issues addressed at hearing were (1) whether the matter was timely filed and (2) whether DOCCS violated Article 14.9 when it rejected the member's medical notes for three absences in July of 2012. We await the Master Arbitrator's decision in this matter.

**Five Points Correctional Facility:** This grievance alleged that the State violated Articles 14 and 27 of the Agreement when the State, in relevant part, improperly designated the grievant "AWOL" rather than "LWOP" for five months following a denial of his National Medical Reviews (NMR) appeal. On November 29, 2018, the State agreed to settle the grievance by removing the AWOLs and designating the grievant LWOP for the entire time period.

**NYS Department of Health:** This grievance alleged that the State violated Article 15.3(e) of the Agreement when it unilaterally changed the member's shift and pass days during a period of staffing shortage. The grievance alleged that the State changed the member's pass days for the purpose of avoiding overtime. An expedited arbitration was held before Master Arbitrator Joel Douglas on July 26, 2018. Arbitrator Douglas found no contractual violation, concluding that "the primary motive for changing the RDOs was to achieve better use of manpower and not to avoid the payment of overtime."

### Retirement

**Coxsackie Correctional Facility:** This is a disability retirement matter. The Applicant's physician testified on February 14, 2018. The member's testimony was taken on September 14, 2017. The matter has been continued to allow the Applicant to obtain copies of his medical records regarding recent surgeries. The matter has also been continued for the testimony of the System's physician.

**Downstate Correctional Facility:** The member sustained a number of injuries during her career as an officer. Her ordinary disability retirement application was denied on the basis that she was not permanently disabled from performing the duties of a correction officer. The member testified on October 25, 2018. The matter was continued for the testimony of the member's doctor.

**Green Haven Correctional Facility:** This is a disability retirement matter where the member sustained a head injury. On March 21, 2016, the member and his treating psychologist testified. This matter was continued to allow the Retirement System to put in the testimony of its psychiatrist. The System's psychiatrist testified on February 3, 2017. This matter was continued for the testimony of the System's neurologist. The System's neurologist has filed a supplement report but will not testify because he is no longer under

contract with the System. We have agreed with the System to close the proof in this matter. The System permitted us to enter into evidence medical records that were not submitted to the System within forty-five days after receipt of the acknowledgement letter. Closing briefs were submitted on March 23, 2018. On November 13, 2018, we received a Final Determination from the Comptroller's Office denying the member's Applications for both Ordinary Disability Retirement Benefits and Inmate-Related Disability Retirement on the grounds that the member was not permanently disabled from performing the duties of a correction officer.

We presented evidence that the member was disabled by virtue of the neurological deficits caused by his Post-Concussive Syndrome. The Hearing Officer, in his Decision, did not even touch upon the member's Post-Concussive Syndrome.

The Hearing Officer failed to consider the Independent Medical Examination ("IME") performed by Patrick Hughes, M.D., a neurologist, who performed the IME for the State Insurance Fund on December 13, 2016. Dr. Hughes diagnosed the member with Post-Concussive Syndrome and opined that the member could return to light duty with no sitting, standing or walking for more than thirty minutes at a time or lifting more than twenty pounds. The Physical Capabilities Form completed by Dr. Hughes, on December 13, 2016, stated that the member could never lift more than twenty pounds, could never squat, crawl, climb or run. The member could not restrain combative inmates and, more importantly, the member could never return to the full duties of a correction officer.

Ira Neustadt, M.D., the System's neurologist, prepared a supplemental report, dated May 12, 2017. Dr. Neustadt admitted that the member's psychiatric manifestations could be related to multiple concussions. Dr. Neustadt wrote that it was possible that the member's psychiatric problems could be caused by his multiple concussions and render the member permanently disabled and unable to perform the duties of a correction officer.

Because the Hearing Officer did not consider the evidence regarding the member's Post-Concussive Syndrome, there is a strong argument that the Final Determination is not supported by substantial evidence. Any Article 78 Proceeding must be filed on or before March 12, 2019.

**Kirby Forensic Psychiatric Center:** 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 her duties as an SHTA. 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. The member's testimony was taken on March 6, 2018. The matter has been continued for the testimony of the System's doctor. The System's doctor's testimony was scheduled for November 14, 2018, and was canceled. The State has submitted a Supplemental Report for its doctor and has rested. The Supplemental Report found that

the member was permanently disabled. The remaining question is whether or not the permanent disability was caused by the act of a patient. Closing Briefs are due on January 25, 2019.

**Mohawk Correction Facility:** This is a disability retirement appeal. The issue is whether the member was injured by the act of an inmate. The hearing was held on August 8, 2018. Closing briefs were submitted on October 12, 2018, and we are awaiting a decision.

**Upstate Correctional Facility:** We filed a demand for a hearing to the NYS Retirement System on behalf of the member relating to Article 14 credit for his prior service as an SHTA. We have provided the Retirement System with witnesses for the hearing and are awaiting a hearing date.

### Workers' Compensation

**Workers' Compensation Discrimination:** On March 29, 2018, we received a decision denying the claim in this case. Although the Judge found that use of the workers' compensation 'scorecard' violated the law, there was no entitlement to promotion, and therefore dismissed the case. On April 24, 2018, we appealed that decision. By way of background, in October 2016, we filed a complaint of discrimination under the New York Workers' Compensation Law, section 120 for discrimination at Central New York Psychiatric Center (CNYPC). In the complaint, we alleged that CNYPC unlawfully used, and continues to use, the amount of Workers' Compensation benefits in its employment and promotion decisions and that the management of CNYPC maintained a Worker's Compensation "scorecard" for use in its promotion process. Workers' Compensation Law § 120 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 alleged that employees at CNYPC were adversely impacted for utilizing Workers' Compensation leave and that certain members were not promoted despite superior test, scores, experience and qualifications.

The sole remedy for a violation of Workers' Compensation Law relating to employment discrimination 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 and sole remedy. Although the reported cases concerning regard termination of an employee's employment, the section specifically prohibits discrimination in any other manner. 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 anti-discriminatory provision applies equally in the public sector. In such cases, the preliminary inquiry is whether civil servants, who are injured on the job, are treated detrimentally when compared to those who must take leaves of absence for non-work-related injuries. If the action complained of is not made in retaliation for the employee's compensation claim or testimony, the section is not violated. In the present case, as indicated in the "scorecard" the three most recent promotees had the lowest workers' compensation days used since December 2015. The coincidence is statistically

unreasonable. Moreover, most of the individuals we spoke with were not promoted despite superior test scores, experience and qualifications.

### Employee Health Services

**Cayuga Correctional Facility:** On September 12, 2018, DOCCS placed the member on involuntary leave pursuant to Civil Service Law 72(5). The member attended EHS Exams and DOCCS determined that she was unfit for duty. We appealed DOCCS's determination regarding the member's fitness for duty on September 21, 2018, and we await a hearing date. The member submitted medical documentation clearing her to work and submitted to further EHS exams and awaits a second determination regarding her fitness.

**Green Haven Correctional Facility:** The member was terminated pursuant to *Civil Service Law* Section 73 for being out on personal leave for over one year. This termination was challenged because the member had been cleared to return to duty by Employee Health Services and was in fact attempting to return to work. He was not disobeying the order or indicating that he was still out on personal illness, he was simply unable to get to work for a couple of days due to transportation issues since he had been out for so long. Based on these unique facts, we argued that the termination was not appropriate. Ultimately, DOCCS has rescinded the termination and the member has returned to duty. We have not received an answer to our further demand for back pay (as his termination was rescinded). It is possible we will need to move forward with a hearing to argue for back pay since the termination was rescinded.

**Green Haven Correctional Facility:** On or about September 1, 2018, DOCCS medically terminated the member's employment pursuant to Civil Service Law 71, Rule 5.9. The member appealed DOCCS's determination regarding her fitness for duty, and a hearing is scheduled for February 15, 2019, before hearing officer Louis Patack.

### General

**ADA Violations:** On June 21, 2018, we spoke to EEOC Buffalo Regional Director John Thompson regarding a response to our February 27, 2018, letter requesting the EEOC and U.S. Department of Justice (DOJ) to initiate an enforcement action, or issue a "Right to Sue" letter enabling us to commence a civil enforcement action against DOCCS in the United States District Court to remedy charges of disability discrimination under the Americans with Disabilities Act (ADA). We were advised that the DOJ returned the files to the EEOC, but they had to locate and review the files to determine if any further action was taken to issue a "Right to Sue" letter. Although we are awaiting a "Right to Sue" letter from the EEOC/DOJ, we can still commence an enforcement action in the absence thereof since we diligently sought the jurisdictionally required letter and would request a waiver from the Court. The ADA claims are based upon: (1) DOCCS' failure to promote members to Sergeant while out on workers' compensation leave for a work-related injury even when expected to be able to return to full duty within a short time period, by refusing to consider

promotion based on workers' compensation leave, and failing to consider any reasonable accommodation such as placement in the Light Duty program or additional short-term leave (Hatfield); and (2) DOCCS' automatic termination of employment under Civil Service Law § 71 upon the expiration of a one-year leave of absence due to a work-related injury, without considering any reasonable accommodation such as placement in the Light Duty program or additional short-term leave. In both cases, the EEOC issued a Determination finding "reasonable cause" to believe the DOCCS engaged in disability discrimination in violation of the ADA when it: (1) failed to engage in an interactive process with the member to determine whether or not a reasonable accommodation was available that would allow the member to accept a promotion or return to work; (2) failed to provide the member a reasonable accommodation to enable the member to accept a promotion or return to work; and, (3) applied a qualification standard that discriminated against the member based upon a disability. Having found that that DOCCS also discriminated against other similarly situated employees (class of employees), the EEOC invited the Department to participate in conciliation in an effort to reach an agreement that would eliminate such discriminatory employment practices, but DOCCS declined to participate in conciliation. As a result of finding reasonable cause to believe that DOCCS engaged in systemic discrimination on account of disabilities in violation of the ADA, the EEOC referred the matter to the DOJ to determine whether it would initiate an enforcement action against DOCCS in the U.S. District Court. Although the EEOC's "reasonable cause" determinations are not binding on the court, they are viewed favorably since the EEOC is the federal agency charged with the responsibility to administer and achieve compliance with the ADA.

**Commission of Correction:** On October, 3, 2018, we represented two members before the Commission of Correction.

**Constitution and Bylaws Committee:** On October 30, 2018, we attended a meeting of the Constitution and Bylaws Committee.

**Rainy Day Fund:** We worked with NYSCOPBA Recording Secretary Chris Summers and Mary Mlock from BST to revise the NYSCOPBA Rainy Day fund Policy and Summary Plan Description.

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



## Lippes Mathias Wexler Friedman LLP

Attorneys at Law

### **OCTOBER 2018 LEGAL REPORT TO THE EXECUTIVE ASSEMBLY**

This is our report for the October 2018 Executive Assembly, regarding the recent developments in some of the cases and legal matters we are handling for NYSCOPBA.

#### **Negotiations**

We continue to meet with the collective bargaining committee. NYSCOPBA submitted proposed language regarding Article 8 of the contract to the State and have begun negotiating this matter. Mediation was held on September 6, 2018. A second mediation session is scheduled for October 16, 2018.

#### **Litigation**

**Statewide – Retiree Health Insurance Litigation (NYSCOPBA v. State, et al., USDC, NDNY, 11-CV-1523):** A decision was rendered on September 24, 2018, dismissing all of our claims, and those in all the related public employee union cases. In dismissing our claims, the U.S. District Court (Judge Mae D'Agostino) took a strict construction interpretation of the collective bargaining agreements, and found that there was no explicit language contained in the contracts to support our claims that the health insurance contributions rates were promised to employees in retirement. The only promise was to continue health insurance benefits in retirement, which the State continues to provide to retirees. Using traditional collective bargaining agreement case law, she found that contract benefits expired upon the termination of the collective bargaining agreement, and that any presumption under the Yardman decision to resolve contract ambiguities in the context of open-ended contract provisions for retiree insurance benefits in labor negotiations to provide for employee benefits in retirement had been effectively overruled and made inapplicable as the result of a 2015 U.S. Supreme Court decision in Tackett (and apparently ignoring the general rule of contract construction and interpretation based upon a reliance of existing case law at the time the contract was negotiated to determine the parties' intent). The Court further found that even had the State promised to continue contribution rates for employees in retirement, the small increases in contribution rates was not a substantial impairment of contract rights and was necessary to further an important State government interest in addressing the State's fiscal crisis as part of a budget gap closing plan in the Executive Budget. As a result of this finding, even if the State had promised continued health insurance contribution rates for employees in retirement, the State would still be allowed to break that promise as a result of necessary measures to address the fiscal crisis. The net result is that we would have to overcome both findings to succeed on appeal.

We will be meeting shortly with union counsel in the related cases to discuss the merits of a potential appeal to the Second Circuit Court of Appeals, and our recommendations to our clients. At a minimum, our recommendation would be to file a Notice of Appeal to preserve NYSCOPBA's right to appeal the decision. The Notice of Appeal would have to be filed within 30 days of the decision, to wit: on or before October 24, 2018. Initially, it appears that there are several grounds regarding the collective bargaining contract claims to raise on appeal, and the legal issues are substantial issues worth litigating in the long term. That said, the findings regarding the fiscal crisis exception presents a challenging hurdle to overcome in the context of the 2008 Great Recession and the State's Executive Budget gap-closing measures, including the across-the-board increases in health insurance contribution rates for employees and retirees, and the Court's characterization of the increases as legally insubstantial for purposes of stating a contract impairment claim. While the cost of appeal would be somewhat expensive given the voluminous record of documents and depositions that would have to be reviewed, certified and published as the record on appeal, the costs would be shared equally by all of the public employee unions appealing the decision.

**[Member] v. State of New York (Orange County Supreme Court/Appellate Division, Second Department):** On September 6, 2018, we settled this case, changing the termination of the member to reflect a resignation. The indication that the member had been terminated from State employment had prevented him from obtaining other State employment.

On November 3, 2017, we filed a Reply Brief in the *Matter of [Member] v. State of New York* in the Appellate Division, Second Department. By way of background, the member was hired as an SHTA on May 14, 2015. Pursuant to Civil Service Rules, he was to serve a one (1) year probationary term. The member was involved in an incident with a patient, which resulted in a Justice Center investigation. Based upon the findings from that investigation, the member was terminated from his employment, effective April 14, 2016, one month prior to the completion of his probationary term. We filed an article 78 proceeding to challenge the determination as arbitrary and capricious. The lower court denied our petition and dismissed the proceeding. The basis for the court's decision was that the member did not exhaust his administrative remedies. The court noted in its decision, "by his own papers, [the member] admits that the Report which is cited for his termination is under appeal, and that no decision has yet been rendered."

The incident which resulted in the termination occurred on February 12, 2016. On that date, the member was performing his routine SHTA duties. At approximately 2:55 p.m., a patient remained in the bathroom, contrary to facility rules. The member directed the patient to leave the bathroom, but the patient refused. The patient then threw a cup of water in the member's face. After throwing a cup of water, the patient began striking the member with closed fist punches. The member reported the incident to the Safety and Security Officers on the Mid-Hudson Forensic Psychiatric Center campus and filed a supporting deposition, seeking criminal charges against the patient.



On April 8, 2016, the member received a letter from MHFPC indicating that “a recommendation has been made and approved by the Executive Director for termination of your probationary services as a Security Hospital Treatment Assistant pursuant to Civil Service Rule 4.5.” The member was terminated from his employment from MHFPC, effective April 14, 2016, one month prior to the completion of his probationary term.

As indicated above, the lower court did not address the merits of the case. Instead, the lower court noted that the member had requested a Justice Center hearing on whether he committed the alleged abuse and/or neglect, and that the hearing has not been conducted. The court further noted, “it is hornbook law that one who objects to the act of an administrative agency must exhaust available administrative before being permitted to litigate in a court of law.” Based upon the failure to exhaust administrative remedies, the lower court denied the petition and dismissed the proceeding.

On July 25, 2017, we filed a brief and record on appeal challenging the decision of the lower court. On November 3, 2017, the State responded, arguing that the Article 78 proceeding was merely a collateral attack on the Justice Center findings and, as such, the matter was not ripe until after the Justice Center hearing. Further, the State addressed the merits of the Article 78, arguing that there was a good faith basis for the termination.

In our November 14, 2017, reply brief, the Union argued that even if the request to the Justice Center is granted in its entirety, the result would be that the two Category 2 abuse and neglect findings are unsubstantiated and the Justice Center’s records sealed, the member would not be returned to his prior employment. Therefore, the determination that the member challenged, the termination of employment, is separate and distinct from the Justice Center’s determination. We further argued that, as the Justice Center is continuing to investigate the incident and has not reached *any* final disposition of the administrative appeal, the decision to terminate Petitioner’s employment should be set aside. “An action which has not reached *any* conclusion should not be used as a basis to terminate someone’s employment.”

**Clinton Correctional Facility:** On June 1, 2018, we filed an Article 78 proceeding challenging the termination of a member after just one year of workers’ compensation leave. We believe, based on the documentation and reports of the incident, that the member’s injury should be considered an assault, thus entitling him to two years of leave under the *Civil Service Law*. The State is required to submit answer papers on August 24, 2018. The return date when all the papers are sent to the Judge was August 31, 2018. We await a decision.

**Correction Sergeant, Spanish Language:** On May 4, 2018, we filed an Article 78 petition in State Supreme Court, Albany County, challenging the Correction Sergeant Spanish Language civil service title and separate eligible list, and the appointments made by DOCCS to that title from the eligible list. We also included an application for a preliminary injunction, which was denied by the Court by Decision and Order dated June 28, 2018. The litigation was subsequently transferred to the law firm of Harris, Conway & Donovan, PLLC (Ryan Donovan, Esq.) based upon a potential conflict of interest

involving NYSCOPBA and its members who are named respondents in the proceeding, including those remaining on the separate eligible list for the Correction Sergeant Spanish Language title.

**Edgecombe Correctional Facility:** This is another Article 78 Proceeding arising out of the termination of the Sergeant's employment, by DOCCS, because he was out of work for a period in excess of one year. The member was injured restraining a parolee/inmate who was attempting to swallow contraband. We contend that the member should have been given a two-year leave pursuant to Section 71 of the Civil Service Law. Our Article 78 is returnable on October 26, 2018.

**[Member] v. State Department of Civil Service (Albany County, Supreme Court):** On November 14, 2017, we commenced an Article 78 proceeding challenging a determination by the New York State Department of Civil Service denying disabled veteran credits to the member, a U.S. Marine Corp veteran, for use on the Correction Lieutenant test. Specifically, we challenged the Department's decision to use the date in which the Department of Veterans Affairs back-dated the member's disability to, rather than the date of its actual disability determination. The State used the "retroactive" date of the determination and by so doing, denied the member disabled veteran's points toward the lieutenant's examination. We contended that the Department's determination was made in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion. On March 2, 2018, we received the State's motion to dismiss. We submitted our response. On August 7, 2018, we received a decision from the Court dismissing the petition as premature and directing Petitioner back to Civil Service for action.

**[Member] v. NYS Justice Center:** We filed an Article 78 petition challenging the decision of the Justice Center in this member's case. The petition argues a legal issue specifically that the Justice Center failed to give *res judicata* or collateral estoppel preclusive effect to a favorable disciplinary decision involving the same exact allegations. The State, in response to our petition, moved to have the case immediately transferred to the Appellate Division, based upon a question of substantial evidence after a hearing. We submitted responsive papers on May 23, 2018, arguing that there was a question of law that must first be decided by the lower court. On June 29, 2018, we received a decision and order of transfer from the Judge assigned that the whole case will be transferred now to the Appellate Division for a decision on the legal questions regarding *res judicata* as well as the substantial evidence question. We are now preparing the formal record which is required for all cases sent to the Appellate Division. We anticipate that the case will be fully submitted to the Appellate Division, with the record and supplemental briefs in the next sixty (60) days.

**SHTA Workers' Compensation Termination:** On April 11, 2018, we filed an Article 78 proceeding challenging the termination of the member after just one year of workers' compensation leave. We believe, based on the documentation and reports of the incident, that his injury should be considered an assault, thus entitling him to two years of leave under the *Civil Service Law*. Following the filing of the Article 78 proceeding, OMH

actually sustained his contract grievance involving the same exact issue and awarding him two years of workers' compensation leave. He was also recently granted disability retirement. We have not withdrawn the Article 78 proceeding yet, as we are first ensuring that the member is made whole appropriately following the grievance decision.

***[Member] and NYSCOPBA v. DOCCS:*** The member received an arbitration award dated January 19, 2018. In that Award, Arbitrator Samuel Butto found that Grievant was guilty of Charge #3 and issued a penalty of dismissal from service. Regarding the suspension, the arbitrator found that the suspension was not in accordance with Article 8.4 (a)(2) of the collective bargaining agreement because of the acquittal of the criminal charges. He awarded that Grievant shall receive full back pay from the date of his suspension from duty. This matter was handled by W. James Schwan, who wrote to DOCCS Director of Labor Relations John Shipley requesting that DOCCS follow the award and pay the member the back pay money owed to him. Since the member was not made whole pursuant to Arbitrator Butto's January 19, 2018, Award, on March 29, 2018, we filed a Notice of Verified Petition and Verified Petition to confirm the arbitration award. All papers have been submitted to the Court. The return date was May 25, 2018. We are waiting for the Court's decision.

***[Members] v. DOCCS (Southern District of New York):*** On July 26, 2018, we filed an amicus brief in this case pending in the U.S. District Court for the Southern District of New York. This is the case regarding the two officers arrested for bringing vitamins into a facility. The case began on February 5, 2016, when the Superintendent's office at Otisville Correctional Facility received an anonymous letter, alleging that an officer was having an inappropriate relationship with an inmate and she would be bringing contraband into the facility on Saturday, February 6, 2016. However, because the substance of the anonymous letter was so weak, OSI advised "that there was not enough information in the letter to justify a direct intervention with [the officer]." To circumvent confronting the officer, Defendant Early directed a search be conducted of the incoming staff members on the 3-11 p.m. shift at Otisville on February 6, 2016.

During the search, certain officers were found to be in possession of certain vitamins and dietary supplement pills. One officer had a bottle containing 77 pills; a second officer possessed 16 pills, including some in a clear bag. Based upon recovery of the pills discussed above, Defendant Roman "informed NYSP Inv. Gallagher that since the employees had contraband, they were to be arrested and charged with promoting and introducing contraband into the facility because, on that date, he understood contraband to be any item that is not authorized by the Superintendent." In the end, the substances confiscated from the officers were tested and determined not to be controlled substances. Based upon the information provided by Defendants Roman and Malave, Defendant Gallagher arrested the members. Subsequently, Plaintiffs were issued a desk appearance ticket for violating NYS Penal Law 205.20 – promoting prison contraband in the second degree, a Class Misdemeanor. That unlawful arrest, and lack of probable cause for the arrest, was the primary focus of the amicus brief. In the brief, we argued that Plaintiffs were arrested during an egregious improper exercise of police authority. What makes this case egregious and is that the primary DOCCS investigator acknowledged that inmates

were allowed to buy from the prison commissary and to possess such vitamins. He was aware, or should have been aware, that possession of vitamins, even in the correctional setting, was not a crime. Therefore, the actions by Defendants in arresting Plaintiffs, without probable cause that a crime had been committed, violated Plaintiffs' rights guaranteed by the United States Constitution and amounted to an unlawful false arrest.

**[Member] v. State, (Albany County Supreme Court/Appellate Division Third Department) Gender Specific Directive (#2230):** On March 9, 2018, we filed a motion for leave to appeal the decision in the this case, which affirmed the lower court's ruling that respondent Department of Corrections and Community Supervision (DOCCS) was not guilty of an unlawful discriminatory practice based on gender.

By way of background, on January 5, 2015, DOCCS updated Directive #2230 to require that special watches and suicide watches must be conducted by staff members of the same gender as the inmate who was under observation.

As relevant to this specific case, at Albion Correctional Facility, hiring for overtime is based upon seniority. On April 27, 2015, the member was on the list to be hired for overtime. However, as conceded by DOCCS, Albion CF applied the above-referenced directive to deny the member the opportunity for overtime based upon his gender. A female correction officer with less seniority than the member was hired for overtime instead. The member and another male officer were both ahead of the female officer based upon terms of seniority, but both officers, including the member, were skipped over based on the gender specific directive

Before the Division of Human Rights, we argued that the Division was incorrect because a prima facie case of discrimination was established. First, DOCCS Directive #2230 clearly discriminated upon the basis of gender. Second, based upon that discriminatory practice, the member 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 has deprived the member of material benefits in that he was denied overtime opportunity. Therefore, the member was directly impacted by Directive #2230, has suffered damages based upon this Directive, and will continue to suffer damages in the future, based upon this Directive.

On November 16, 2015, the Division dismissed the Complaint, finding the existence of a Bona Fide Occupational Qualification (BFOQ). On January 15, 2016, we commenced an Article 78 proceeding challenging the Division's determination as being arbitrary and capricious. On June 22, 2016, the lower court affirmed the Division's finding that there was a BFOQ. We appealed that decision to the Appellate Division, Third Department. The basis for the appeal was that DOCCS did not establish a valid BFOQ defense and that the Division's determination was legally insufficient, arbitrary and capricious, and not supported by a rational basis. To establish a BFOQ, a Respondent must make a strong factual showing that no reasonable alternatives existed. DOCCS failed to do so before the Division. Furthermore, because a BFOQ determination must be so factually specific, we

submit that a full evidentiary hearing was necessary; lacking that, the determination should be annulled as arbitrary and capricious. Specifically, the decision does not adequately consider whether any reasonable alternatives exist. We argued that the only aspect of the special and suicide watches that might involve impermissible cross-gender surveillance is in observance of defection, and a female officer could be used for that task. Therefore, a reasonable alternative exists. Mere inconvenience does not establish a Bona Fide Occupational Qualification. Because the court did take reasonable alternatives into account, we believe the lower court erred.

As previously indicated, under the procedural rules, there is no automatic right to appeal to the Court of Appeals – it is by permission only. Unlike in the Appellate Division, which emphasizes factual questions such as whether the weight of the credible evidence supports a trial verdict or whether a court abused its discretion in making a ruling, the papers seeking leave from the Court of Appeals must identify issues of law to be addressed. The Court of Appeals hears very few cases each year and focuses on cases that involve novel or unique issues of law, and/or issues of public importance.

***[Member] and NYSCOPBA v. DOCCS (Albany County Index Number 04662-18).*** The member (Cayuga Correctional Facility) was injured while restraining an inmate who was in possession of a weapon. The member was notified by DOCCS that his employment was being terminated effective July 27, 2018, because he has been absent for more than one cumulative year because of a work related injury. The member stopped an inmate for a pat frisk and saw a weapon in the inmates left pants pocket. The inmate pulled the weapon out of his pocket and tried to move away from the member, who was injured during the restraint. DOCCS now defines an assault as injury sustained as the result of an intentional physical act of violence directed towards an employee by an inmate or parolee. Assault in the Second Degree, as defined in Penal Law §120.05(3), occurs when a person, with intent to prevent a peace officer from performing a lawful duty, causes physical injury to the peace officer. What happened to the member is an Assault in the Second Degree according to the Penal Law. On July 20, 2018, we filed an Article 78 Proceeding challenging DOCCS definition of an assault and requesting that the court give the member a two-year leave. The Article 78 return date is August 24, 2018.

***[Member] v. Justice Center (Supreme Court, Albany County):*** On February 8, 2018, we received an order from the New York Supreme Court transferring the case to the Appellate Division. By way of background, on August 3, 2017, we commenced a special proceeding pursuant to CPLR Article 78 to review a determination of the Justice Center, which denied the member's request to amend and seal a report of alleged abuse. The challenged decision was issued after an administrative hearing conducted before Administrative Law Judge Sharon Golish Blum on March 8, 2017, at the Adam Clayton Powell Jr. State Office Building in New York, New York. In the Decision after Hearing, the Administrative Law Judge denied the member's request to amend the substantiated finding of abuse and to seal the file.

The case resulted from an incident on July 4, 2015, at the Kirby Forensic Psychiatric Center in which it was alleged that the member conducted a restraint with excessive force and

improper technique. Such technique included grabbing a service recipient by his shirt, lifting him up by his collar, pushing him to the floor, dragging him into the hallway, and/or punching him in the face. On July 4, 2015, during the lunch time, two service recipients started fighting while seated at one of the cafeteria tables. Although other staff members were present, they were not in the immediate area to provide assistance to the member. The fight escalated and both patients began exchanging closed fist blows. After standing up, one patient grabbed a plastic knife and attempted to stab the other patient in the face. At that time, the member intervened, grabbed the patient with the knife to restrain him in an OMH-approved maneuver called a “standing wrap.” However, in doing so, the member backed into the table behind him, causing both the member and the patient to fall to the floor.

The ALJ found that allegation unsubstantiated because the member’s actions were reasonable emergency interventions to prevent the imminent risk of harm to a person – he had to prevent the other patient from being stabbed in the face. While the patient was on the floor, the member observed that the knife previously used in the attack was on the floor, and within reach. The member reasonably believed that the patient might harm someone - - another patient, another staff member, or himself -- so with no staff assistance immediately available, he grabbed the patient, who had previously possessed the knife, and dragged him 6 to 8 feet out of the dining room and into the hallway. With respect to that allegation, the Administrative Law Judge found the abuse allegation substantiated because dragging the patient out of the cafeteria was not a reasonable emergency intervention.

In the article 78, we allege that the finding in the Recommended Decision after Hearing, that the act of dragging the Service Recipient out of the dining room by the back of his shirt was not a reasonable emergency intervention to prevent imminent risk of harm, was irrational and not supported by substantial evidence. We filed the Record on Review and Brief in Support on September 10, 2018. The State’s Brief is due on November 8, 2018.

### Discipline

**Interrogations:** For the months of August 2018 and September 2018, we represented sixty-six (66) members who were interrogated by DOCCS.

**Bare Hill Correctional Facility:** This NOD is for allegedly using improper and racial language in front of inmates. Hearings were held before Arbitrator Edward Battisti on July 11 and 12, 2018. Additional hearing dates are scheduled for October 3 and 4, 2018.

**Bedford Hills Correctional Facility:** The officer in this NOD is accused of falsifying information on his Sergeant’s canvass letter. The case has been assigned to Arbitrator Samuel Butto and is scheduled for hearing on December 5, 2018.

**Buffalo Psychiatric Center:** The member received a notice of discipline alleging that in the course of his job duties, he filed an accusatory instrument with Buffalo City Court containing false statements, unlawfully imprisoned an individual, improperly acquired an

electronic stun gun during a traffic stop and inappropriately called in sick to work when he was working another security job. OMH is seeking termination. The first two days of arbitration were held on August 6 and 27, 2018, before Arbitrator Thomas Rinaldo. Subsequent arbitration days are scheduled for September 10, October 1, and October 5, 2018.

**Coxsackie Correctional Facility:** The NOD alleges that the member deviated from a trip itinerary while transporting an inmate and subsequently provided false documentation regarding the trip. The matter was scheduled for expedited arbitration before Arbitrator David Lande on September 26, 2018, in Manhattan. The member has since resigned.

**Coxsackie Correctional Facility:** The NOD alleges that the member used racial and profane language while instigating a use of force on an inmate. The matter has been scheduled for hearing on October 16, 2018, and either December 5 or 6, 2018.

**Downstate Correctional Facility:** On August 11, 2017, the member received an NOD resulting from an arrest for an alleged sexual assault. This matter was scheduled for September 11, 2018. The Complainant did not appear on September 11, and the matter was adjourned until November 26, 2018, with the understanding that the NOD would be dismissed if the Complainant did not appear.

**Downstate Correctional Facility:** The member received a Notice of Discipline charging her, as movement and control officer, with failing to document the arrival of an inmate, with providing a false or misleading count for four facility counts, and with working unauthorized overtime. The first day of this expedited arbitration was held on June 27, 2018. Day was held on August 15, 2018. Closing briefs were submitted on August 22, 2018. On August 31, 2018, we received the Arbitration Award from Joel Douglas. The member was found guilty of two of the four charges and was suspended for 20 working days. The member was awarded her back pay and accruals for most of her suspension.

**Downstate Correctional Facility:** This member has been charged with failing to comply with a lawful order given by a superior officer, not being in compliance with Department appearance and/or grooming standards; failing to communicate in a professional, courteous and dignified manner; and providing false and/or misleading information to a superior officer. We are currently discussing a resolution of this Notice of Discipline.

**Fishkill Correctional Facility:** The officer in this NOD was charged criminally. When the criminal matter is resolved the NOD may proceed.

**Fishkill Correctional Facility:** This NOD is for allegedly leaving the facility with a canister of OC spray without permission and failing to cooperate with the facility's efforts to retrieve the canister. We have submitted our arbitrator requests and are awaiting the assignment of an arbitrator.

**Fishkill Correctional Facility:** The member received a Notice of Discipline when she was arrested for possession of Suboxone. Her arbitration has been scheduled for November 29, 2018.

**Fishkill Correctional Facility:** This Sergeant is accused of falsely stating that restraints were placed on an inmate by another officer. The NOD has been assigned to Arbitrator David Lande.

**Fishkill Correctional Facility:** This member has been charged with using unnecessary and excessive force. Four (4) days of hearings were held on September 8, 2017, December 19, 2017, May 9, 2018, and July 31, 2018, before Arbitrator Lise Gelernter. The final transcript has been received. Briefs will be submitted by October 19, 2018.

**Franklin Correctional Facility:** This case involved allegations that the member failed to report other staff members striking an inmate and putting their hands around the inmate's neck, as well as an allegation that the member provided a false statement in his interrogation. Two days of hearing were held and additional hearing days were scheduled for August 29, 30, and 31, 2018. Prior to the third day of hearing, DOCCS withdrew the NOD.

**Great Meadow Correctional Facility:** The member received an NOD dated November 20, 2017. This is another Herman Bell case. The member is charged with failing to report an excessive and unjustified use of force and making false statements during his interrogation. The first two days were heard on July 18 and 19, 2018. The next two hearing days are scheduled for November 7 and 8, 2018.

**Great Meadow Correctional Facility:** This NOD is for allegedly failing to report another officer's alleged excessive force and providing false information. The NOD has been assigned to Arbitrator Edward Battisti. Hearing dates have been scheduled for October 10, 11, 24, and 25, 2018.

**Great Meadow Correctional Facility:** The member has received two Notices of Discipline arising out of the Herman Bell use of force. The NODs are dated October 4, 2017, and November 27, 2017. The case is scheduled to be heard on May 2 and 4, 2018, and on August 17, 2018. Charges 2 and 3 of the First NOD, which charged the member with lying when he stated that he passed his assigned OC Spray to another officer, were being withdrawn by DOCCS. The remaining charge alleges that the member withheld the name of staff that were physically restraining Inmate Bell, withheld information as to what he saw regarding the force used on Inmate Bell, and withheld the names of staff who responded to the Level 2. The Second NOD charges the member with failing to report an unjustified and excessive use of force on Inmate Bell. Days 1 and 2 of this case were held on May 2 and 4, 2018. Day 3 was held on August 17, 2018. On Day 3, the Department presented testimony from Deputy Commissioner Kirkpatrick and then called the member. At the conclusion of the member's testimony, the State requested an adjournment. The fourth hearing day was held on September 27, 2018. The State rested after the testimony



of Herman Bell, and the Grievant rested as well. Closing Briefs are due on November 16, 2018.

**Great Meadow Correctional Facility:** This NOD alleges utilizing unjustified and excessive force on an inmate, completing and signing an Inmate Misbehavior Report containing false and misleading information, and making false and misleading statements during an interrogation. The matter has been scheduled for a hearing before Arbitrator Timothy Taylor on December 5 and 6, 2018.

**Great Meadow Correctional Facility:** The NOD in this case alleges that the member failed to report the use of unjustified and excessive force by other staff members and provided false statements in his interrogation with OSI. The first two days of hearing in this case were held August 6 and 7, 2018, before Arbitrator Taylor. Additional hearing dates have been scheduled for the end of November.

**Green Haven Correctional Facility:** The NOD alleges that the member made a racist joke in front of multiple staff members. The matter has been scheduled for a hearing on November 20, 2018, before Arbitrator Lise Gelernter.

**Moriah Shock Incarceration Correctional Facility:** The member charged in this NOD has a criminal action pending. When the criminal matter is resolved, the NOD may proceed.

**NYS Department of Education:** The SSO in this NOD is accused of insubordination and not obeying a direct order. A hearing was scheduled before Arbitrator Samuel Butto on September 19, 2018, but the NOD was settled.

**NYS Department of Education:** The member received a Notice of Discipline for insubordination. The arbitration is scheduled for November 14, 2018.

**New York State Psychiatric Institute/Washington Heights:** In this NOD, the SSO is accused of failing to follow orders when he refused to let a patient's service dog see his provider for a scheduled visit. We have submitted our arbitrator requests and are awaiting the assignment of an arbitrator.

**Rockland Psychiatric Center:** The member received an NOD for having an inappropriate relationship with a patient and former patient. This matter was settled for a letter of reprimand.

**Shawangunk Correctional Facility:** The member in this NOD was charged criminally. When the criminal matter is resolved, the NOD may proceed.

**Sing Sing Correctional Facility:** The NOD alleges that the member, while off duty, operated a motor vehicle while under the influence of alcohol. The matter involves associated criminal charges. The matter is scheduled for a hearing on October 18, 2018, before Arbitrator Timothy Taylor.

**Sing Sing Correctional Facility:** The NOD alleges that the member, while off duty, operated a motor vehicle while intoxicated. This matter involves associated criminal charges. The matter has been scheduled for a hearing on November 1, 2018.

**Sullivan Correctional Facility:** The Officer in this NOD is accused of possessing and testing positively for marijuana.

**Sullivan Correctional Facility:** This NOD alleges misconduct, charging the member with sharing her residence with another officer who tested positive for the presence of marijuana. Additionally, the member was charged with giving a false or inaccurate statement at an interrogation. The matter has been filed for disciplinary expedited arbitration. Timothy Taylor was assigned as the arbitrator to hear this matter and the hearing was held on July 6, 2018. On July 22, 2018, Arbitrator Taylor issued an Award finding the Grievant not guilty of the charges in the Notice of Discipline. The arbitrator did find the suspension on June 5, 2018, appropriate under Article 8.4 (a) of the collective bargaining agreement. However, the arbitrator awarded back pay and benefits and the Grievant to be made whole, including restoration of her leave accruals for the entire period of her suspension. If Grievant used any accrued annual leave to cover her unpaid suspension, her accrued annual leave should be restored.

**Ulster Correctional Facility:** The member received an NOD for insubordination. This matter was scheduled to be heard on September 19, 2018. On September 12, 2018, this matter was settled.

**Upstate Correctional Facility:** This officer in this NOD is accused of repeatedly spending hours inattentive while on duty. The NOD has been assigned to Arbitrator James Cooper. Hearing dates are scheduled for November 28 and 29, 2018.

**Upstate Correctional Facility:** The officer in this Notice of Discipline is accused of failing to remain alert and attentive to his duties. The Notice of Discipline has been assigned to Arbitrator Timothy Taylor. This matter is scheduled to be heard on December 20 and 21, 2018.

**Washington Correctional Facility:** The officer in this NOD is charged criminally. When the criminal matter is resolved the NOD may proceed.

**Washington Correctional Facility:** The Officer in this NOD was charged criminally. The criminal charges have been resolved and settlement negotiations are ongoing.

**Western New York DDSO:** The member received a Notice of discipline for sexually harassing a female SSO. The first day of this case was heard on May 31, 2018. The second day was held on July 6, 2018. Closing briefs were submitted on August 3, 2018. On September 4, 2018, we received the Arbitration Award. Arbitrator Rinaldo terminated the member.

**Woodbourne Correctional Facility:** The officer in this NOD is charged criminally. When the criminal matter is resolved the NOD may proceed.

### Justice Center

**Bernard Fineson Developmental Center:** This Category 2 and 3 report of physical abuse and neglect alleges that the member committed neglect when she prevented a service recipient from moving about the Chauncey Residence IRA and placed her arm on the service recipient's neck. We submitted a request for amendment on September 18, 2018, and await a response.

**Kirby Forensic Psychiatric Center:** This Category 2 report of neglect/abuse stems from allegations from a service recipient that he was choked and scratched by the member. The matter was heard before ALJ Requets on September 19, 2018, in Brooklyn.

**Kirby Psychiatric Center:** This Category 3 report of physical abuse and neglect alleges that the member directed a derogatory comment toward a service recipient and placed a service recipient in a room and/or pushed a pen in his back. We submitted a request for amendment on August 15, 2018, and await a response.

**Mid-Hudson Forensic Psychiatric Center:** This Category 2 report of neglect alleges that the member fell asleep or was less than alert while on duty, and/or otherwise failed to provide a service recipient with proper supervision. An administrative hearing was scheduled for September 18, 2018 in Schenectady, and has been rescheduled for November 9, 2018.

**Mid-Hudson Forensic Psychiatric Center:** This Category 2 report of neglect alleges that the member fell asleep or was less than alert while on duty, and/or otherwise failed to provide a service recipient with proper supervision; a Category 3 report of abuse also alleges that the member falsified records related to a service recipient's safety and supervision. An administrative hearing was scheduled for September 18, 2018 in Schenectady, and has been rescheduled for November 9, 2018.

**Mid-Hudson Forensic Psychiatric Center:** This Category 2 report of physical abuse and abuse (deliberate inappropriate use of restraints) alleges that the member conducted a restraint with excessive force and improper technique, which included placing his arm around a service recipient's neck. An administrative hearing was scheduled for July 18, 2018, in Poughkeepsie. At the hearing, this matter was settled. The Justice Center unsubstantiated the Category 2 physical abuse allegation and modified the abuse (deliberate inappropriate use of restraints) allegation from Category 2 to Category 3. The modified report will be maintained on the Vulnerable Persons' Central Register for five years and then it will be sealed.

**New York City Children’s Center:** This Category 3 report of neglect/abuse alleged that the member improperly used handcuffs on a service recipient in order to gain therapeutic compliance, despite the fact that this action was at the direction of the service recipient’s doctor and treatment team leader. The matter has been scheduled for a hearing on November 7, 2018, before the Justice Center in Brooklyn.

### Improper Practice Charges

**Statewide - Civil Service Promotional Exam Fees (U-29179):** NYSCOPBA, along with other unions, filed an IP alleging that the State unilaterally changed its policy/procedure with respect to the fees charged for promotional civil service examination. The case was heard by an ALJ, went up to the Board, and was remanded back to the ALJ for further proceedings. Ultimately, ALJ Sargent found that the State, specifically the Department of Civil Service, violated § 209-a.1 (d) of the Act when it unilaterally began requiring employees to pay a fee for promotional/transition examinations, and ordered the State to make whole employees for any fees paid. Subsequently, the State filed exceptions to the Board on this decision. On behalf of NYSCOPBA, this office submitted a response to the exceptions.

**Statewide – DOCCS (Clear Bag) (U-35624):** The hearing in the Improper Practice Charge relative to the clear bag was completed on July 11 and 12, 2018. We had a total of four days of hearing in this matter before ALJ Sargent at PERB. In total, the union presented seven witnesses and the State presented two witnesses for their case (former D.C. Bellnier and Dan Martuscello) who we had an opportunity to cross examine. The record is now closed. We have just received the transcripts from the hearing and will be provided with a date to submit briefs soon. The ALJ sets the initial briefing schedule, usually 30-60 days. Once briefs are submitted, the ALJ will issue her decision. There is no set timeframe for PERB decisions and it can take quite some time for a decision.

**Statewide – Commissioner Annucci’s Memorandum (U-35773):** This office filed an Improper Practice Charge in response to Acting Commissioner Annucci’s May 3, 2017, memorandum. The memorandum was read at lineup to correction staff for ninety-six (96) hours, which, among other things, effectively accused the Union of disseminating “half-truths” and perpetuating a “negative outlook” about the Department. We received the State’s Answer in response. An initial conference took place on October 19, 2017. This matter has been complicated by GOER indicating that it will consider issuing strike notices to members for alleged job actions that occurred at Auburn CF, Clinton CF, and Great Meadow CF in April-May 2017 if this IP is not withdrawn. That is because the Annucci memo was (in DOCCS’ words) a “knock-it-off” response to the job actions. On January 8, 2018, this office met with NYSCOPBA Executive VP Tammy Sawchuk, Northern Region VP John Roberts, Business Agent Ricky Brunelle, and Stewards from Clinton CF and Great Meadow CF to present and discuss the facts surrounding the IP and possible strike notices, and its potential impact on members at Clinton CF. The matter was scheduled for a hearing on May 3, 2018, but has since been placed on the PERB hold calendar until October 24, 2018, pending negotiations with GOER.

**Statewide – Duty of Fair Representation (U-36027):** We submitted our Answer on behalf of NYSCOPBA in an Improper Practice charge filed by a member, alleging that NYSCOPBA breached its duty of fair representation in the manner in which it allegedly withheld union representation from the member at Fishkill Correctional Facility. A conference was held at the Albany PERB Office on March 14, 2018, at 11 am. A second pre-hearing conference took place by phone on June 12, 2018, to discuss evidence and issues to be resolved at hearing, with hearing dates of July 30 and 31, 2018. The hearing was adjourned on July 30, 2018, at the request of the member, as he was physically incapable of appearing at the hearing due to his recent surgery. Judge Reich adjourned the hearing and the matter is scheduled for a phone conference on October 3, 2018, to further discuss scheduling and the matter.

**Statewide – Employee’s Manual (U-33638):** On February 23, 2018, we discussed settlements with GOER to resolve this charge. This IP is from 2014 and involves changes in the Employee’s Manual. Specifically, the changes include: section 2.2 regarding a change in the licensure practice; section 2.3 regarding reporting requirements in domestic violence situations; section 4.9 regarding copying documents; section 4.15 regarding dissemination of criminal history; section 6.3 regarding official stationary; and section 2.44 regarding alerting of supervisory rounds. We will keep you informed regarding progress of negotiations.

**Statewide – Office for People with Developmental Disabilities (U-35979):** On September 26, 2017, we filed an Improper Practice Charge with PERB, stemming from a statewide OPWDD job posting for specialized SSO1 positions as Family Care Inspectors. The job posting requires interested candidates to submit a cover letter and resume. Past practice has been to bid these positions regionally and award them by seniority. The charge alleges that OPWDD violated the Act by unilaterally changing the posting and bidding procedures without negotiating with NYSCOPBA. The initial conference of this matter was held December 20, 2017. An improper practice charge was filed after a statewide OPWDD job posting for specialized SSO1 positions as Family Care Inspectors required applicants to submit a resume and cover letter and did not award the jobs by seniority. This matter has been placed on PERB’s hold calendar in order for both parties to investigate it further.

**Albany Training Academy (U-36266):** We filed an improper practice charge with PERB after Albany Training Academy Assistant Director James Huff threatened and refused to provide the member with Union representation during investigatory questioning that took place during a chemical agents instructor school at the Albany Training Academy in November 2017. The charge alleges that Assistant Director Huff denied the member Union representation during questioning which could result in discipline, and that Assistant Director Huff’s behavior constituted interference and retaliation, all in violation of the Act. An initial conference was held on June 11, 2018, before Administrative Law Judge William Weisblatt. The parties engaged in settlement discussions and are currently negotiating language for a settlement agreement.

**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 injured 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. During that time, the Union will continue to review various assault alert forms completed by members in order to ascertain whether they received medical treatment or were ignored by facility physicians.

**Central New York Psychiatric Center (U-35970):** A conference was held on January 17, 2018. On September 21, 2017, we filed an Improper Practice Charge alleging that Central New York Psychiatric Center (“CNYPC”) interfered, restrained, retaliated against and coerced employees in the exercise of their rights guaranteed under the *Taylor Act*. Specifically, we alleged that on August 27, 2017, the member, a NYSCOPBA member, Union Steward, and a Central Service Staff member, was directed to cover a mandatory overtime post at SUNY Upstate Medical Center. On September 13, 2017, NYSCOPBA filed a grievance regarding the mandating of overtime to the member and the change in overtime policy generally. After the grievance was filed, on September 15, 2017, Mr. Paparella confronted Central Service Staff members regarding the grievance on overtime mandating and distribution. During the discussion, Mr. Paparella stated, among other things: 1) Things are going to happen if [the grievance] goes through; 2) That he is sick and tired of all the whining and complaining; 3) That he planned to remove responsibilities from those who filed the grievance; 4) That Central Staff SHTA’s duties would be changed such that, upon entering the building, they would be assigned different posts and locations. On September 19, 2017, in further retaliation to the grievance, Mr. Paparella directed supervisory staff to assign Central Service Staff members to cover all Mandatory Overtime at the SUNY Upstate Medical Center. Such direction is inconsistent past practice, as well as the local Labor/Management agreement. The case is on hold pending further discovery.

**Central New York Psychiatric Center (U-36192):** This office filed an Improper Practice Charge in response to CNYPC’s reinterpretation of the existing call-in procedure that changes how an ill employee reports an illness-related absence and how such absence is counted for discipline purposes. The matter was heard at a pre-hearing conference with ALJ Weisblatt on March 26, 2018. The Judge placed the matter on PERB’s hold calendar until June 1, 2018, to give the parties the opportunity to discuss possible settlement. The matter has been scheduled for a hearing on August 29, 2018, but has since been adjourned, pending negotiations.

**Mid-Hudson FPC Bag Restriction (U-36147):** We filed an Improper Proper Practice Charge alleging a failure to negotiate regarding a mandatory subject of bargaining. Mid-Hudson FPC unilaterally changed a significant work rule, impacting the comfort and convenience of employees. Specifically, the facility implemented a new rule restricting all employees to entering the facility with only one bag (of restricted size) for clothing, etc. and one small cooler for food. The prior practice at the facility did not limit employees in

the size and number of bags they could bring into the facility for each shift. We appeared at a conference on March 21, 2018, before ALJ Weisblatt. The parties had a substantive conversation about settling this case. The ALJ placed the matter on the hold calendar so that the discussions could continue.

**NYS Education Department (U-34622):** We filed this Improper Practice Charge alleging that SED unilaterally changed its policy with respect to sick leave, specifically, that before June 23, 2015, employees calling in sick or departing early were only required to provide a physician's note if they were absent for more than two consecutive work days or where the employee was placed on "one day letter" status. Judge Burritt scheduled this matter for a hearing on September 26, 2018. On September 13, 2018, the Charge was withdrawn.

**Rochester Psychiatric Center (U-36177):** We filed an improper practice charge with PERB, after Rochester PC announced a new paycheck distribution policy whereby employees will no longer be able to pick up live paychecks at Rochester PC. Judge Burritt held a conference call between the parties on June 5, 2018, to discuss resolution. A second conference call to discuss the resolution of this charge took place on July 9, 2018.

**Roswell Park Cancer Institute (U-36525):** We filed an improper practice charge after RPCI unilaterally changed the work schedules and pass days of several members' bidded posts without prior negotiations. This resulted in some members losing their rotating three-day-weekends and other members having weekday pass days instead of weekend pass days. The matter is scheduled for a pre-hearing phone conference on October 4, 2018.

**Southport Correctional Facility (U-34184):** On December 12, 2017, we participated in a conference call initiated by PERB on this charge, which 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. A hearing in the case was held in December of 2015 and briefs were later filed, but the administrative law judge who heard the case left PERB before issuing a decision. The case is now assigned to another judge who, if a settlement is not otherwise reached, will review the record and briefs and issue a decision. On the conference call, the judge asked the attorneys to present their legal arguments in support of their respective positions and she also asked the parties to consider whether there was a possibility of settling the case. We are exploring that.

### Contract Enforcement

**Appeals to Arbitration:** We received eight (8) requests from NYSCOPBA's grievance department to appeal contract grievances to arbitration during the months of August and September 2018. We have reviewed the grievance files and drafted and submitted the arbitration appeals to the Governor's Office of Employee Relations (GOER).

During the months of August and September 2018, we have triaged 127 grievances; six (6) were settled and sixteen (16) were withdrawn. We held four (4) expedited arbitration proceedings and four (4) summary hearings.

**Attica Correctional Facility (Class Action):** On September 28, 2018, we received a decision sustaining the grievance. In this case, NYSCOPBA alleged that DOCCS violated Article 24.2 of the 2009-2016 Agreement by assigning an Officer to the duties of Fire Brigade Training Instructor without complying with any necessary procedures and without regard to seniority. Sometime during the first week of September 2013, a Fire and Safety instructor's position was awarded. The position's opening was kept a secret, as it was not read at roll call. Past practice by this facility was to read off the position opening at roll call and thus a resume would be submitted and interviews conducted. In the past if several officers were qualified the senior officer would be awarded the position. At the hearing, we established that the selection was done in violation of the Agreement—it was not bid, and there was no thorough review process in accordance with DOCCS Directives. Despite the complete lack of notification, one Officer was selected for the position over at least three (3) Officers with equal or greater experience and greater seniority. The Arbitrator vacated the appointment and directed a reconvening for the position.

**Auburn Correctional Facility:** An expedited arbitration hearing was held before Master Arbitrator Joel Douglas on June 8, 2018. At issue in this grievance was whether the grievant was properly denied the opportunity to be awarded a post that was classified as male-only. The Master Arbitrator sustained the grievance, finding that there was no bona fide occupational qualification to designate the at-issue post male-only and that the State therefore violated the parties' Collective Bargaining Agreement when it denied the member the opportunity to win the at-issue bid. The Master Arbitrator ordered that the post be rebid without reference to or consideration of a bona fide occupational qualification.

**NYS Education Department:** This grievance alleged that the State violated Article 14 of the Agreement when it charged the member 1.5 hours of unauthorized leave for an unplanned early departure due to illness. The State sustained the member's grievance, allowing him to charge 1.5 hours of sick leave, and removing the AWOL designation and associated counseling memorandum from his personal history file.

**NYS Department of Health:** This grievance alleged that the State violated Article 15.3 (e) of the Agreement when it unilaterally changed the member's shift and pass days during a period of staffing shortage. The grievance alleged that the State changed the member's pass days for the purpose of avoiding overtime. An expedited arbitration was held before Master Arbitrator Joel Douglas on July 26, 2018. We await a decision.

### Retirement

**Coxsackie Correctional Facility:** This is a disability retirement matter. The Applicant's physician testified on February 14, 2018. The member's testimony was taken on September 14, 2017. The matter has been continued to allow the Applicant to obtain copies of his medical records regarding recent surgeries. The matter has also been continued for the testimony of the System's physician.



**Kirby Forensic Psychiatric Center:** 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 her duties as an SHTA. 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. The member's testimony was taken on March 6, 2018. The matter has been continued for the testimony of the System's doctor. The System's doctor's testimony has been scheduled for November 14, 2018.

**Mohawk Correction Facility:** This is a disability retirement appeal. The issue is whether the member was injured by the act of an inmate. The hearing was held on August 8, 2018. Closing briefs will be submitted thirty days after the receipt of the transcripts.

**Upstate Correctional Facility:** We filed a demand for a hearing to the NYS Retirement System on behalf of the member relating to Article 14 credit for his prior service as an SHTA. We have provided the Retirement System with witnesses for the hearing and are awaiting a hearing date.

#### Workers' Compensation

**Workers' Compensation Discrimination:** On March 29, 2018, we received a decision denying the claim in this case. Although the Judge found that use of the workers' compensation 'scorecard' violated the law, there was no entitlement to promotion, and therefore, dismissed the case. On April 24, 2018, we appealed that decision. By way of background, in October 2016, we filed a complaint of discrimination under the New York Workers' Compensation Law, section 120 for discrimination at Central New York Psychiatric Center (CNYPC). In the complaint, we alleged that CNYPC unlawfully used, and continues to use, the amount of Workers' Compensation benefits in its employment and promotion decisions and that the management of CNYPC maintained a Worker's Compensation "scorecard" for use in its promotion process. *Workers' Compensation Law* § 120 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 alleged that employees at CNYPC were adversely impacted for utilizing Workers' Compensation leave and that certain members were not promoted despite superior test, scores, experience and qualifications.

The sole remedy for a violation of *Workers' Compensation Law* relating to employment discrimination 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 and sole remedy. Although the reported cases concerning termination of an employee's employment, the section specifically prohibits discrimination *in any other manner*. 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 anti-discriminatory provision applies equally in the public sector. In such cases, the preliminary inquiry is whether civil servants, who are injured on the job, are treated detrimentally when compared to those who must take leaves of absence for non-work-related injuries. If the action complained of is not made in retaliation for the employee's compensation claim or testimony, the section not violated. In the present case, as indicated in the "scorecard" the three most recent promotees had the lowest workers' compensation days used since December 2015. The coincidence is statistically unreasonable. Moreover, most of the individuals we spoke with were not promoted despite superior test, scores, experience and qualifications.

### Employee Health Services

**Cayuga Correctional Facility:** On September 12, 2018, DOCCS placed the member on involuntary leave pursuant to Civil Service Law 72(5). The member attended EHS Exams and DOCCS determined that she was unfit for duty. We appealed DOCCS's determination regarding the member's fitness for duty on September 21, 2018, and we await documentation and a hearing date.

**Green Haven Correctional Facility:** The member was terminated pursuant to *Civil Service Law* Section 73 for being out on personal leave for over one year. This termination was challenged because the member had been cleared to return to duty by Employee Health Services and was in fact attempting to return to work. He was not disobeying the order or indicating that he was still out on personal illness, he was simply unable to get to work for a couple of days due to transportation issues since he had been out for so long. Based on these unique facts, we argued that the termination was not appropriate. Ultimately, DOCCS has rescinded the termination and the member has returned to duty. We have not received an answer to our further demand for back pay (as his termination was rescinded). It is possible we will need to move forward with a hearing to argue for back pay since the termination was rescinded.

**New York State Education Department:** We are attempting to schedule a hearing for the member. State Ed has adjourned the member's termination date. State Ed alleges that medical evidence indicates that the member is unable to perform the duties of his position.

**Southport Correctional Facility:** On January 18, 2018, DOCCS placed the member on involuntary leave pursuant to Civil Service Law § 72 (5). The member attended an EHS Exam and DOCCS determined that he was unfit for duty. We appealed DOCCS's determination regarding the member's fitness for duty and a hearing was scheduled for July 24, 2018, before Arbitrator Joel Douglas. The member's appeal was subsequently withdrawn.

**Woodbourne Correctional Facility:** We filed a demand for a hearing challenging the determination of Employee Health Services that the member was unfit for full and strenuous duty. A hearing was scheduled for June 12, 2018, which we adjourned when the

member's physician stated he was unavailable to testify. The member has requested a second review by Employee Health Services. We will determine whether to proceed with a hearing in the near future.

**Wyoming Correctional Facility:** The member sustained a work-related injury on March 2, 2018. Upon his return to work, DOCCS determined that the member was unfit for duty. We appealed DOCCS's determination regarding the member's fitness for duty pursuant to Civil Service Rule 5.9 and requested a hearing. The member subsequently submitted new medical documentation, attended an EHS Exam and was found fit for duty. The member returned to work on September 17, 2018, and has withdrawn his request for a hearing.

### General

**ADA Violations:** On June 21, 2018, we spoke to EEOC Buffalo Regional Director John Thompson regarding a response to our February 27, 2018, letter requesting the EEOC and U.S. Department of Justice (DOJ) to initiate an enforcement action, or issue a "Right to Sue" letter enabling us to commence a civil enforcement action against DOCCS in the United States District Court to remedy charges of disability discrimination under the Americans with Disabilities Act (ADA). We were advised that the DOJ returned the files to the EEOC, but they had to locate and review the files to determine if any further action was taken to issue a "Right to Sue" letter. Although we are awaiting a "Right to Sue" letter from the EEOC/DOJ, we can still commence an enforcement action in the absence thereof since we diligently sought the jurisdictionally required letter and would request a waiver from the Court. The ADA claims are based upon: (1) DOCCS' failure to promote members to Sergeant while out on workers' compensation leave for a work-related injury even when expected to be able to return to full duty within a short time period, by refusing to consider promotion based on workers' compensation leave, and failing to consider any reasonable accommodation such as placement in the Light Duty program or additional short-term leave (Hatfield); and (2) DOCCS' automatic termination of employment under Civil Service Law § 71 upon the expiration of a one-year leave of absence due to a work-related injury, without considering any reasonable accommodation such as placement in the Light Duty program or additional short-term leave. In both cases, the EEOC issued a Determination finding "reasonable cause" to believe the DOCCS engaged in disability discrimination in violation of the ADA when it: (1) failed to engage in an interactive process with the member to determine whether or not a reasonable accommodation was available that would allow the member to accept a promotion or return to work; (2) failed to provide the member a reasonable accommodation to enable the member to accept a promotion or return to work; and, (3) applied a qualification standard that discriminated against the member based upon a disability. Having found that that DOCCS also discriminated against other similarly situated employees (class of employees), the EEOC invited the Department to participate in conciliation in an effort to reach an agreement that would eliminate such discriminatory employment practices, but DOCCS declined to participate in conciliation. As a result of finding reasonable cause to believe that DOCCS engaged in systemic discrimination on account of disabilities in violation of the ADA, the

EEOC referred the matter to the DOJ to determine whether it would initiate an enforcement action against DOCCS in the U.S. District Court. Although the EEOC's "reasonable cause" determinations are not binding on the court, they are viewed favorably since the EEOC is the federal agency charged with the responsibility to administer and achieve compliance with the ADA.

**Civil Service Termination Extension Letters:** We have recently submitted a number of letters to DOCCS personnel requesting extensions on proposed *Civil Service Law* terminations for individuals who are waiting for disability retirement determinations or to have a few more months to recover from injuries in order to return to duty.

**Constitution and Bylaws Committee:** On September 27, 2018, we attended a meeting of the Constitution and Bylaws Committee.

**JCOPE Proceeding (SSO1 and retired SSOII):** JCOPE notified two members that it is considering commencing a formal investigation relating to allegations of requesting and receiving overtime payments in violation of the Public Officers Law. We responded to this notice with a detailed explanation of the members' conduct and the authority for his actions. We requested that JCOPE not commence a formal investigation. We were notified by JCOPE, by letter dated August 14, 2018, that JCOPE has determined not to take any further action relating to either member. The matter is, therefore, resolved.

**SUNY:** We recently reviewed a draft Sexual Harassment policy which was scheduled to be reviewed by the SUNY Board of Regents last month. Ultimately, the Board of Regents tabled the matter and has not taken any action with respect to the policy. We have drafted a letter for VP Harmon's review and signature which formally notes an objection to a portion of the policy which we believe could implicate a mandatory subject of bargaining (should the Board of Regents choose to address this again in the future).

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



# Lippes Mathias Wexler Friedman LLP

Attorneys at Law

## AUGUST 2018 LEGAL REPORT TO THE EXECUTIVE ASSEMBLY

This is our report for the August 2018 Executive Assembly, regarding the recent developments in some of the cases and legal matters we are handling for NYSCOPBA.

### Negotiations

We continue to meet with the collective bargaining committee.

### Litigation

**Statewide – Retiree Health Insurance Litigation (NYSCOPBA v. State, et al., USDC, NDNY, 11-CV-1523):** On January 26, 2018, the State defendants submitted their reply papers in response to our opposition papers to the State defendants’ summary judgment motion that we filed on December 20, 2017. While the matter is now fully submitted to the Court, it appears that the defendants submitted exhibits to their reply papers that were not produced during discovery, and we will need to request permission from the Court to submit a sur-reply to address the issue and request that the non-produced documents be stricken. As previously reported, we believe that there are genuine issues of material fact preventing summary judgment in favor of the State defendants, and result in a trial regarding whether or not the State defendants negotiated health insurance contribution rates for represented employees in retirement during the 1982-1985 bargaining and contracts.

**[Member] v. State of New York (Orange County Supreme Court/Appellate Division, Second Department):** On November 3, 2017, we filed a Reply Brief in the *Matter of [Member] v. State of New York* in the Appellate Division, Second Department. By way of background, the member was hired as an SHTA on May 14, 2015. Pursuant to Civil Service Rules, he was to serve a one (1) year probationary term. The member was involved in an incident with a patient, which resulted in a Justice Center investigation. Based upon the findings from that investigation, the member was terminated from his employment, effective April 14, 2016, one month prior to the completion of his probationary term. We filed an article 78 proceeding to challenge the determination as arbitrary and capricious. The lower court denied our petition and dismissed the proceeding. The basis for the court’s decision was that the member did not exhaust his administrative remedies. The court noted in its decision, “by his own papers, [the member] admits that the Report which is cited for his termination is under appeal, and that no decision has yet been rendered.”

The incident which resulted in the termination occurred on February 12, 2016. On that date, the member was performing his routine SHTA duties. At approximately 2:55 p.m., a patient remained in the bathroom, contrary to facility rules. The member directed the patient to leave the bathroom, but the patient refused. The patient then threw a cup of water

in the member's face. After throwing a cup of water, the patient began striking the member with closed fist punches. The member reported the incident to the Safety and Security Officers on the Mid-Hudson Forensic Psychiatric Center campus and filed a supporting deposition, seeking criminal charges against the patient.

On April 8, 2016, the member received a letter from MHFPC indicating that "a recommendation has been made and approved by the Executive Director for termination of your probationary services as a Security Hospital Treatment Assistant pursuant to Civil Service Rule 4.5." The member was terminated from his employment from MHFPC, effective April 14, 2016, one month prior to the completion of his probationary term.

As indicated above, the lower court did not address the merits of the case. Instead, the lower court noted that the member had requested a Justice Center hearing on whether he committed the alleged abuse and/or neglect, and that the hearing has not been conducted. The court further noted, "it is hornbook law that one who objects to the act of an administrative agency must exhaust available administrative before being permitted to litigate in a court of law." Based upon the failure to exhaust administrative remedies, the lower court denied the petition and dismissed the proceeding.

On July 25, 2017, we filed a brief and record on appeal challenging the decision of the lower court. On November 3, 2017, the State responded, arguing that the Article 78 proceeding was merely a collateral attack on the Justice Center findings and, as such, the matter was not ripe until after the Justice Center hearing. Further, the State addressed the merits of the Article 78, arguing that there was a good faith basis for the termination.

In our November 14, 2017, reply brief, the Union argued that even if the request to the Justice Center is granted in its entirety, the result would be that the two Category 2 abuse and neglect findings are unsubstantiated and the Justice Center's records sealed, the member would not be returned to his prior employment. Therefore, the determination that the member challenged, the termination of employment, is separate and distinct from the Justice Center's determination. We further argued that, as the Justice Center is continuing to investigate the incident and has not reached *any* final disposition of the administrative appeal, the decision to terminate Petitioner's employment should be set aside. "An action which has not reached *any* conclusion should not be used as a basis to terminate someone's employment." We await the Appellate Court's decision on the matter.

**Clinton Correctional Facility:** On June 1, 2018, we filed an Article 78 proceeding challenging the termination of a member after just one year of workers' compensation leave. We believe, based on the documentation and reports of the incident, that the member's injury should be considered an assault, thus entitling him to two years of leave under the *Civil Service Law*. The State is required to submit answer papers on August 24, 2018. The return date when all the papers are sent to the Judge is August 31, 2018.

**Correction Sergeant, Spanish Language:** On May 4, 2018, we filed an Article 78 petition in Albany County, Supreme Court, challenging the Correction Sergeant Spanish

Language position and the appointments made to that position. This litigation also includes an application for a preliminary injunction.

**Elmira Correctional Facility (Enforcement of Settlement Agreement):** On February 26, 2018, we sent a proposed settlement agreement to the Assistant Attorney General handling this case, which was filed in 2015 in Chemung County Supreme Court alleging breach of contract in relation to Elmira's continuing failure to abide by the terms of a settlement agreement in a 2008 PERB case. Under the agreement, the administration at Elmira is required to notify local stewards of any proposed changes to the jobs of officers or sergeants and give them an opportunity to provide "timely input" before any changes take effect. We await a response.

**[Member] v. State Department of Civil Service (Albany County, Supreme Court):** On November 14, 2017, we commenced an Article 78 proceeding challenging a determination by the New York State Department of Civil Service denying disabled veteran credits to the member, a U.S. Marine Corp veteran, for use on the Correction Lieutenant test. Specifically, we challenged the Department's decision to use the date in which the Department of Veterans Affairs back-dated the member's disability to, rather than the date of its actual disability determination. The State used the "retroactive" date of the determination and by so doing, denied the member disabled veteran's points toward the lieutenant's examination. We contended that the Department's determination was made in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion. On March 2, 2018, we received the State's motion to dismiss. We submitted our response and are awaiting the Court's decision.

**[Member] v. NYS Justice Center:** We filed an Article 78 petition challenging the decision of the Justice Center in this member's case. The petition argues a legal issue specifically that the Justice Center failed to give *res judicata* or collateral estoppel preclusive effect to a favorable disciplinary decision involving the same exact allegations. The State, in response to our petition, moved to have the case immediately transferred to the Appellate Division, based upon a question of substantial evidence after a hearing. We submitted responsive papers on May 23, 2018, arguing that there was a question of law that must first be decided by the lower court. On June 29, 2018, we received a decision and order of transfer from the Judge assigned that the whole case will be transferred now to the Appellate Division for a decision on the legal questions regarding *res judicata* as well as the substantial evidence question. We are now preparing the formal record which is required for all cases sent to the Appellate Division. We anticipate that the case will be fully submitted to the Appellate Division, with the record and supplemental briefs in the next sixty (60) days.

**SHTA Workers' Compensation Termination:** On April 11, 2018, we filed an Article 78 proceeding challenging the termination of the member after just one year of workers' compensation leave. We believe, based on the documentation and reports of the incident, that his injury should be considered an assault, thus entitling him to two years of leave under the *Civil Service Law*. Following the filing of the Article 78 proceeding, OMH actually sustained his contract grievance involving the same exact issue and awarding him

two years of workers' compensation leave. He was also recently granted disability retirement. We have not withdrawn the Article 78 proceeding yet, as we are first ensuring that the member is made whole appropriately following the grievance decision. Once we have confirmed this, we can discontinue the Article 78.

***[Member] v. State, (Albany County Supreme Court/Appellate Division Third Department) Gender Specific Directive (#2230):*** On March 9, 2018, we filed a motion for leave to appeal the decision in the this case, which affirmed the lower court's ruling that respondent Department of Corrections and Community Supervision (DOCCS) was not guilty of an unlawful discriminatory practice based on gender.

By way of background, on January 5, 2015, DOCCS updated Directive #2230 to require that special watches and suicide watches must be conducted by staff members of the same gender as the inmate who was under observation.

As relevant to this specific case, at Albion Correctional Facility, hiring for overtime is based upon seniority. On April 27, 2015, the member was on the list to be hired for overtime. However, as conceded by DOCCS, Albion CF applied the above-referenced directive to deny the member the opportunity for overtime based upon his gender. A female correction officer with less seniority than the member was hired for overtime instead. The member and another male officer were both ahead of the female officer based upon terms of seniority, but both officers, including the member, were skipped over based on the gender specific directive

Before the Division of Human Rights, we argued that the Division was incorrect because a prima facie case of discrimination was established. First, DOCCS Directive #2230 clearly discriminated upon the basis of gender. Second, based upon that discriminatory practice, the member 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 has deprived the member of material benefits in that he was denied overtime opportunity. Therefore, the member was directly impacted by Directive #2230, has suffered damages based upon this Directive, and will continue to suffer damages in the future, based upon this Directive.

On November 16, 2015, the Division dismissed the Complaint, finding the existence of a Bona Fide Occupational Qualification (BFOQ). On January 15, 2016, we commenced an Article 78 proceeding challenging the Division's determination as being arbitrary and capricious. On June 22, 2016, the lower court affirmed the Division's finding that there was a BFOQ. We appealed that decision to the Appellate Division, Third Department. The basis for the appeal was that DOCCS did not establish a valid BFOQ defense and that the Division's determination was legally insufficient, arbitrary and capricious, and not supported by a rational basis. To establish a BFOQ, a Respondent must make a strong factual showing that no reasonable alternatives existed. DOCCS failed to do so before the Division. Furthermore, because a BFOQ determination must be so factually specific, we submit that a full evidentiary hearing was necessary; lacking that, the determination should



be annulled as arbitrary and capricious. Specifically, the decision does not adequately consider whether any reasonable alternatives exist. We argued that the only aspect of the special and suicide watches that might involve impermissible cross-gender surveillance is in observance of defection, and a female officer could be used for that task. Therefore, a reasonable alternative exists. Mere inconvenience does not establish a Bona Fide Occupational Qualification. Because the court did take reasonable alternatives into account, we believe the lower court erred.

As previously indicated, under the procedural rules, there is no automatic right to appeal to the Court of Appeals – it is by permission only. Unlike in the Appellate Division, which emphasizes factual questions such as whether the weight of the credible evidence supports a trial verdict or whether a court abused its discretion in making a ruling, the papers seeking leave from the Court of Appeals must identify issues of law to be addressed. The Court of Appeals hears very few cases each year and focuses on cases that involve novel or unique issues of law, and/or issues of public importance.

**[Member] v. DOCCS (Southern District of New York):** On July 26, 2018, we filed an amicus brief in the *[Member] v. DOCCS* case pending in the U.S. District Court for the Southern District of New York. This is the case regarding the two officers arrested from bringing vitamins into a facility. The case began on February 5, 2016, when the Superintendent’s office at Otisville Correctional Facility received an anonymous letter, alleging that Plaintiff was having an inappropriate relationship with an inmate and she would be bringing contraband into the facility on Saturday, February 6, 2016. However, because the substance of the anonymous letter was so weak, OSI advised “that there was not enough information in the letter to justify a direct intervention with Officer [redacted].” To circumvent confronting Plaintiff, Defendant Early directed a search be conducted of the incoming staff members on the 3-11 p.m. shift at Otisville on February 6, 2016.

During the search, Plaintiffs were found to be in possession of certain vitamins and dietary supplemental pills. Plaintiff had a bottle containing 77 pills; Plaintiff possessed 16 pills, including some in a clear bag. Based upon recovery of the pills discussed above, Defendant Roman “informed NYSP Inv. Gallagher that since the employees had contraband, they were to be arrested and charged with promoting and introducing contraband into the facility because, on that date, he “understood contraband to be any item that is not authorized by the Superintendent.” In the end, the substances confiscated from Plaintiffs were tested and determined not to be controlled substances. Based upon the information provided by Defendants Roman and Malave, Defendant Gallagher arrested Plaintiffs. Subsequently, Plaintiffs were issued a desk appearance ticket for violating NYS Penal Law 205.20 – promoting prison contraband in the second degree, a Class Misdemeanor. That unlawful arrest, and lack of probable cause for the arrest, was the primary focus of the amicus brief. In the brief, we argued that Plaintiffs were arrested during an egregious improper exercise of police authority. What makes this case egregious and is that the primary DOCCS investigator acknowledged that inmates were allowed buy from the prison commissary and to possess such vitamins. He was aware, or should have been aware, that possession of vitamins, even in the correctional setting, was not a crime. Therefore, the

actions by Defendants in arresting Plaintiffs, without probable cause that a crime had been committed, violated Plaintiffs' rights guaranteed by the United States Constitution and amounted to an unlawful false arrest.

**[Member] and NYSCOPBA v. DOCCS:** The member received an arbitration Award dated January 19, 2018. In that Award, Arbitrator Samuel Butto awarded that Grievant is guilty of Charge #3 and issued a penalty of dismissal from service. Regarding the suspension, the arbitrator found that the suspension was not proper in accordance with Article 8.4(a) (2) of the collective bargaining agreement, because of the acquittal of the criminal charges. He awarded that Grievant shall receive full back pay from the date of his suspension from duty. This matter was handled by W. James Schwan who wrote to DOCCS Director of Labor Relations John Shipley requesting that DOCCS follow the award and pay the member the back pay money that is owed to him. Since the member was not made whole pursuant to Arbitrator Butto's January 19, 2018 Award, on March 29, 2018, we filed a Notice of Verified Petition and Verified Petition to Confirm the arbitration award. The NYS Office of the Attorney General required additional time to respond to our Petition. All papers have been submitted to the Court. The return date was May 25, 2018. We are waiting for the Court's decision.

**[Member] and NYSCOPBA v. DOCCS (Albany County Index Number 04662-18).** The member (Cayuga Correctional Facility) was injured while restraining an inmate who was in possession of a weapon. The member was notified by DOCCS that his employment was being terminated effective July 27, 2018, because he has been absent for more than one cumulative year because of a work related injury. The member stopped an inmate for a pat frisk and saw a weapon in the inmates left pants pocket. The inmate pulled the weapon out of his pocket and tried to move away from the member, who was injured during the restraint. DOCCS now defines an assault as injury sustained as the result of an intentional physical act of violence directed towards an employee by an inmate or parolee. Assault in the Second Degree, as defined in Penal Law §120.05(3), occurs when a person, with intent to prevent a peace officer from performing a lawful duty, causes physical injury to the peace officer. What happened to the member is an Assault in the Second Degree according to the Penal Law. On July 20, 2018, we filed an Article 78 Proceeding challenging DOCCS definition of an assault and requesting that the court give the member a two-year leave. The Article 78 return date is August 24, 2018.

**[Member] v. Justice Center (Supreme Court, Albany County):** On February 8, 2018, we received an order from the New York Supreme Court transferring the case to the Appellate Division. By way of background, on August 3, 2017, we commenced a special proceeding pursuant to CPLR Article 78 to review a determination of the Justice Center, which denied the member's request to amend and seal a report of alleged abuse. The challenged decision was issued after an administrative hearing conducted before Administrative Law Judge Sharon Golish Blum on March 8, 2017, at the Adam Clayton Powell Jr. State Office Building in New York, New York. In the Decision after Hearing, the Administrative Law Judge denied the member's request to amend the substantiated finding of abuse and to seal the file.

The case resulted from an incident on July 4, 2015, at the Kirby Forensic Psychiatric Center in which it was alleged that the member conducted a restraint with excessive force and improper technique. Such technique included grabbing a service recipient by his shirt, lifting him up by his collar, pushing him to the floor, dragging him into the hallway, and/or punching him in the face. On July 4, 2015, during the lunch time, two service recipients started fighting while seated at one of the cafeteria tables. Although other staff members were present, they were not in the immediate area to provide assistance to the member. The fight escalated and both patients began exchanging closed fist blows. After standing up, one patient grabbed a plastic knife and attempted to stab the other patient in the face. At that time, the member intervened, grabbed the patient with the knife to restrain him in an OMH-approved maneuver called a "standing wrap." However, in doing so, the member backed into the table behind him, causing both the member and the patient to fall to the floor.

The ALJ found that allegation unsubstantiated because the member's actions were reasonable emergency interventions to prevent the imminent risk of harm to a person – he had to prevent the other patient from being stabbed in the face. While the patient was on the floor, the member observed that the knife previously used in the attack was on the floor, and within reach. The member reasonably believed that the patient might harm someone - another patient, another staff member, or himself -- so with no staff assistance immediately available, he grabbed the patient, who had previously possessed the knife, and dragged him 6 to 8 feet out of the dining room and into the hallway. With respect to that allegation, the Administrative Law Judge found the abuse allegation substantiated because dragging the patient out of the cafeteria was not a reasonable emergency intervention.

In the article 78, we allege that the finding in the Recommended Decision after Hearing, that the act of dragging the Service Recipient out of the dining room by the back of his shirt was not a reasonable emergency intervention to prevent imminent risk of harm, was irrational and not supported by substantial evidence.

### Discipline

**Interrogations:** For the months of June 2018 and July 2018, we represented sixty-four (64) members who were interrogated by DOCCS.

**Auburn Correctional Facility:** The Officer in this NOD was accused of striking a minor while off duty. Additionally, he was accused of testing positively for marijuana. The Officer's resignation from service was accepted by DOCCS on July 23, 2018, and the hearings scheduled for September 6 and 7, 2018, have been cancelled.

**Bare Hill Correctional Facility:** This NOD is for allegedly using improper and racial language in front of inmates. Hearings were held before Arbitrator Edward Battisti on July 11 and 12, 2018. Additional hearing dates are scheduled for October 3 and 4, 2018.

**Buffalo Psychiatric Center:** The member received a notice of discipline alleging that in the course of his job duties, he filed an accusatory instrument with Buffalo City Court containing false statements, unlawfully imprisoned an individual, improperly acquired an electronic stun gun during a traffic stop and inappropriately called in sick to work when he was actually working another security job. OMH is seeking termination. Arbitration is scheduled for August 6, 7, and 27, 2018, before Arbitrator Thomas Rinaldo.

**Coxsackie Correctional Facility:** The NOD alleges that the member used racial and profane language prior to instigating a use of force on an inmate. The matter has been scheduled for hearing on October 16, 2018, and either December 5 or 6, 2018.

**Downstate Correctional Facility:** On August 11, 2017, the member received an NOD resulting from an arrest for an alleged sexual assault. This matter is scheduled for September 11, 2018.

**Downstate Correctional Facility:** This NOD alleges that the member failed to properly account for all inmates under his supervision and submitted a false, inaccurate and/or misleading document relating to an improper "report of count" slip. This was the second time the member was disciplined for basically the same allegation. The matter has been filed to disciplinary expedited arbitration and was scheduled for a hearing before Arbitrator Bruce Trachtenberg. Prior to the hearing, this matter was settled on July 16, 2018.

**Downstate Correctional Facility:** The member received a Notice of Discipline charging her, as movement and control officer, with failing to document the arrival of an inmate, with providing a false or misleading count for four facility counts, and with working unauthorized overtime. The first day of this expedited arbitration was held on June 27, 2018. Day two will be held on August 15, 2018.

**Fishkill Correctional Facility:** The officer in this NOD was charged criminally. When the criminal matter is resolved the NOD may proceed.

**Fishkill Correctional Facility:** This NOD is for allegedly leaving the facility with a canister of OC spray without permission and failing to cooperate with the facility's efforts to retrieve the canister. We have submitted our arbitrator requests and are awaiting the assignment of an arbitrator.

**Fishkill Correctional Facility:** This member is accused of falsely stating that restraints were placed on an inmate by another member. The NOD has been assigned to Arbitrator David Lande.

**Fishkill Correctional Facility:** This member has been charged with using unnecessary and excessive force. Three (3) days of hearings were held on September 8, 2017, December 19, 2017, and May 9, 2018, before Arbitrator Lise Gelernter. The final hearing date took place on July 31, 2018.

**Fishkill Correctional Facility:** The NOD alleges that the member provided false and misleading statements regarding a use of force, among other charges. The first day of the arbitration took place on September 28, 2017, before Arbitrator Dennis Campagna. The second day of the arbitration took place on December 4, 2017. After the second day, we made a motion to restore the member to duty or, in the alternative, to restore him to the payroll pending the results of the disciplinary arbitration on the grounds that the member worked for six (6) months without incident after the alleged excessive use of force, and even had the alleged victim work as his porter without incident during that time. Therefore, the State did not have probable cause to believe that the member's continued presence would be a risk to the safety and security of the facility. The State submitted its answer to the motion. The Arbitrator determined that DOCCS improperly suspended the member and ordered that the member be restored to pay status pending the result of the disciplinary arbitration. A third day of hearing took place on January 24, 2018, and a fourth day of hearing took place on March 19, 2018. Closing briefs were submitted. Arbitrator Campagna found the member guilty of one (1) of the four (4) charges and issued a time-served suspension (ten (10) months). The member has since returned to work.

**Franklin Correctional Facility:** This NOD is for allegedly failing to properly secure a firearm. This matter was settled on July 6, 2018.

**Franklin Correctional Facility:** The NOD alleges that the member failed to report excessive use of force. The first day of hearing was held on April 13, 2018. The second day of hearing was held on May 3, 2018. This case involves allegations that Officer Foote failed to report other staff members striking an inmate and putting their hands around the inmate's neck, as well as an allegation that Officer Foote provided a false statement in his interrogation. Additional hearing days are scheduled for August 29, 30, and 31, 2018.

**Franklin Correctional Facility:** This member has been charged with using excessive and unjustified use of force, among other charges. Hearings were held before Arbitrator Louis Patack on August 23, 2017, in Plattsburgh, New York, on October 20, 2017, in Albany, New York, and on January 31, and February 1, 2018, in Plattsburgh, New York. The parties have completed the hearing phase of the case. Transcripts were received on March 8, 2018, and briefs were submitted on April 20, 2018. The Arbitrator found the member not guilty of all charges and awarded full back pay, accruals, etc.

**Franklin Correctional Facility:** This NOD is for allegedly failing to properly secure a firearm. This matter was settled on July 6, 2018.

**Great Meadow Correctional Facility:** The member received an NOD dated November 20, 2017. This is another Herman Bell case. The member is charged with failing to report an excessive and unjustified use of force and making false statements during his interrogation. The first two days were heard on July 18 and 19, 2018. We are waiting to hear back from the Arbitrator to schedule the next two hearing days.

**Great Meadow Correctional Facility:** This NOD is for allegedly failing to report another officer's alleged excessive force and providing false information. The NOD has been

assigned to Arbitrator Edward Battisti. Hearing dates have been scheduled for October 10, 11, 24, and 25, 2018.

**Great Meadow Correctional Facility:** The member has received two Notices of Discipline arising out of the Herman Bell use of force. The NODs are dated October 4, 2017, and November 27, 2017. The case is scheduled to be heard on May 2 and 4, 2018, and on August 17, 2018. Charges 2 and 3 of the first NOD, which charged the member with lying when he stated that he passed his assigned OC Spray to another member, are being withdrawn by DOCCS. The remaining charge alleges that the member withheld the name of staff that were physically restraining Inmate Bell, withheld information as to what he saw regarding the force used on Inmate Bell, and withheld the names of staff who responded to the Level 2. The Second NOD charges the member with failing to report an unjustified and excessive use of force on Inmate Bell. Days 1 and 2 of this case were held on May 2 and 4, 2018. Day 3 is scheduled for August 17, 2018 and Day 4 for September 27, 2018.

**Great Meadow Correctional Facility:** This NOD alleges utilizing unjustified and excessive force on an inmate, completing and signing an Inmate Misbehavior Report containing false and misleading information, and making false and misleading statements during an interrogation. The matter has been scheduled for a hearing before Arbitrator Timothy Taylor on December 5 and 6, 2018.

**Great Meadow Correctional Facility:** The first day of hearing in this matter, scheduled for July 9, 2018, was adjourned to a later date. The NOD in this case alleges that the member failed to report the use of unjustified and excessive force by other staff members and provided false statements in his interrogation with OSI. The first two days of hearing in this case will now be held August 6 and 7, 2018, before Arbitrator Taylor.

**Mid-Hudson Forensic Psychiatric Center:** The member received a notice of discipline alleging that he punched a patient in the face while initiating a manual restraint. Arbitration was held on May 24, 2018. Arbitrator Dennis Campagna found the member not guilty of the charge in the notice of discipline and dismissed the notice of discipline in its entirety.

**Moriah Shock Incarceration Correctional Facility:** The CO charged in this NOD has a criminal action pending. When the criminal matter is resolved, the NOD will proceed if the criminal resolution does not result in termination.

**NYS Department of Education:** The SSO in this NOD is accused of insubordination and not obeying a direct order. Arbitrator Samuel Butto has been assigned the matter.

**New York State Psychiatric Institute/Washington Heights:** In this NOD, the SSO is accused of failing to follow orders when he refused to let a patient's service dog see his provider for a scheduled visit. We have submitted our arbitrator requests and are awaiting the assignment of an arbitrator.

**Otisville Correctional Facility:** The CO charged in this NOD has a criminal action pending. When the criminal matter is resolved, the NOD will proceed if the criminal resolution does not result in termination.

**Shawangunk Correctional Facility:** The CO charged in this NOD has a criminal action pending. When the criminal matter is resolved, the NOD will proceed if the criminal resolution does not result in termination.

**Shawangunk Correctional Facility:** The member in this NOD was charged criminally. When the criminal matter is resolved, the NOD may proceed.

**Sing Sing Correctional Facility:** The NOD alleges that the member operated a motor vehicle while intoxicated while off duty. This matter involves associated criminal charges. The matter has been scheduled for a hearing on November 1, 2018.

**Sullivan Correctional Facility:** The Officer in this NOD is accused of possessing and testing positively for marijuana.

**Sullivan Correctional Facility:** This NOD alleges misconduct, charging the member with sharing her residence with another member who tested positive for the presence of marijuana. Additionally, the member is charged with giving a false or inaccurate statement at an interrogation. The matter has been filed for disciplinary expedited arbitration. Timothy Taylor was assigned as the arbitrator to hear this matter and the hearing was held on July 6, 2018. On July 22, 2018, Arbitrator Taylor issued an Award finding the Grievant not guilty of the charges in the Notice of Discipline. The arbitrator did find the suspension on June 5, 2018 appropriate under Article 8.4(a) of the collective bargaining agreement. However, the arbitrator awarded back pay and benefits and the Grievant is to be made whole, including restoration of her leave accruals for the entire period of her suspension. If Grievant used any accrued annual leave to cover her unpaid suspension, her accrued annual leave should be restored.

**Ulster Correctional Facility:** The member received an NOD for insubordination. This matter is scheduled to be heard on September 19, 2018.

**Upstate Correctional Facility:** The Officer in this NOD is accused of spending 4.5 hours in a room inattentive while on duty. This NOD has been settled.

**Upstate Correctional Facility:** The Officer in this NOD was accused of improper communication and unjustified physical force with an inmate. This NOD has been settled.

**Upstate Correctional Facility:** The Officer in this NOD is accused of repeatedly spending hours inattentive while on duty. The NOD has been assigned to Arbitrator James Cooper. We are awaiting hearing dates.

**Washington Correctional Facility:** The Officer in this NOD was charged criminally. The criminal charges have been resolved and settlement negotiations are ongoing.

**Western New York DDSO:** The member received a Notice of discipline for sexually harassing a female SSO. The first day of this case was heard on May 31, 2018. The second day was held on July 6, 2018. Closing briefs are due on August 3, 2018.

### Justice Center

**Central New York Psychiatric Center:** This Category 3 report of neglect alleged that the member fell asleep or was less than alert during a one-on-one watch on the overnight shift. This matter was settled and the charge was immediately sealed.

**Central New York Psychiatric Center:** This Category 3 report of neglect alleges that on November 26, 2017, the member failed to provide proper supervision and/or adequate medical care to a service recipient when she vomited while in mechanical restraints. We have submitted a request for amendment and await a response.

**Kirby Forensic Psychiatric Center:** This Category 3 report of neglect/abuse stems from allegations from a service recipient that he was choked and scratched by the member. The matter has been scheduled for a hearing on September 19, 2018, in Brooklyn.

**Mid-Hudson Forensic Psychiatric Center:** This Category 2 report of neglect alleges that the member fell asleep or was less than alert while on duty, and/or otherwise failed to provide a service recipient with proper supervision. A pre-hearing conference took place on July 13, 2018.

**Mid-Hudson Forensic Psychiatric Center:** A hearing was scheduled for July 18, 2018, in this Category 3 allegation of improper take down technique against the member. A few days prior to the hearing, we received an offer to settle this matter in a favorable settlement whereby the Category 3 charges (which was less than one year old) would be immediately sealed. This settlement was accepted and the case is now sealed and closed.

**Mid-Hudson Forensic Psychiatric Center:** This Category 2 report of neglect alleges that the member fell asleep or was less than alert while on duty, and/or otherwise failed to provide a service recipient with proper supervision. A pre-hearing conference is scheduled for July 13, 2018.

**Mid-Hudson Forensic Psychiatric Center:** This Category 2 report of neglect alleges that the member fell asleep or was less than alert while on duty, and/or otherwise failed to provide a service recipient with proper supervision; a Category 3 report of abuse also alleges that the member falsified records related to a service recipient's safety and supervision. A pre-hearing conference is scheduled for July 13, 2018.



**Mid-Hudson Forensic Psychiatric Center:** This Category 2 report of abuse alleges that the member conducted a restraint with excessive force and improper technique, which included placing his arm around a service recipient's neck. An administrative hearing is scheduled for July 18, 2018, in Poughkeepsie.

**Mid-Hudson Forensic Psychiatric Center:** This Category 2 report of physical abuse and abuse (deliberate inappropriate use of restraints) alleges that on August 21, 2017, the member conducted a restraint with excessive force and/or improper technique, including scraping a service recipient's face on concrete, kicking and/or punching him. We have submitted a request for amendment and await a response.

**Mid-Hudson Forensic Psychiatric Center:** This Category 2 report of physical abuse and abuse (deliberate inappropriate use of restraints) alleges that on August 21, 2017, the member conducted a restraint with excessive force and/or improper technique, including scraping a service recipient's face on concrete, kicking and/or punching him. We have submitted a request for amendment and await a response.

**New York City Children's Center:** This Category 3 report of neglect/abuse alleged that the member improperly used handcuffs on a service recipient in order to gain therapeutic compliance, despite the fact that this action was at the direction of the service recipient's doctor and treatment team leader. The matter will now be scheduled for a hearing before the Justice Center.

### Improper Practice Charges

**Statewide - Civil Service Promotional Exam Fees (U-29179):** NYSCOPBA, along with other unions, filed an IP alleging that the State unilaterally changed its policy/procedure with respect to the fees charged for promotional civil service examination. The case was heard by an ALJ, went up the Board, and was remanded back to the ALJ for further proceedings. Ultimately, ALJ Sargent found that the State, specifically the Department of Civil Service, violated § 209-a.1 (d) of the Act when it unilaterally began requiring employees to pay a fee for promotional/transition examinations, and ordered the State to make whole employees for any fees paid. Subsequently, the State filed exceptions to the Board on this decision. On behalf of NYSCOPBA, this office submitted a response to the exceptions.

**Statewide – DOCCS (Clear Bag) (U-35624):** The hearing in the Improper Practice Charge relative to the clear bag was completed on July 11 and 12, 2018. We had a total of four days of hearing in this matter before ALJ Sargent at PERB. In total, the union presented seven witnesses and the State presented two witnesses for their case (former D.C. Bellnier and Dan Martuscello) who we had an opportunity to cross examine. The record is now closed. We have just received the transcripts from the hearing and will be provided with a date to submit briefs soon. The ALJ sets the initial briefing schedule, usually 30-60 days. Once briefs are submitted, the ALJ will issue her decision. There is no set timeframe for PERB decisions and it can take quite some time for a decision.

**Statewide – Commissioner Annucci’s Memorandum (U-35773):** This office filed an Improper Practice Charge in response to Acting Commissioner Annucci’s May 3, 2017, memorandum. The memorandum was read at lineup to correction staff for ninety-six (96) hours, which, among other things, effectively accused the Union of disseminating “half-truths” and perpetuating a “negative outlook” about the Department. We received the State’s Answer in response. An initial conference took place on October 19, 2017. This matter has been complicated by GOER indicating that it will consider issuing strike notices to members for alleged job actions that occurred at Auburn CF, Clinton CF, and Great Meadow CF in April-May 2017 if this IP is not withdrawn. That is because the Annucci memo was (in DOCCS’ words) a “knock-it-off” response to the job actions. On January 8, 2018, this office met with NYSCOPBA Executive VP Tammy Sawchuk, Northern Region VP John Roberts, Business Agent Ricky Brunelle, and Stewards from Clinton CF and Great Meadow CF to present and discuss the facts surrounding the IP and possible strike notices, and its potential impact on members at Clinton CF. The matter was scheduled for a hearing on May 3, 2018, but has since been placed on the PERB hold calendar until August 24, 2018, pending negotiations with GOER/DOCCS.

**Statewide – Duty of Fair Representation (Fishkill CF) (U-36027):** We submitted our Answer on behalf of NYSCOPBA in an Improper Practice charge filed by a member, alleging that NYSCOPBA breached its duty of fair representation in the manner in which it allegedly withheld union representation from the member at Fishkill Correctional Facility. A conference was held at the Albany PERB Office on March 14, 2018, at 11 am. A second pre-hearing conference took place by phone on June 12, 2018, to discuss evidence and issues to be resolved at hearing, with hearing dates of July 30 and 31, 2018. The hearing was adjourned on July 30, 2018, at the request of the member, as he was physically incapable of appearing at the hearing due to his recent surgery. Judge Reich adjourned the hearing and indicated that he will schedule a phone conference in order to assess future hearing dates.

**Statewide – Duty of Fair Representation (Collins CF) (U-36028):** We appeared (via telephone) at a conference on May 2, 2018 regarding this Improper Practice charge filed by a member, alleging that NYSCOPBA breached its duty of fair representation in the manner in which sergeants vacation schedules were addressed at Collins Correctional Facility. We presented our arguments to the ALJ at the conference, which include the fact that these vacation schedules are allowed pursuant to Article 14.1(d), and that the local sector followed the established internal procedure to address local arrangements for vacation selection. A vote took place, for which the member did participate, and the local overwhelmingly voted to change the vacation bidding procedure for sergeants. As such, there certainly was no breach of the duty of fair representation as to the member. After a long conference, the member indicated a willingness to withdraw the charge. The ALJ gave him a little time to decide. The member withdrew the charge.

**Statewide – Employee’s Manual (U-33638):** On February 23, 2018, we discussed settlements with GOER to resolve this charge. This IP is from 2014 and involves changes in the Employee’s Manual. Specifically, the changes include: section 2.2 regarding a

change in the licensure practice; section 2.3 regarding reporting requirements in domestic violence situations; section 4.9 regarding copying documents; section 4.15 regarding dissemination of criminal history; section 6.3 regarding official stationary; and section 2.44 regarding alerting of supervisory rounds. We will keep you informed regarding progress of negotiations.

**Statewide – Office for People with Developmental Disabilities (U-35979):** On September 26, 2017, we filed an Improper Practice Charge with PERB, stemming from a statewide OPWDD job posting for specialized SSO1 positions as Family Care Inspectors. The job posting requires interested candidates to submit a cover letter and resume. Past practice has been to bid these positions regionally and award them by seniority. The charge alleges that OPWDD violated the Act by unilaterally changing the posting and bidding procedures without negotiating with NYSCOPBA. The initial conference of this matter was held December 20, 2017. An improper practice charge was filed after a statewide OPWDD job posting for specialized SSO1 positions as Family Care Inspectors required applicants to submit a resume and cover letter and did not award the jobs by seniority. This matter has been placed on PERB’s hold calendar in order for both parties to investigate it further.

**Albany Training Academy (U-36266):** We filed an improper practice charge with PERB, after Albany Training Academy Assistant Director James Huff threatened and refused to provide the member with Union representation during investigatory questioning that took place during a chemical agents instructor school at the Albany Training Academy in November 2017. The charge alleges that Assistant Director Huff denied the member Union representation during questioning which could result in discipline, and that Assistant Director Huff’s behavior constituted interference and retaliation, all in violation of the Act. An initial conference was held on June 11, 2018, before Administrative Law Judge William Weisblatt. The parties engaged in settlement discussions and are currently negotiating language for a settlement agreement.

**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 injured 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 October 1, 2018. During that time, the Union will continue to review various assault alert forms completed by members in order to ascertain whether they received medical treatment or were ignored by facility physicians.

**Central New York Psychiatric Center (U-35970):** A conference was held on January 17, 2018. On September 21, 2017, we filed an Improper Practice Charge alleging that Central New York Psychiatric Center, (“CNYPC”) interfered, restrained, retaliated against and coerced employees in the exercise of their rights guaranteed under the *Taylor Act*. Specifically, we alleged that on August 27, 2017, the member, a NYSCOPBA member, Union Steward, and a Central Service Staff member, was directed to cover a

mandatory overtime post at SUNY Upstate Medical Center. On September 13, 2017, NYSCOPBA filed a grievance regarding the mandating of overtime to the member and the change in overtime policy generally. After the grievance was filed, on September 15, 2017, Mr. Paparella confronted Central Service Staff members regarding the grievance on overtime mandating and distribution. During the discussion, Mr. Paparella stated, among other things: 1) Things are going to happen if [the grievance] goes through; 2) That he is sick and tired of all the whining and complaining; 3) That he planned to remove responsibilities from those who filed the grievance; 4) That Central Staff SHTA's duties would be changed such that, upon entering the building, they would be assigned different posts and locations. On September 19, 2017, in further retaliation to the grievance, Mr. Paparella directed supervisory staff to assign Central Service Staff members to cover all Mandatory Overtime at the SUNY Upstate Medical Center. Such direction is inconsistent past practice, as well as the local Labor/Management agreement. The case is on hold pending further discovery.

**Central New York Psychiatric Center (U-36192):** This office filed an Improper Practice Charge in response to CNYPC's reinterpretation of the existing call-in procedure that changes how an ill employee reports an illness-related absence and how such absence is counted for discipline purposes. The matter was heard at a pre-hearing conference with ALJ Weisblatt on March 26, 2018. The Judge placed the matter on PERB's hold calendar until June 1, 2018, to give the parties the opportunity to discuss possible settlement. The matter has been scheduled for a hearing on August 29, 2018.

**Mid-Hudson FPC Bag Restriction (U-36147):** We filed an Improper Proper Practice Charge alleging a failure to negotiate regarding a mandatory subject of bargaining. Mid-Hudson FPC unilaterally changed a significant work rule, impacting the comfort and convenience of employees. Specifically, the facility implemented a new rule restricting all employees to entering the facility with only one bag (of restricted size) for clothing, etc. and one small cooler for food. The prior practice at the facility did not limit employees in the size and number of bags they could bring into the facility for each shift. We appeared at a conference on March 21, 2018 before ALJ Weisblatt. The parties had a substantive conversation about settling this case. The ALJ placed the matter on the hold calendar so that the discussions could continue.

**Rochester Psychiatric Center (U-36177):** We filed an improper practice charge with PERB, after Rochester PC announced a new paycheck distribution policy whereby employees will no longer be able to pick up live paychecks at Rochester PC. Judge Burritt held a conference call between the parties on June 5, 2018, to discuss resolution. A second conference call to discuss the resolution of this charge took place on July 9, 2018.

**Southport Correctional Facility (U-34184):** On December 12, 2017, we participated in a conference call initiated by PERB on this charge, which 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. A hearing in the case was held in December of 2015 and briefs were later filed, but the administrative law judge who heard the case left PERB before issuing a decision. The case is now assigned to another judge

who, if a settlement is not otherwise reached, will review the record and briefs and issue a decision. On the conference call, the judge asked the attorneys to present their legal arguments in support of their respective positions and she also asked the parties to consider whether there was a possibility of settling the case. We are exploring that.

### Contract Enforcement

**Appeals to Arbitration:** We received four (4) requests from NYSCOPBA's grievance department to appeal contract grievances to arbitration during the month of July 2018. We have reviewed the grievance files and drafted and submitted the arbitration appeals to the Governor's Office of Employee Relations (GOER).

**Auburn Correctional Facility:** An expedited arbitration was held before Master Arbitrator Joel Douglas on June 8, 2018. At issue in this grievance is whether the grievant was properly denied the opportunity to be awarded a post that was classified as male-only. The parties submitted closing letter briefs and await the decision of the arbitrator.

### Retirement

**Greene Correctional Facility:** The member's disability retirement application was denied. The Retirement System's Orthopedic Surgeon found that the member had limitations that made it dangerous for him to work as a correction officer, but stated that he could not determine if the member was permanently disabled, because he has refused surgeries that might make it possible for him to perform his duties. The member's medical records show that he has refused surgery on his lower back, right knee, and right shoulder. We are looking at whether the member's doctors are able give opinions that surgery would not improve his prognosis. At this time, we are not able to produce a doctor who will testify that the member is permanently disabled from performing his duties. On May 23, 2017, we filed the Scheduling Information Form to proceed on medical records. The initial hearing was held on January 17, 2018, at which time the member testified. The hearing has been continued to permit the member to present medical testimony.

**Green Haven Correctional Facility:** This is a disability retirement matter where the member sustained a head injury. On March 21, 2016, the member and his treating psychologist testified. This matter was continued to allow the Retirement System to put in the testimony of its psychiatrist. The System's psychiatrist testified on February 3, 2017. This matter was continued for the testimony of the System's neurologist. The System's neurologist has filed a supplemental report but will not testify because he is no longer under contract with the System. We have agreed with the System to close the proof in this matter. The System permitted us to enter into evidence medical records that were not submitted to the System within forty-five days after receipt of the acknowledgement letter. Closing briefs were submitted on March 23, 2018.

**Kirby Forensic Psychiatric Center:** 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 her duties as an SHTA. 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. The member's testimony was taken on March 6, 2018. The matter has been continued for the testimony of the System's doctor.

**Mohawk Correction Facility:** This is a disability retirement appeal. The issue is whether the member was injured by the act of an inmate. The hearing is scheduled for August 8, 2018.

**Sullivan Correctional Facility:** The member was injured when he was struck in the head with a baton swung by an inmate. The member's disability retirement application was denied by the Retirement System, which found that the member was not permanently disabled from performing his duties. The initial hearing was held on March 6, 2018. The matter has been continued for the testimony of the System's doctor.

**SHTA Retirement:** We filed a demand for a hearing to the NYS Retirement System on behalf of the member relating to Article 14 credit for his prior service as an SHTA before becoming a correction officer.

### Workers' Compensation

**Workers' Compensation Board Policy Updates:** The Workers' Compensation Board is updating a number of its internal policies and procedures and providing the union with an opportunity to review and comment. We have recently reviewed at least five policy revisions to ensure none of the changes involve mandatory subjects of bargaining that must be negotiated. To the extent the policies relate to existing laws, we are also ensuring that the policies are consistent with the language of any relevant laws and regulations.

**Workers' Compensation Discrimination:** On March 29, 2018, we received a decision denying the claim in this case. Although the Judge found that use of the workers' compensation 'scorecard' violated the law, there was no entitlement to promotion, and therefore dismissed the case. On April 24, 2018, we appealed that decision. By way of background, in October 2016, we filed a complaint of discrimination under the New York Workers' Compensation Law, section 120 for discrimination at Central New York Psychiatric Center (CNYPC). In the complaint, we alleged that CNYPC unlawfully used, and continues to use, the amount of Workers' Compensation benefits in its employment and promotion decisions and that the management of CNYPC maintained a Worker's Compensation "scorecard" for use in its promotion process. *Workers' Compensation Law* § 120 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 alleged that employees at CNYPC were adversely impacted for utilizing Workers’ Compensation leave and that certain members were not promoted despite superior test, scores, experience and qualifications.

The sole remedy for a violation of *Workers’ Compensation Law* relating to employment discrimination 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 and sole remedy. Although the reported cases concerning regard termination of an employee’s employment, the section specifically prohibits discrimination *in any other manner*. 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 anti-discriminatory provision applies equally in the public sector. In such cases, the preliminary inquiry is whether civil servants, who are injured on the job, are treated detrimentally when compared to those who must take leaves of absence for non-work-related injuries. *Duncan, supra*. If the action complained of is not made in retaliation for the employee’s compensation claim or testimony, the section not violated. In the present case, as indicated in the “scorecard” the three most recent promotees had the lowest workers’ compensation days used since December 2015. The coincidence is statistically unreasonable. Moreover, most of the individuals we spoke with were not promoted despite superior test, scores, experience and qualifications.

### Employee Health Services

**Green Haven Correctional Facility:** The member was terminated pursuant to *Civil Service Law* Section 73 for being out on personal leave for over one year. This termination was challenged because the member had been cleared to return to duty by Employee Health Services and was in fact attempting to return to work. He was not disobeying the order or indicating that he was still out on personal illness, he was simply unable to get to work for a couple of days due to transportation issues since he had been out for so long. Based on these unique facts, we argued that the termination was not appropriate. Ultimately, DOCCS has rescinded the termination and the member has returned to duty. We have not received an answer to our further demand for back pay (as his termination was rescinded). It is possible we will need to move forward with a hearing to argue for back pay since the termination was rescinded.

**Hale Creek Correctional Facility:** A hearing was scheduled before Hearing Officer Battisti on July 25, 2018, challenging the determination by Employee Health Services (supported by DOCCS) that the member was unfit for duty in March, 2018. Ultimately, the member submitted a new return to work note, was found fit by Employee Health Services, but did not return to work. Instead he chose to resign for personal reasons. He has now left state service.

**New York State Education Department:** We are attempting to schedule a hearing for the member. State Ed has adjourned the member's termination date. State Ed alleges that medical evidence indicates that the member is unable to perform the duties of his position.

**Southport Correctional Facility:** On January 18, 2018, following an EHS exam, DOCCS placed the member on involuntary leave pursuant to Civil Service Law 72 (5). Thereafter, the member submitted a medical note to DOCCS triggering a second EHS exam. DOCCS determined that the member was unfit for duty after both of these EHS exams. We have appealed DOCCS's determination regarding Officer Thrall's fitness for duty and a hearing was scheduled for July 24, 2018, before Arbitrator Joel Douglas.

**Woodbourne Correctional Facility:** We filed a demand for a hearing challenging the determination of Employee Health Services that the member was unfit for full and strenuous duty. A hearing was scheduled for June 12, 2018, which we adjourned when the member's physician stated he was unavailable to testify. The member has requested a second review by Employee Health Services. We will determine whether to proceed with a hearing in the near future.

### General

**ADA Violations:** We previously filed charges of disability discrimination under the Americans with Disabilities Act (ADA) against DOCCS with the Buffalo Regional Office of the U.S. Equal Employment Opportunity Commission (EEOC), based upon: (1) DOCCS' failure to promote members to Sergeant while out on workers' compensation leave for a work-related injury even when expected to be able to return to full duty within a short time period, by refusing to consider promotion based on workers' compensation leave, and failing to consider any reasonable accommodation such as placement in the Light Duty program or additional short-term leave; and (2) DOCCS' automatic termination of employment under Civil Service Law § 71 upon the expiration of a one-year leave of absence due to a work-related injury, without considering any reasonable accommodation such as placement in the Light Duty program or additional short-term leave. In both cases, the EEOC issued a Determination finding "reasonable cause" to believe the DOCCS engaged in disability discrimination in violation of the ADA when it: (1) failed to engage in an interactive process with the member to determine whether or not a reasonable accommodation was available that would allow the member to accept a promotion or return to work; (2) failed to provide the member a reasonable accommodation to enable the member to accept a promotion or return to work; and, (3) applied a qualification standard that discriminated against the member based upon a disability. Having also found that that DOCCS also discriminated against other similarly situated employees (class of employees), the EEOC invited the Department to participate in conciliation in an effort to reach an agreement that would eliminate such discriminatory employment practices, but DOCCS declined to participate in conciliation. As a result of finding reasonable cause to believe that DOCCS engaged in systemic discrimination on account of disabilities in violation of the ADA, the EEOC referred the matter to the U.S. Department of Justice (DOJ) for review to determine whether or not it would initiate an enforcement action



against DOCCS in the United States District Court. Although the EEOC's "reasonable cause" determinations are not binding on the court, they are viewed favorably since the EEOC is the federal agency charged with the responsibility to administer and achieve compliance with the ADA.

**Civil Service Termination Extension Letters:** We have recently submitted a number of letters to DOCCS personnel requesting extensions on proposed *Civil Service Law* terminations for individuals who are waiting for disability retirement determinations or to have a few more months to recover from injuries in order to return to duty.

**Constitution and By-Laws Committee:** On June 27, 2018, we attended the NYSCOPBA Constitution and By-Laws Committee meeting.

**JCOPE Proceeding (SSO1 and retired SSOII):** JCOPE notified two members that it is considering commencing a formal investigation relating to allegations of requesting and receiving overtime payments in violation of the Public Officers Law. We responded to this notice with a detailed explanation of the members' conduct and the authority for his actions. We requested that JCOPE not commence a formal investigation. We are awaiting JCOPE's response.

**SUNY:** We recently reviewed a draft Sexual Harassment policy which was scheduled to be reviewed by the SUNY Board of Regents last month. Ultimately, the Board of Regents tabled the matter and has not taken any action with respect to the policy. We have drafted a letter for VP Harmon's review and signature which formally notes an objection to a portion of the policy which we believe could implicate a mandatory subject of bargaining (should the Board of Regents choose to address this again in the future).

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



**JUNE 2018 LEGAL REPORT  
TO THE EXECUTIVE ASSEMBLY**

This is our report for the June 2018 Executive Assembly, regarding the recent developments in some of the cases and legal matters we are handling for NYSCOPBA.

**Negotiations**

We continue to meet with the collective bargaining committee.

**Litigation**

**Statewide – Retiree Health Insurance Litigation (NYSCOPBA v. State, et al., USDC, NDNY, 11-CV-1523):** On January 26, 2018, the State defendants submitted their reply papers in response to our opposition papers to the State defendants’ summary judgment motion that we filed on December 20, 2017. While the matter is now fully submitted to the Court, it appears that the defendants submitted exhibits to their reply papers that were not produced during discovery, and we will need to request permission from the Court to submit a sur-reply to address the issue and request that the non-produced documents be stricken. As previously reported, we believe that there are genuine issues of material fact preventing summary judgment in favor of the State defendants, and result in a trial regarding whether or not the State defendants negotiated health insurance contribution rates for represented employees in retirement during the 1982-1985 bargaining and contracts.

**[Member] v. State of New York (Orange County Supreme Court/Appellate Division, Second Department):** On November 3, 2017, we filed a Reply Brief in the *Matter of [Member] v. State of New York* in the Appellate Division, Second Department. By way of background, the member was hired as an SHTA on May 14, 2015. Pursuant to Civil Service Rules, he was to serve a one (1) year probationary term. The member was involved in an incident with a patient, which resulted in a Justice Center investigation. Based upon the findings from that investigation, the member was terminated from his employment, effective April 14, 2016, one month prior to the completion of his probationary term. We filed an article 78 proceeding to challenge the determination as arbitrary and capricious. The lower court denied our petition and dismissed the proceeding. The basis for the court’s decision was that the member did not exhaust his administrative remedies. The court noted in its decision, “by his own papers, [the member] admits that the Report which is cited for his termination is under appeal, and that no decision has yet been rendered.”

The incident which resulted in the termination occurred on February 12, 2016. On that date, the member was performing his routine SHTA duties. At approximately 2:55 p.m., a patient remained in the bathroom, contrary to facility rules. The member directed the patient to leave the bathroom, but the patient refused. The patient then threw a cup of water

in the member's face. After throwing a cup of water, the patient began striking the member with closed fist punches. The member reported the incident to the Safety and Security Officers on the Mid-Hudson Forensic Psychiatric Center campus and filed a supporting deposition, seeking criminal charges against the patient.

On April 8, 2016, the member received a letter from MHFPC indicating that "a recommendation has been made and approved by the Executive Director for termination of your probationary services as a Security Hospital Treatment Assistant pursuant to Civil Service Rule 4.5." The member was terminated from his employment from MHFPC, effective April 14, 2016, one month prior to the completion of his probationary term.

As indicated above, the lower court did not address the merits of the case. Instead, the lower court noted that the member had requested a Justice Center hearing on whether he committed the alleged abuse and/or neglect, and that the hearing has not been conducted. The court further noted, "it is hornbook law that one who objects to the act of an administrative agency must exhaust available administrative before being permitted to litigate in a court of law." Based upon the failure to exhaust administrative remedies, the lower court denied the petition and dismissed the proceeding.

On July 25, 2017, we filed a brief and record on appeal challenging the decision of the lower court. On November 3, 2017, the State responded, arguing that the Article 78 proceeding was merely a collateral attack on the Justice Center findings and, as such, the matter was not ripe until after the Justice Center hearing. Further, the State addressed the merits of the Article 78, arguing that there was a good faith basis for the termination.

In our November 14, 2017, reply brief, the Union argued that even if the request to the Justice Center is granted in its entirety, the result would be that the two Category 2 abuse and neglect findings are unsubstantiated and the Justice Center's records sealed, the member would not be returned to his prior employment. Therefore, the determination that the member challenged, the termination of employment, is separate and distinct from the Justice Center's determination. We further argued that, as the Justice Center is continuing to investigate the incident and has not reached *any* final disposition of the administrative appeal, the decision to terminate Petitioner's employment should be set aside. "An action which has not reached *any* conclusion should not be used as a basis to terminate someone's employment." We await the Appellate Court's decision on the matter.

**Correction Sergeant, Spanish Language:** On May 4, 2018, we filed an Article 78 petition in Albany County, Supreme Court, challenging the Correction Sergeant Spanish Language position and the appointments made to that position. This litigation also includes an application for a preliminary injunction.

**Elmira Correctional Facility (Enforcement of Settlement Agreement):** On February 26, 2018, we sent a proposed settlement agreement to the Assistant Attorney General handling this case, which was filed in 2015 in Chemung County Supreme Court alleging breach of contract in relation to Elmira's continuing failure to abide by the terms of a settlement agreement in a 2008 PERB case. Under the agreement, the administration at

Elmira is required to notify local stewards of any proposed changes to the jobs of officers or sergeants and give them an opportunity to provide “timely input” before any changes take effect. We await a response.

**[Member] v. State Department of Civil Service (Albany County, Supreme Court):** On November 14, 2017, we commenced an Article 78 proceeding challenging a determination by the New York State Department of Civil Service denying disabled veteran credits to the member, a U.S. Marine Corp veteran, for use on the Correction Lieutenant test. Specifically, we challenged the Department’s decision to use the date in which the Department of Veterans Affairs back-dated the member’s disability to, rather than the date of its actual disability determination. The State used the “retroactive” date of the determination and by so doing, denied the member disabled veteran’s points toward the lieutenant’s examination. We contended that the Department’s determination was made in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion. On March 2, 2018, we received the State’s motion to dismiss. We submitted our response and are awaiting the Court’s decision.

**[Member] v. NYS Justice Center:** On March 7, 2018, we filed an Article 78 proceeding challenging the decision of the Justice Center against the member. Specifically, we challenged the Justice Center’s failure to give *res judicata* or collateral estoppel effect to the decision of the disciplinary Arbitrator, who found the member not guilty of the same exact charges. These legal principles, in the simplest terms, provide an argument that this issue was addressed and decided by an arbitrator in an identical disciplinary matter, and therefore, the arbitrator’s decision must be binding on this case as well. We also included an argument that the decision of the Justice Center was not based upon substantial evidence. The Article 78 has been filed in Albany County Supreme Court. The return date for all papers to be submitted is May 25, 2018.

**[Member] v. State, (Albany County Supreme Court/Appellate Division Third Department) Gender Specific Directive (#2230):** On March 9, 2018, we filed a motion for leave to appeal the decision in the this case, which affirmed the lower court’s ruling that respondent Department of Corrections and Community Supervision (DOCCS) was not guilty of an unlawful discriminatory practice based on gender.

By way of background, on January 5, 2015, DOCCS updated Directive #2230 to require that special watches and suicide watches must be conducted by staff members of the same gender as the inmate who was under observation.

As relevant to this specific case, at Albion Correctional Facility, hiring for overtime is based upon seniority. On April 27, 2015, the member was on the list to be hired for overtime. However, as conceded by DOCCS, Albion CF applied the above-referenced directive to deny the member the opportunity for overtime based upon his gender. A female correction officer with less seniority than the member was hired for overtime instead. The member and another male officer were both ahead of the female officer based upon terms of seniority, but both officers, including the member, were skipped over based on the gender specific directive

Before the Division of Human Rights, we argued that the Division was incorrect because a prima facie case of discrimination was established. First, DOCCS Directive #2230 clearly discriminated upon the basis of gender. Second, based upon that discriminatory practice, the member 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 has deprived the member of material benefits in that he was denied overtime opportunity. Therefore, the member was directly impacted by Directive #2230, has suffered damages based upon this Directive, and will continue to suffer damages in the future, based upon this Directive.

On November 16, 2015, the Division dismissed the Complaint, finding the existence of a Bona Fide Occupational Qualification (BFOQ). On January 15, 2016, we commenced an Article 78 proceeding challenging the Division's determination as being arbitrary and capricious. On June 22, 2016, the lower court affirmed the Division's finding that there was a BFOQ. We appealed that decision to the Appellate Division, Third Department. The basis for the appeal was that DOCCS did not establish a valid BFOQ defense and that the Division's determination was legally insufficient, arbitrary and capricious, and not supported by a rational basis. To establish a BFOQ, a Respondent must make a strong factual showing that no reasonable alternatives existed. DOCCS failed to do so before the Division. Furthermore, because a BFOQ determination must be so factually specific, we submit that a full evidentiary hearing was necessary; lacking that, the determination should be annulled as arbitrary and capricious. Specifically, the decision does not adequately consider whether any reasonable alternatives exist. We argued that the only aspect of the special and suicide watches that might involve impermissible cross-gender surveillance is in observance of defection, and a female officer could be used for that task. Therefore, a reasonable alternative exists. Mere inconvenience does not establish a Bona Fide Occupational Qualification. Because the court did take reasonable alternatives into account, we believe the lower court erred.

As previously indicated, under the procedural rules, there is no automatic right to appeal to the Court of Appeals – it is by permission only. Unlike in the Appellate Division, which emphasizes factual questions such as whether the weight of the credible evidence supports a trial verdict or whether a court abused its discretion in making a ruling, the papers seeking leave from the Court of Appeals must identify issues of law to be addressed. The Court of Appeals hears very few cases each year and focuses on cases that involve novel or unique issues of law, and/or issues of public importance. On March 12, 2018, we received the State's opposition to our motion for leave to appeal. We are awaiting action by the Court of Appeals.

**Mohawk Correctional Facility:** On December 15, 2017, we filed an Article 78 proceeding in Supreme Court, Albany County, challenging DOCCS' refusal to grant this officer a two-year leave of absence in connection with injuries he suffered when coming to the aid of a fellow officer who was being assaulted by a non-compliant inmate. In assisting in subduing the inmate and gaining compliance, the member injured his shoulder

and later had surgery, but he still has significant limitations and is unable to return to work. He has applied for disability retirement (both ordinary and performance of duty). We contend that the member was injured as the result of an assault and is therefore entitled to a two-year leave of absence under Section 71 of the Civil Service Law. We received a decision from the Court indicating that DOCCS had a rational basis for determining that the member was not entitled to a two-year leave of absence. The Court made this determination based on the fact that the member allegedly received his injuries while restraining the inmate with a body hold, not because the inmate had assaulted the member. We recommend that the decision be appealed based on the fact that the decision suggests that DOCCS's interpretation of Section 71 is determinative, rather than the Legislature's intent. Furthermore, the decision fails to address the recent relevant case law and did not consider our arguments pertaining to legislative intent.

**[Member] and NYSCOPBA v. DOCCS:** The member received an arbitration Award dated January 19, 2018. In that Award, Arbitrator Samuel Butto awarded that Grievant is guilty of Charge #3 and issued a penalty of dismissal from service. Regarding the suspension, the arbitrator found that the suspension was not proper in accordance with Article 8.4(a) (2) of the collective bargaining agreement, because of the acquittal of the criminal charges. He awarded that Grievant shall receive full back pay from the date of his suspension from duty. This matter was handled by W. James Schwan who wrote to DOCCS Director of Labor Relations John Shipley requesting that DOCCS follow the award and pay the member the back pay money that is owed to him. Since the member was not made whole pursuant to Arbitrator Butto's January 19, 2018 Award, on March 29, 2018, we filed a Notice of Verified Petition and Verified Petition to Confirm the arbitration award. The NYS Office of the Attorney General required additional time to respond to our Petition. The new return date was May 25, 2018.

**[Member] v. Justice Center (Supreme Court, Albany County):** On February 8, 2018, we received an order from the New York Supreme Court transferring the case to the Appellate Division. By way of background, on August 3, 2017, we commenced a special proceeding pursuant to CPLR Article 78 to review a determination of the Justice Center, which denied the member's request to amend and seal a report of alleged abuse. The challenged decision was issued after an administrative hearing conducted before Administrative Law Judge Sharon Golish Blum on March 8, 2017, at the Adam Clayton Powell Jr. State Office Building in New York, New York. In the Decision after Hearing, the Administrative Law Judge denied the member's request to amend the substantiated finding of abuse and to seal the file.

The case resulted from an incident on July 4, 2015, at the Kirby Forensic Psychiatric Center in which it was alleged that the member conducted a restraint with excessive force and improper technique. Such technique included grabbing a service recipient by his shirt, lifting him up by his collar, pushing him to the floor, dragging him into the hallway, and/or punching him in the face. On July 4, 2015, during the lunch time, two service recipients started fighting while seated at one of the cafeteria tables. Although other staff members were present, they were not in the immediate area to provide assistance to the member. The fight escalated and both patients began exchanging closed fist blows. After standing

up, one patient grabbed a plastic knife and attempted to stab the other patient in the face. At that time, the member intervened, grabbed the patient with the knife to restrain him in an OMH-approved maneuver called a “standing wrap.” However, in doing so, the member backed into the table behind him, causing both the member and the patient to fall to the floor.

The ALJ found that allegation unsubstantiated because the member’s actions were reasonable emergency interventions to prevent the imminent risk of harm to a person – he had to prevent the other patient from being stabbed in the face. While the patient was on the floor, the member observed that the knife previously used in the attack was on the floor, and within reach. The member reasonably believed that the patient might harm someone - - another patient, another staff member, or himself -- so with no staff assistance immediately available, he grabbed the patient, who had previously possessed the knife, and dragged him 6 to 8 feet out of the dining room and into the hallway. With respect to that allegation, the Administrative Law Judge found the abuse allegation substantiated because dragging the patient out of the cafeteria was not a reasonable emergency intervention.

In the Article 78, we alleged that the finding in the Recommended Decision after Hearing, that the act of dragging the Service Recipient out of the dining room by the back of his shirt was not a reasonable emergency intervention to prevent imminent risk of harm, was irrational and not supported by substantial evidence. We have completed the Record on Appeal for review by the Attorney General.

### Discipline

**Interrogations:** For the months of April 2018 and May 2018, we represented one hundred seventeen (117) members who were interrogated by DOCCS.

**Auburn Correctional Facility:** The member is accused of striking a minor while off duty. Additionally, he is accused of testing positively for marijuana. We have submitted our arbitrator requests and are awaiting the assignment of an arbitrator.

**Auburn Correctional Facility:** The Notice of Discipline alleges that the member, in concert with another member, allegedly set up an inmate to be in possession of a weapon during a Code 2 incident in the South Yard. Additionally, the member is charged with issuing an incorrect To/From Memorandum detailing the incident as well as endorsing an Inmate Misbehavior Report against the inmate. The member is also accused of providing false or misleading statements during his interrogation. We met with the member and NYSCOPBA Western Region Business Agent Dave Tessmer on December 20, 2017, to prepare a defense to these charges. We represented the member at his disciplinary hearing on March 8 and 9, 2018, before Arbitrator Samuel Butto at the Auburn Holiday Inn, Auburn, New York. At the hearing, the State indicated it may need to present a rebuttal witness. The State indicated it will not be presenting a rebuttal case. Briefs were submitted by May 17, 2018.

**Bare Hill Correctional Facility:** This NOD is for using improper and racial language in front of inmates. The matter is before Arbitrator Edward Battisti and is scheduled for July 11 and 12, 2018.

**Bedford Hills Correctional Facility:** The member received a Notice of Discipline for allegedly not reporting that an inmate claimed that a correction officer was retaliating against her because of the termination of the employment of another officer. The first hearing day was held on January 10, 2018. Day 2 was held on February 20, 2018, and closing briefs were submitted on March 22, 2018.

**Broome DDSO:** This member was charged with misconduct/incompetence for allegedly allowing a subordinate staff member to help her put on her bulletproof vest as well as button her uniform shirt and some other similarly related allegations allegedly violating OPWDD Sexual Harassment Police. An arbitration was scheduled before Arbitrator William Babiskin on April 30, 2018. Prior to the hearing, the parties settled this matter whereby the member shall remain with OPWDD in unpaid leave status until her retirement date in October 2018.

**Fishkill Correctional Facility:** The NOD alleges that the member shoved an elderly man to the ground while he had his backed turned in a pizzeria, causing injuries. The matter was heard at arbitration on March 22, 2018, before Arbitrator Dennis Campagna. The parties submitted closing briefs. Arbitrator Campagna rendered his decision and terminated the member. Arbitrator Campagna found the member guilty of violently shoving an elderly man on video surveillance, and that such actions, which garnered significant media attention, discredited the Department and warranted termination.

**Fishkill Correctional Facility:** This NOD is for allegedly leaving the facility with a canister of OC spray without permission and failing to cooperate with the facility's efforts to retrieve the canister. We have submitted our arbitrator requests and are awaiting the assignment of an arbitrator.

**Fishkill Correctional Facility:** This member received a Notice of Discipline for failing to maintain control of a Class A Tool. Specifically, it is alleged that he was observed by supervisory staff having in his possession or wearing an N-95 Type face mask and failing to maintain and secure control of the mask and/or securely dispose of it. This matter was appealed to arbitration utilizing the expedited disciplinary procedures and Arbitrator Joel Douglas has been assigned to hear this case. A hearing was scheduled for April 30, 2018. Prior to the hearing, the parties resolved the matter whereby the member accepted a suspension from March 3, 2018, through April 27, 2018, and DOCCS restored ten (10) days of annual leave accruals to the member.

**Fishkill Correctional Facility:** This NOD for allegedly failing to properly dispose of a Tool (a mask) was in expedited arbitration and assigned to Arbitrator David Lande. The hearing was scheduled for April 9, 2018, but the member accepted an offer for a position with another law enforcement organization and left DOCCS employment.



**Fishkill Correctional Facility:** The NOD alleges that the member improperly disposed of a Class A Tool (N-95 facemask) in the facility. The matter settled via consent award during the expedited arbitration hearing on April 20, 2018, before Arbitrator Gaba.

**Fishkill Correctional Facility:** This member has been charged with using unnecessary and excessive force. Three (3) days of hearings were held on September 8, 2017, December 19, 2017, and May 9, 2018, before Arbitrator Lise Gelernter. Additional hearing days will be scheduled.

**Fishkill Correctional Facility:** The NOD alleges that the member provided false and misleading statements regarding a use of force. The first day of the arbitration took place on September 28, 2017, before Arbitrator Dennis Campagna. The second day of the arbitration took place on December 4, 2017. After the second day, we made a motion to restore the member to duty or, in the alternative, to restore him to the payroll pending the results of the disciplinary arbitration on the grounds that the member worked for six (6) months without incident after the alleged excessive use of force, and even had the alleged victim work as his porter without incident during that time. Therefore, the State did not have probable cause to believe that the member's continued presence would be a risk to the safety and security of the facility. The State submitted its answer to the motion. The Arbitrator determined that DOCCS improperly suspended the member and ordered that the member be restored to pay status pending the result of the disciplinary arbitration. A third day of hearing took place on January 24, 2018, and a fourth day of hearing is scheduled for March 7, 2018. However, the Arbitrator cancelled the hearing due to severe winter weather. The final day of hearing took place on March 19, 2018, with the parties agreeing to draft the closing briefs within thirty (30) days of receipt of the final day's transcripts. Closing briefs are due by June 14, 2018.

**Fishkill Correctional Facility:** The member is charged with failing to maintain secure control of and properly dispose of a respirator mask. This matter is scheduled for an expedited arbitration on April 2, 2018.

**Franklin Correctional Facility:** This member has been charged with using excessive and unjustified use of force, among other charges. Hearings were held before Arbitrator Louis Patack on August 23, 2017, in Plattsburgh, New York, on October 20, 2017, in Albany, New York, and on January 31, and February 1, 2018, in Plattsburgh, New York. The parties have completed the hearing phase of the case. Transcripts were received on March 8, 2018, and briefs were submitted on April 20, 2018.

**Franklin Correctional Facility:** This NOD is for allegedly failing to properly secure a firearm. We have submitted our arbitrator requests and are awaiting the assignment of an arbitrator.

**Franklin Correctional Facility:** The NOD alleges that the member failed to report excessive use of force. The first day of hearing was held on April 13, 2018. The second day of hearing was held on May 3, 2018. Additional days will be scheduled.

**Great Meadow Correctional Facility:** This NOD is for allegedly failing to report another officer's alleged excessive force and providing false information. No arbitrator has yet been assigned to this NOD.

**Great Meadow Correctional Facility:** The member has received two Notices of Discipline arising out of the Herman Bell use of force. The NODs are dated October 4, 2017, and November 27, 2017. The case was heard on May 2 and 4, 2018, and will continue on August 17, 2018. Charges 2 and 3 of the First NOD, which charged the member with lying when he stated that he passed his assigned OC Spray to another member, are being withdrawn by DOCCS. The remaining charge alleges that the member withheld the name of staff that were physically restraining Inmate Bell, withheld information as to what he saw regarding the force used on Inmate Bell, and withheld the names of staff who responded to the Level 2. The Second NOD charges the member with failing to report an unjustified and excessive use of force on Inmate Bell.

**Green Haven Correctional Facility:** This member is charged with operating a motor vehicle on a public highway while impaired and/or under the influence of alcohol and/or an illegal drug. Additionally, among other charges, she is charged with reporting to duty in a physically impaired condition. A hearing was held on December 14, 2017, at the Ramada Inn in Fishkill, New York, before Arbitrator Louis Patack. A second day of hearing was scheduled for April 25, 2018, but was postponed to allow the parties time to discuss settlement.

**Mid-Hudson Forensic Psychiatric Center:** The arbitration of this matter took place on December 13, 2017, and February 12, 2018, at Mid-Hudson Forensic Psychiatric Center before Arbitrator Lise Gelernter, who directed the parties to submit post-hearing briefs by April 11, 2018. The notice of discipline alleges that the member failed to call for assistance for a patient in a timely manner and used an improper restraint technique to restrain a patient causing an injury to his lip. The member is not suspended. In her decision and award, Arbitrator Gelernter found the member not guilty of all charges alleged in the NOD.

**Mid-Hudson Forensic Psychiatric Center:** The notice of discipline dated June 27, 2016, alleges that on March 4, 2016, the member punched a patient in the face while initiating a manual restraint. The arbitration in this matter was scheduled for March 19, 2018, but has since been rescheduled to May 24, 2018, before Arbitrator Dennis Campagna. The member is not suspended.

**Mid-Hudson Forensic Psychiatric Center:** The suspension notice of discipline dated February 15, 2018, alleges that on May 15, 2017, the member performed an unwarranted restraint with excessive force and improper technique; specifically, it is alleged that the member applied pressure to a patient's neck, threw him against a wall and fractured his nose. The notice of discipline seeks termination. The arbitration in this matter is scheduled for May 7 and 8, 2018, before Arbitrator Bruce Trachtenberg.

**Mid-Hudson Forensic Psychiatric Center:** The member is accused of biting a patient. The first day of hearing was held on July 12, 2017. The second hearing day was held on

November 10, 2017. Closing briefs were filed on December 20, 2017. On April 16, 2018, we received the Award from Arbitrator Campagna which found the member not guilty of the Charge contained in the NOD.

**Moriah Shock Incarceration Correctional Facility:** The CO charged in this NOD has a criminal action pending. When the criminal matter is resolved, the NOD will proceed if the criminal resolution does not result in termination.

**New York State Education Department:** The arbitration of this matter was held on April 25 and 26, 2018, before Arbitrator Timothy Taylor. The notice of discipline dated October 17, 2017, alleges that the member, while on duty, disclosed confidential information to another employee, improperly entered a private office and glared at an employee in an improper manner. The notice of discipline also alleges that the member made false statements during an interrogation. Post-hearing briefs were submitted on May 25, 2018.

**New York State Psychiatric Institute/Washington Heights:** In this NOD, the SSO is accused of failing to follow orders when he refused to let a patient's service dog see his provider for a scheduled visit. We have submitted our arbitrator requests and are awaiting the assignment of an arbitrator.

**Otisville Correctional Facility:** The CO charged in this NOD has a criminal action pending. When the criminal matter is resolved, the NOD will proceed if the criminal resolution does not result in termination.

**Shawangunk Correctional Facility:** The CO charged in this NOD has a criminal action pending. When the criminal matter is resolved, the NOD will proceed if the criminal resolution does not result in termination.

**Shawangunk Correctional Facility:** The member in this NOD was charged criminally. When the criminal matter is resolved, the NOD may proceed.

**Sing Sing Correctional Facility:** The member received a Notice of Discipline for allegedly failing to stop one inmate from assaulting another inmate; failing to get medical attention for an injured inmate; improper use of force; and failing to file appropriate reports. The case has been assigned to Arbitrator David Lande. The first day of hearing took place March 29, 2018, at Lincoln C.F. The second day of hearing took place on May 2, 2018, in Manhattan. The matter was settled at the hearing.

**Sing Sing Correctional Facility:** A hearing in this matter was held on February 23, 2018, before Arbitrator Taylor. The NOD in this case alleges that the member failed to comply with a lawful order when he left the facility at the end of his shift after being ordered to work mandatory overtime. Post-hearing briefs in this matter were submitted. The Arbitrator found the member guilty of insubordination for refusing to work a mandatory overtime shift, and imposed the full forty-five (45) day penalty sought in the NOD. The Arbitrator took particular note of the member's statement that he would call the police if not allowed to leave the facility.

**Washington Correctional Facility:** The member received a Notice of Discipline for using unnecessary and excessive force. We had four days of hearings on this case. The final hearing days were held on December 13 and 14, 2017. Closing Briefs were submitted on March 2, 2018. On April 16, 2018, we received the Award from Arbitrator Battisti which found the member not guilty of Charges 1 and 2 of the NOD (actually using excessive force on the inmate), but found the member guilty of Charges 3, 4, 5 and 6 of the NOD for failing to properly document and report the use of excessive force on the inmate. The Arbitrator found that the appropriate penalty was a suspension to date and the demotion from Correction Sergeant to Correction Officer. After receiving the Arbitration Award, the member submitted his resignation.

**Washington Correctional Facility:** Hearings have been held on September 11 and 12, October 16, November 13, 2017, and January 10, 2018. The grievant was restored to the payroll on Administrative Leave from January 11 to February 6, 2018, when DOCCS requested a continuation to adjourn the hearing to call a witness who was not identified on their witness list. The hearing was concluded on February 7 and 8, 2018, before Arbitrator Louis Patack. Grievant is charged with excessive force, failure to report, failure to report employee misconduct, and proving false and misleading statements during his interrogation. The final hearing transcript was received on March 5, 2018, and closing briefs were submitted on April 6, 2018.

**Western New York DDSO:** The member received a Notice of discipline for sexually harassing a female SSO. This matter was heard at arbitration on May 31, 2018.

#### Justice Center

**Central New York Psychiatric Center:** The member has been charged with failing to stay alert while on duty, a Category 3 offense. The matter has been schedule for a hearing on July 6, 2018.

**Creedmoor Psychiatric Center:** The member was issued a Substantiated Finding by the Justice Center for improper supervision of a patient, a Category 2 offense. In the pre-hearing conference held on May 1, 2018, the Justice Center agreed to issue an Amended Letter changing the finding to unsubstantiated.

#### Improper Practice Charges

**Statewide - Civil Service Promotional Exam Fees (U-29179):** NYSCOPBA, along with other unions, filed an IP alleging that the State unilaterally changed its policy/procedure with respect to the fees charged for promotional civil service examination. The case was heard by an ALJ, went up the Board, and was remanded back to the ALJ for further proceedings. Ultimately, ALJ Sargent found that the State, specifically the Department of Civil Service, violated § 209-a.1 (d) of the Act when it unilaterally began requiring

employees to pay a fee for promotional/transition examinations, and ordered the State to make whole employees for any fees paid. Subsequently, the State filed exceptions to the Board on this decision. On behalf of NYSCOPBA, this office submitted a response to the exceptions.

**Statewide – DOCCS (Consolidated Clear Bag and Staff Allowable List Case) (U-35624 and U-35745):** The hearing in the Improper Practice Charge relative to the clear bag continued with testimony on May 8, 2018. On this day, three (3) witnesses testified on behalf of NYSCOPBA. The hearing will need to continue on another day to proceed with more witnesses. The next day of hearing is scheduled for July 11 and 12 and August 15, 2018 (if needed).

**Statewide – Commissioner Annucci’s Memorandum (U-35773):** This office filed an Improper Practice Charge in response to Acting Commissioner Annucci’s May 3, 2017, memorandum. The memorandum was read at lineup to correction staff for ninety-six (96) hours, which, among other things, effectively accused the Union of disseminating “half-truths” and perpetuating a “negative outlook” about the Department. We received the State’s Answer in response. An initial conference took place on October 19, 2017. This matter has been complicated by GOER indicating that it will consider issuing strike notices to members for alleged job actions that occurred at Auburn CF, Clinton CF, and Great Meadow CF in April-May 2017 if this IP is not withdrawn. That is because the Annucci memo was (in DOCCS’ words) a “knock-it-off” response to the job actions. On January 8, 2018, this office met with NYSCOPBA Executive VP Tammy Sawchuk, Northern Region VP John Roberts, Business Agent Ricky Brunelle, and Stewards from Clinton CF and Great Meadow CF to present and discuss the facts surrounding the IP and possible strike notices, and its potential impact on members at Clinton CF. The matter was scheduled for a hearing on May 3, 2018, but has since been adjourned without a date, pending negotiations with GOER/DOCCS.

**Statewide – Directive 2115 (U-35942):** This office filed an Improper Practice Charge in response to the recent change to Directive 2115, which addresses drug testing DOCCS employees. The change made discipline mandatory for failing to report for a drug test when the direct order to submit to the drug test happened when the member was off-duty. Therefore, an employee would be disciplined regardless of if the employee faced travel or other legitimate issues that would make it difficult to comply with a lawful order to submit to a drug test. An initial conference took place on November 10, 2017, before ALJ Mitchell. The matter was placed on PERB’s hold calendar to allow the parties the time to determine the best course of action. The parties have stipulated to language removing the mandatory discipline imposed by the new version of the directive. The matter was withdrawn after execution of the stipulation.

**Statewide – Directive 0750 (U-35987):** This office filed an Improper Practice Charge in response to DOCCS adding a brand new Directive 0750, which addresses an employee’s responsibility to report suspicious activities of inmates and fellow staff that may be indicative of terrorist activities. The directive labels as “suspicious” commonplace activities like owning a large amount of weapons, frequenting gun ranges, engaging in

martial arts, interests in surveillance, etc. The matter was scheduled for a preliminary conference on November 15, 2017, before ALJ Frederick Reich. Prior to the conference date, the parties agreed to adjourn so as to meet and discuss their respective positions on the directive. The parties then met on December 20, 2017. The parties agreed that NYSCOPBA would draft language to potentially be included in the directive, clarifying what is suspicious and that members' routine hobbies and activities would not be considered suspicious if they were not connected with potential terrorist activity. The agreed to stipulate to the clarifying language that DOCCS is not interested in curbing legitimate recreational activities of its members. The matter was placed on the PERB hold calendar and the parties have agreed to settle the matter pursuant to the clarifying language. The matter was withdrawn after full execution of the stipulation of settlement.

**Statewide – Duty of Fair Representation (Fishkill CF) (U-36027):** We submitted our Answer on behalf of NYSCOPBA in an Improper Practice charge filed by a member, alleging that NYSCOPBA breached its duty of fair representation in the manner in which it allegedly withheld union representation from the member at Fishkill Correctional Facility. A conference was held at the Albany PERB Office on March 14, 2018, at 11 am. Judge Reich has since indicated that a second pre-hearing conference will take place by phone on June 12, 2018, with hearing dates to follow on July 30 and 31, 2018.

**Statewide – Duty of Fair Representation (Collins CF) (U-36028):** We appeared (via telephone) at a conference on May 2, 2018 regarding this Improper Practice charge filed by a member, alleging that NYSCOPBA breached its duty of fair representation in the manner in which sergeants vacation schedules were addressed at Collins Correctional Facility. We presented our arguments to the ALJ at the conference, which include the fact that these vacation schedules are allowed pursuant to Article 14.1(d), and that the local sector followed the established internal procedure to address local arrangements for vacation selection. A vote took place, for which the member did participate, and the local overwhelmingly voted to change the vacation bidding procedure for sergeants. As such, there certainly was no breach of the duty of fair representation as to the member. After a long conference, the member indicated a willingness to withdraw the charge. The ALJ gave him a little time to decide. We should have an answer soon. If he does not withdraw, the ALJ will direct that the parties submit written briefs on the subject.

**Statewide – Employee's Manual (U-33638):** On February 23, 2018, we discussed settlements with GOER to resolve this charge. This IP is from 2014 and involves changes in the Employee's Manual. Specifically, the changes include: section 2.2 regarding a change in the licensure practice; section 2.3 regarding reporting requirements in domestic violence situations; section 4.9 regarding copying documents; section 4.15 regarding dissemination of criminal history; section 6.3 regarding official stationary; and section 2.44 regarding alerting of supervisory rounds. We will keep you informed regarding progress of negotiations.

**Statewide – ISO Scheduling Issues (U-36232):** We filed an Improper Practice charge challenging the unilateral change of the hours of work and lunch schedules for ISOs at a number of reporting locations in the Long Island area. Prior to the state submitting an

Answer, we learned that the schedules at each reporting location in the Long Island area had either returned to the prior schedule (prior to the change) or had been returned to a similar schedule, with union approval. As such, this matter has been resolved and closed.

**Statewide – Office for People with Developmental Disabilities (U-35979):** On September 26, 2017, we filed an Improper Practice Charge with PERB, stemming from a statewide OPWDD job posting for specialized SSO1 positions as Family Care Inspectors. The job posting requires interested candidates to submit a cover letter and resume. Past practice has been to bid these positions regionally and award them by seniority. The charge alleges that OPWDD violated the Act by unilaterally changing the posting and bidding procedures without negotiating with NYSCOPBA. The initial conference of this matter was held December 20, 2017. An improper practice charge was filed after a statewide OPWDD job posting for specialized SSO1 positions as Family Care Inspectors required applicants to submit a resume and cover letter and did not award the jobs by seniority. This matter has been placed on PERB’s hold calendar in order for both parties to investigate it further.

**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 injured 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 July 26, 2018. During that time, the Union will continue to review various assault alert forms completed by members in order to ascertain whether they received medical treatment or were ignored by facility physicians.

**Central New York Psychiatric Center (U-35970):** A conference was held on January 17, 2018. On September 21, 2017, we filed an Improper Practice Charge alleging that Central New York Psychiatric Center, (“CNYPC”) interfered, restrained, retaliated against and coerced employees in the exercise of their rights guaranteed under the *Taylor Act*. Specifically, we alleged that on August 27, 2017, the member, a NYSCOPBA member, Union Steward, and a Central Service Staff member, was directed to cover a mandatory overtime post at SUNY Upstate Medical Center. On September 13, 2017, NYSCOPBA filed a grievance regarding the mandating of overtime to the member and the change in overtime policy generally. After the grievance was filed, on September 15, 2017, Mr. Paparella confronted Central Service Staff members regarding the grievance on overtime mandating and distribution. During the discussion, Mr. Paparella stated, among other things: 1) Things are going to happen if [the grievance] goes through; 2) That he is sick and tired of all the whining and complaining; 3) That he planned to remove responsibilities from those who filed the grievance; 4) That Central Staff SHTA’s duties would be changed such that, upon entering the building, they would be assigned different posts and locations. On September 19, 2017, in further retaliation to the grievance, Mr. Paparella directed supervisory staff to assign Central Service Staff members to cover all Mandatory Overtime at the SUNY Upstate Medical Center. Such direction is

inconsistent past practice, as well as the local Labor/Management agreement. The case is on hold pending further discovery.

**Central New York Psychiatric Center (U-36192):** This office filed an Improper Practice Charge in response to CNYPC's reinterpretation of the existing call-in procedure that changes how an ill employee reports an illness-related absence and how such absence is counted for discipline purposes. The matter was heard at a pre-hearing conference with ALJ Weisblatt on March 26, 2018. The Judge placed the matter on PERB's hold calendar. NYSCOPBA has since requested that a hearing be scheduled on the matter.

**Mid-Hudson FPC Bag Restriction (U-36147):** We filed an Improper Proper Practice Charge alleging a failure to negotiate regarding a mandatory subject of bargaining. Mid-Hudson FPC unilaterally changed a significant work rule, impacting the comfort and convenience of employees. Specifically, the facility implemented a new rule restricting all employees to entering the facility with only one bag (of restricted size) for clothing, etc. and one small cooler for food. The prior practice at the facility did not limit employees in the size and number of bags they could bring into the facility for each shift. We appeared at a conference on March 21, 2018 before ALJ Weisblatt. The parties had a substantive conversation about settling this case. The ALJ placed the matter on the hold calendar so that the discussions could continue.

**NYS Department of Labor (U-35136 and U-35815):** We met with GOER and agency representatives to discuss resolution of these two Improper Practice Charges. The two charges were filed after the Department of Labor announced changes to officers' length of lunch, ability to change into and out of uniform during pre-shift briefing and prior to the end of their shifts, and to built-in non-compensatory time.

**Rochester Psychiatric Center (U-36177):** We filed an improper practice charge with PERB, after Rochester PC announced a new paycheck distribution policy whereby employees will no longer be able to pick up live paychecks at Rochester PC. On March 20, 2018, we attended an initial conference before Judge Nancy Burritt. Judge Burritt scheduled a follow-up phone conference for April 30, 2018, to facilitate resolution of this charge.

**Southport Correctional Facility (U-34184):** On December 12, 2017, we participated in a conference call initiated by PERB on this charge, which 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. A hearing in the case was held in December of 2015 and briefs were later filed, but the administrative law judge who heard the case left PERB before issuing a decision. The case is now assigned to another judge who, if a settlement is not otherwise reached, will review the record and briefs and issue a decision. On the conference call, the judge asked the attorneys to present their legal arguments in support of their respective positions and she also asked the parties to consider whether there was a possibility of settling the case. We are exploring that.



**Training Academy (U-33924):** We filed an improper practice charge with PERB, after Albany Training Academy Assistant Director James Huff threatened and refused to provide the member with Union representation during investigatory questioning that took place during a chemical agents instructor school at the Albany Training Academy in November 2017. The charge alleges that Assistant Director Huff denied the member Union representation during questioning which could result in discipline, and that Assistant Director Huff's behavior constituted interference and retaliation, all in violation of the Act. We await a conference date.

### Contract Enforcement

**Appeals to Arbitration:** We received eleven (11) requests from NYSCOPBA's grievance department to appeal contract grievances to arbitration during the months of April 2018 and May 2018. We have reviewed the grievance files and drafted and submitted the arbitration appeals to the Governor's Office of Employee Relations (GOER).

**Kirby Class Action (Triborough Bridge Tolls):** This contract grievance was heard during a full arbitration before Arbitrator Jacqueline Drucker in May 2017. The issues presented were (1) whether the Office of Mental Health, specifically, Kirby Forensic Psychiatric Center and Manhattan Psychiatric Center violated Article 17.3 of Contract when it mandated employees to pay the up-front cost for work-related passage over the Triborough Bridge, and (2) whether the grievance was timely filed.

Article 17.3 of the Contract states that "the Employer agrees to arrange for work-related passage over the Triborough Bridge without cost for car tolls to employees employed" at facilities on Ward's Island. NYSCOPBA argued that OMH violated this clear and unambiguous language by requiring employees at KFPC and MPC to pay the up-front, out-of-pocket cost of their work-related passage over the Bridge and then submit for reimbursement. NYSCOPBA further argued that the reimbursement program is subject to numerous, time-consuming conditions that fail to relieve employees of the cost of the toll. Finally, NYSCOPBA argued that OMH's failure to provide passage over the Bridge "without cost" to employees on an ongoing and regular basis constituted a continuing violation, rendering the contract grievance timely.

Arbitrator Drucker issued a decision on April 23, 2018. Arbitrator Drucker found that the grievance was timely filed; however, she found that the State did not violate its obligations under Article 17.3 of the Contract and denied the grievance. Arbitrator Drucker wrote of the language "without cost" in Article 17.3: "clarity is not found within the four corners of the document, as each party offers an equally reasonable and plausible reading of the language." As such, Arbitrator Drucker examined the past practice of the parties under the contract. NYSCOPBA argued that for many years, the State had systems in place (a token system and then RIO passes) that resulted in no out-of-pocket payments by employees, which illustrates that no out-of-pocket expense was contemplated within the meaning on Article 17.3. The State argued that the reimbursement system was put in place beginning in approximately 2009 and the Union did not oppose it. Ultimately, Arbitrator Drucker

found that “having been aware of and in not challenging the reimbursement approach for nearly four years, after use in numerous instances, the Union must be regarded as having acquiesced in the concept of reimbursement as an adequate means of fulfilling the obligations set forth in Article 17.3.” Arbitrator Drucker noted that the Memorandum issued by the Business Office is not part of the accepted interpretive practice, and that the facility’s level of discretion and final authority in the reimbursement process may be inconsistent with Article 17.3. However, Arbitrator Drucker did not address the nuances and specific requirements set forth in the Memorandum and encouraged the parties to “engage in discussion in this regard.” The Decision, while adverse, leaves open the possibility of successfully challenging KFPC and MPC’s self-imposed reimbursement practices under Article 17.3 in the future.

### **Retirement**

**Greene Correctional Facility:** The member’s disability retirement application was denied. The Retirement System’s Orthopedic Surgeon found that the member had limitations that made it dangerous for him to work as a correction officer, but stated that he could not determine if the member was permanently disabled, because he has refused surgeries that might make it possible for him to perform his duties. The member’s medical records show that he has refused surgery on his lower back, right knee, and right shoulder. We are looking at whether the member’s doctors are able give opinions that surgery would not improve his prognosis. At this time, we are not able to produce a doctor who will testify that the member is permanently disabled from performing his duties. On May 23, 2017, we filed the Scheduling Information Form to proceed on medical records. The initial hearing was held on January 17, 2018, at which time the member testified. The hearing has been continued to permit the member to present medical testimony.

**Green Haven Correctional Facility:** This is a disability retirement matter where the member sustained a head injury. On March 21, 2016, the member and his treating psychologist testified. This matter was continued to allow the Retirement System to put in the testimony of its psychiatrist. The System’s psychiatrist testified on February 3, 2017. This matter was continued for the testimony of the System’s neurologist. The System’s neurologist has filed a supplemental report but will not testify because he is no longer under contract with the System. We have agreed with the System to close the proof in this matter. The System permitted us to enter into evidence medical records that were not submitted to the System within forty-five days after receipt of the acknowledgement letter. Closing briefs were submitted on March 23, 2018.

**Kirby Forensic Psychiatric Center:** 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 her duties as an SHTA. 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. The member's testimony was taken on March 6, 2018. The matter has been continued for the testimony of the System's doctor.

**Sullivan Correctional Facility:** The member was injured when he was struck in the head with a baton swung by an inmate. The member's disability retirement application was denied by the Retirement System, which found that the member was not permanently disabled from performing his duties. The initial hearing was held on March 6, 2018. The matter has been continued for the testimony of the System's doctor.

**SHTA Retirement:** We filed a demand for a hearing to the NYS Retirement System on behalf of the member relating to Article 14 credit for his prior service as an SHTA before becoming a correction officer.

### Workers' Compensation

**Workers' Compensation Discrimination:** On March 30, 2018, we received the Court's decision in the above-referenced matter. The Court denied the claims holding that there were other legitimate reasons for non-promotion of claims, but found that "the record supports a finding that the Claimants have met their burden of showing that the lists were created detailing workers' compensation usage for promotional candidates. *These lists were made in violation of WCL section 120.* The lists were made in close proximity to the time candidates were being interviewed in June/July 2016 and October 2016. The lists were taken into the interviews. Both OMH and CNYPC found the lists to be inappropriate." In other words, CNYPC violated the law, but the claimants did not have a sufficient entitlement to promotion. We believe these findings are inconsistent and intend to appeal the Court's decision, which must be filed within thirty (30) days of receipt of the decision.

By way of background, in October 2016, we filed a complaint of discrimination under the New York Workers' Compensation Law, section 120 for discrimination at Central New York Psychiatric Center (CNYPC). In the complaint, we alleged that CNYPC unlawfully used, and continues to use, the amount of Workers' Compensation benefits in its employment and promotion decisions and that the management of CNYPC maintained a Worker's Compensation "scorecard" for use in its promotion process. *Workers' Compensation Law* § 120 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 alleged that employees at CNYPC were adversely impacted for utilizing Workers' Compensation leave and that certain members were not promoted despite superior test, scores, experience and qualifications.

The sole remedy for a violation of *Workers' Compensation Law* relating to employment discrimination 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 and sole remedy. Although the reported cases concerning regard termination of an employee's employment, the section specifically prohibits discrimination *in any other manner*. 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 anti-discriminatory provision applies equally in the public sector. In such cases, the preliminary inquiry is whether civil servants, who are injured on the job, are treated detrimentally when compared to those who must take leaves of absence for non-work-related injuries. *Duncan, supra*. If the action complained of is not made in retaliation for the employee's compensation claim or testimony, the section not violated. In the present case, as indicated in the "scorecard" the three most recent promotees had the lowest workers' compensation days used since December 2015. The coincidence is statistically unreasonable. Moreover, most of the individuals we spoke with were not promoted despite superior test, scores, experience and qualifications.

### Employee Health Services

**New York State Education Department:** We are attempting to schedule a hearing for the member. State Ed has adjourned the member's termination date. State Ed alleges that medical evidence indicates that the member is unable to perform the duties of his position.

**Southport Correctional Facility:** On January 18, 2018, following an EHS exam, DOCCS placed the member on involuntary leave pursuant to Civil Service Law 72 (5). Thereafter, the member submitted a medical note to DOCCS triggering a second EHS exam. DOCCS determined that the member was unfit for duty after both of these EHS exams. We have appealed both DOCCS determinations and preserved the member's right to a hearing to contest the Department's fitness determinations. We await a hearing date.

**Woodbourne Correctional Facility:** We filed a demand for a hearing and have been in contact with DOCCS Labor Relations seeking a hearing officer and dates regarding this NYS Civil Service Law § 72 appeal. DOCCS alleges that medical evidence indicates that the member is unable to perform her duties as a CO.

### General

**ADA Violations:** We previously filed charges of disability discrimination under the Americans with Disabilities Act (ADA) against DOCCS with the Buffalo Regional Office of the U.S. Equal Employment Opportunity Commission (EEOC), based upon: (1) DOCCS' failure to promote members to Sergeant while out on workers' compensation leave for a work-related injury even when expected to be able to return to full duty within a short time period, by refusing to consider promotion based on workers' compensation leave, and failing to consider any reasonable accommodation such as placement in the Light Duty program or additional short-term leave; and (2) DOCCS' automatic termination of employment under Civil Service Law § 71 upon the expiration of a one-year leave of absence due to a work-related injury, without considering any reasonable accommodation

such as placement in the Light Duty program or additional short-term leave. In both cases, the EEOC issued a Determination finding “reasonable cause” to believe the DOCCS engaged in disability discrimination in violation of the ADA when it: (1) failed to engage in an interactive process with the member to determine whether or not a reasonable accommodation was available that would allow the member to accept a promotion or return to work; (2) failed to provide the member a reasonable accommodation to enable the member to accept a promotion or return to work; and, (3) applied a qualification standard that discriminated against the member based upon a disability. Having also found that that DOCCS also discriminated against other similarly situated employees (class of employees), the EEOC invited the Department to participate in conciliation in an effort to reach an agreement that would eliminate such discriminatory employment practices, but DOCCS declined to participate in conciliation. As a result of finding reasonable cause to believe that DOCCS engaged in systemic discrimination on account of disabilities in violation of the ADA, the EEOC referred the matter to the U.S. Department of Justice (DOJ) for review to determine whether or not it would initiate an enforcement action against DOCCS in the United States District Court. Although the EEOC’s “reasonable cause” determinations are not binding on the court, they are viewed favorably since the EEOC is the federal agency charged with the responsibility to administer and achieve compliance with the ADA.

**JCOPE Proceeding (SSO1 and retired SSOII):** JCOPE notified two members that it is considering commencing a formal investigation relating to allegations of requesting and receiving overtime payments in violation of the Public Officers Law. We responded to this notice with a detailed explanation of the members’ conduct and the authority for his actions. We requested that JCOPE not commence a formal investigation. We are awaiting JCOPE’s response.

**NYSCOPBA-DOCCS Statewide Labor-Management Meeting.** On May 4, 2018, we attended the NYSCOPBA-DOCCS Statewide Labor-Management Meeting at the DOCCS Headquarters in Albany, New York.

**NYSCOPBA-OMH Statewide Labor-Management Meeting.** On April 5, 2018, we will be attending the NYSCOPBA-OMH Statewide Labor-Management Meeting at the Office of Mental Health Headquarters in Albany, New York.

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



# Lippes Mathias Wexler Friedman LLP

Attorneys at Law

## APRIL 2018 LEGAL REPORT TO THE EXECUTIVE ASSEMBLY

This is our report for the April 2018 Executive Assembly, regarding the recent developments in some of the cases and legal matters we are handling for NYSCOPBA.

### Negotiations

We continue to meet with the collective bargaining committee.

### Litigation

**Statewide – Retiree Health Insurance Litigation (NYSCOPBA v. State, et al., USDC, NDNY, 11-CV-1523):** On January 26, 2018, the State defendants submitted their reply papers in response to our opposition papers to the State defendants’ summary judgment motion that we filed on December 20, 2017. While the matter is now fully submitted to the Court, it appears that the defendants submitted exhibits to their reply papers that were not produced during discovery, and we will need to request permission from the Court to submit a sur-reply to address the issue and request that the non-produced documents be stricken. As previously reported, we believe that there are genuine issues of material fact preventing summary judgment in favor of the State defendants, and result in a trial regarding whether or not the State defendants negotiated health insurance contribution rates for represented employees in retirement during the 1982-1985 bargaining and contracts.

**[Member] v. State of New York (Orange County Supreme Court/Appellate Division, Second Department):** On November 3, 2017, we filed a Reply Brief in the *Matter of [Member] v. State of New York* in the Appellate Division, Second Department. By way of background, the member was hired as an SHTA on May 14, 2015. Pursuant to Civil Service Rules, he was to serve a one (1) year probationary term. The member was involved in an incident with a patient, which resulted in a Justice Center investigation. Based upon the findings from that investigation, the member was terminated from his employment, effective April 14, 2016, one month prior to the completion of his probationary term. We filed an article 78 proceeding to challenge the determination as arbitrary and capricious. The lower court denied our petition and dismissed the proceeding. The basis for the court’s decision was that the member did not exhaust his administrative remedies. The court noted in its decision, “by his own papers, [the member] admits that the Report which is cited for his termination is under appeal, and that no decision has yet been rendered.”

The incident which resulted in the termination occurred on February 12, 2016. On that date, the member was performing his routine SHTA duties. At approximately 2:55 p.m., a patient remained in the bathroom, contrary to facility rules. The member directed the patient to leave the bathroom, but the patient refused. The patient then threw a cup of water

in the member's face. After throwing a cup of water, the patient began striking the member with closed fist punches. The member reported the incident to the Safety and Security Officers on the Mid-Hudson Forensic Psychiatric Center campus and filed a supporting deposition, seeking criminal charges against the patient.

On April 8, 2016, the member received a letter from MHFPC indicating that "a recommendation has been made and approved by the Executive Director for termination of your probationary services as a Security Hospital Treatment Assistant pursuant to Civil Service Rule 4.5." The member was terminated from his employment from MHFPC, effective April 14, 2016, one month prior to the completion of his probationary term.

As indicated above, the lower court did not address the merits of the case. Instead, the lower court noted that the member had requested a Justice Center hearing on whether he committed the alleged abuse and/or neglect, and that the hearing has not been conducted. The court further noted, "it is hornbook law that one who objects to the act of an administrative agency must exhaust available administrative before being permitted to litigate in a court of law." Based upon the failure to exhaust administrative remedies, the lower court denied the petition and dismissed the proceeding.

On July 25, 2017, we filed a brief and record on appeal challenging the decision of the lower court. On November 3, 2017, the State responded, arguing that the Article 78 proceeding was merely a collateral attack on the Justice Center findings and, as such, the matter was not ripe until after the Justice Center hearing. Further, the State addressed the merits of the Article 78, arguing that there was a good faith basis for the termination.

In our November 14, 2017, reply brief, the Union argued that even if the request to the Justice Center is granted in its entirety, the result would be that the two Category 2 abuse and neglect findings are unsubstantiated and the Justice Center's records sealed, the member would not be returned to his prior employment. Therefore, the determination that the member challenged, the termination of employment, is separate and distinct from the Justice Center's determination. We further argued that, as the Justice Center is continuing to investigate the incident and has not reached *any* final disposition of the administrative appeal, the decision to terminate Petitioner's employment should be set aside. "An action which has not reached *any* conclusion should not be used as a basis to terminate someone's employment." We await the Appellate Court's decision on the matter.

***DOCCS, et al. v. NYSCOPBA:*** The member received an arbitration award dated July 18, 2017. The arbitrator found the member not guilty of Charges #1 and #2 of the Notice of Discipline, but did not make a determination regarding Charge #3 as the criminal adjudication had not been resolved. The State is seeking vacatur of the award, which NYSCOPBA and the member are opposing. NYSCOPBA's papers were submitted on December 8, 2017. Petitioners' Reply papers were received on January 11, 2018. On March 5, 2018, Judge Gerald Connolly issued a decision remitting the case to Arbitrator Butto for a determination as to Charge #3 based on the evidence already presented. The court's determination found that there were no grounds for "re-visitation of the determinations rendered with respect to of Charges #1 and #2." We filed the decision with

the Albany County Clerk and will serve it on the Petitioners with Notice of Entry. At that time, the State has 30 days (or 35 days if sent via mail) to file a Notice of Appeal with the Appellate Division. On March 24, 2018, Arbitrator Butto, pursuant to the court's Order, re-issued his Award finding that Charges 1, 2, and 3 as contained in the November 15, 2016 Notice of Discipline are unproved and dismissed and reinstated the Grievant to duty with full back pay and benefits retroactive to June 19, 2017 from the date of his return to duty. Arbitrator Butto found that the suspension of Grievant was proper from October 26, 2016 until June 18, 2017. Upon information provided to us by NYSCOPBA Western Region Business Agent Al Mothershed, the member received a call to return to duty.

**Elmira Correctional Facility (Enforcement of Settlement Agreement):** On February 26, 2018, we sent a proposed settlement agreement to the Assistant Attorney General handling this case, which was filed in 2015 in Chemung County Supreme Court alleging breach of contract in relation to Elmira's continuing failure to abide by the terms of a settlement agreement in a 2008 PERB case. Under the agreement, the administration at Elmira is required to notify local stewards of any proposed changes to the jobs of officers or sergeants and give them an opportunity to provide "timely input" before any changes take effect. We await a response.

**[Member] v. State Department of Civil Service (Albany County, Supreme Court):** On November 14, 2017, we commenced an Article 78 proceeding challenging a determination by the New York State Department of Civil Service denying disabled veteran credits to the member, a U.S. Marine Corp veteran, for use on the Correction Lieutenant test. Specifically, we challenged the Department's decision to use the date in which the Department of Veterans Affairs back-dated the member's disability to, rather than the date of its actual disability determination. The State used the "retroactive" date of the determination and by so doing, denied the member disabled veteran's points toward the lieutenant's examination. We contended that the Department's determination was made in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion. On March 2, 2018, we received the State's motion to dismiss. We submitted our response and are awaiting the Court's decision.

**[Member] v. NYS Justice Center:** On March 7, 2018, we filed an Article 78 proceeding challenging the decision of the Justice Center against the member. Specifically, we challenged the Justice Center's failure to give *res judicata* or collateral estoppel effect to the decision of the disciplinary Arbitrator, who found the member not guilty of the same exact charges. These legal principles, in the simplest terms, provide an argument that this issue was addressed and decided by an arbitrator in an identical disciplinary matter, and therefore, the arbitrator's decision must be binding on this case as well. We also included an argument that the decision of the Justice Center was not based upon substantial evidence. The Article 78 has been filed in Albany Supreme Court and is currently scheduled to be returnable before a Judge (yet to be assigned) on April 13, 2018.

**[Member] v. State, (Albany County Supreme Court/Appellate Division Third Department) Gender Specific Directive (#2230):** On March 9, 2018, we filed a motion for leave to appeal the decision in the this case, which affirmed the lower court's ruling



that respondent Department of Corrections and Community Supervision (DOCCS) was not guilty of an unlawful discriminatory practice based on gender.

By way of background, on January 5, 2015, DOCCS updated Directive #2230 to require that special watches and suicide watches must be conducted by staff members of the same gender as the inmate who was under observation.

As relevant to this specific case, at Albion Correctional Facility, hiring for overtime is based upon seniority. On April 27, 2015, the member was on the list to be hired for overtime. However, as conceded by DOCCS, Albion CF applied the above-referenced directive to deny the member the opportunity for overtime based upon his gender. A female correction officer with less seniority than the member was hired for overtime instead. The member and another male officer were both ahead of the female officer based upon terms of seniority, but both officers, including the member, were skipped over based on the gender specific directive

Before the Division of Human Rights, we argued that the Division was incorrect because a prima facie case of discrimination was established. First, DOCCS Directive #2230 clearly discriminated upon the basis of gender. Second, based upon that discriminatory practice, the member 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 has deprived the member of material benefits in that he was denied overtime opportunity. Therefore, the member was directly impacted by Directive #2230, has suffered damages based upon this Directive, and will continue to suffer damages in the future, based upon this Directive.

On November 16, 2015, the Division dismissed the Complaint, finding the existence of a Bona Fide Occupational Qualification (BFOQ). On January 15, 2016, we commenced an Article 78 proceeding challenging the Division's determination as being arbitrary and capricious. On June 22, 2016, the lower court affirmed the Division's finding that there was a BFOQ. We appealed that decision to the Appellate Division, Third Department. The basis for the appeal was that DOCCS did not establish a valid BFOQ defense and that the Division's determination was legally insufficient, arbitrary and capricious, and not supported by a rational basis. To establish a BFOQ, a Respondent must make a strong factual showing that no reasonable alternatives existed. DOCCS failed to do so before the Division. Furthermore, because a BFOQ determination must be so factually specific, we submit that a full evidentiary hearing was necessary; lacking that, the determination should be annulled as arbitrary and capricious. Specifically, the decision does not adequately consider whether any reasonable alternatives exist. We argued that the only aspect of the special and suicide watches that might involve impermissible cross-gender surveillance is in observance of defection, and a female officer could be used for that task. Therefore, a reasonable alternative exists. Mere inconvenience does not establish a Bona Fide Occupational Qualification. Because the court did take reasonable alternatives into account, we believe the lower court erred.

As previously indicated, under the procedural rules, there is no automatic right to appeal to the Court of Appeals – it is by permission only. Unlike in the Appellate Division, which emphasizes factual questions such as whether the weight of the credible evidence supports a trial verdict or whether a court abused its discretion in making a ruling, the papers seeking leave from the Court of Appeals must identify issues of law to be addressed. The Court of Appeals hears very few cases each year and focuses on cases that involve novel or unique issues of law, and/or issues of public importance. On March 12, 2018, we received the State's opposition to our motion for leave to appeal. We are awaiting action by the Court of Appeals.

**Mohawk Correctional Facility:** On December 15, 2017, we filed an Article 78 proceeding in Supreme Court, Albany County, challenging DOCCS' refusal to grant this officer a two-year leave of absence in connection with injuries he suffered when coming to the aid of a fellow officer who was being assaulted by a non-compliant inmate. In assisting in subduing the inmate and gaining compliance, the member injured his shoulder and later had surgery, but he still has significant limitations and is unable to return to work. He has applied for disability retirement (both ordinary and performance of duty). We contend that the member was injured as the result of an assault and is therefore entitled to a two-year leave of absence under Section 71 of the Civil Service Law. The case is now fully submitted and we await a determination.

**Rochester Psychiatric Center (NYSCOPBA and [Member] v. OMH, Rochester PC, et al):** We filed an Article 78 petition to challenge Rochester PC's unlawful summary termination of the member. Rochester PC terminated the member's employment based on his probationary status, but an argument can be made that the member had completed his probationary period prior to summary termination. The Petition seeks his reinstatement. We filed the Petition and received the State's Answer, we then submitted our Reply and a Supplemental Reply. On March 2, 2017, we appeared on behalf of the member in Supreme Court, Monroe County, before Judge William Taylor. We received a decision from the Judge, which denied and dismissed our petition because the Judge found that the member was not qualified to hold the title of SSO Trainee on his first day of work and his probation could not have started until he was qualified. Therefore, according to the Judge, the member was properly summarily terminated within his probationary period. This office filed a Notice of Appeal, and the matter will be heard before the Appellate Division, Fourth Department. This office finalized the Record on Appeal and additional legal documents necessary to perfect and pursue the appeal, and filed the paperwork on August 14, 2017. The appeal was heard at oral argument before the Appellate Division, Fourth Department, in Rochester, NY, on the February 27, 2018. The Fourth Department issued a written decision affirming the Supreme Court decision and denying our petition to reinstate the member based on the grounds that he was still a probationary employee when he was terminated and was not entitled to a hearing prior to termination. There are no grounds to appeal this to the Court of Appeals, as there is no appeal as of right in this case and this case does not satisfy the remaining criteria for the Court of Appeals to hear this case based on leave to appeal, therefore, we have exhausted all options to reinstate the member to the title of SSO with Rochester PC.

**[Member] and NYSCOPBA v. DOCCS:** The member received an arbitration Award dated January 19, 2018. In that Award, Arbitrator Samuel Butto awarded that Grievant is guilty of Charge #3 and issued a penalty of dismissal from service. Regarding the suspension, the arbitrator found that the suspension was not proper in accordance with Article 8.4(a) (2) of the collective bargaining agreement, because of the acquittal of the criminal charges. He awarded that Grievant shall receive full back pay from the date of his suspension from duty. This matter was handled by W. James Schwan who wrote to DOCCS Director of Labor Relations John Shipley requesting that DOCCS follow the award and pay the member the back pay money that is owed to him. Since the member was not made whole pursuant to Arbitrator Butto's January 19, 2018 Award, on March 29, 2018, we filed a Notice of Verified Petition and Verified Petition to Confirm the arbitration award. The return date for this matter is April 30, 2018.

**[Member] v. Justice Center (Supreme Court, Albany County):** On February 8, 2018, we received an order from the New York Supreme Court transferring the case to the Appellate Division. By way of background, on August 3, 2017, we commenced a special proceeding pursuant to CPLR Article 78 to review a determination of the Justice Center, which denied the member's request to amend and seal a report of alleged abuse. The challenged decision was issued after an administrative hearing conducted before Administrative Law Judge Sharon Golish Blum on March 8, 2017, at the Adam Clayton Powell Jr. State Office Building in New York, New York. In the Decision after Hearing, the Administrative Law Judge denied the member's request to amend the substantiated finding of abuse and to seal the file.

The case resulted from an incident on July 4, 2015, at the Kirby Forensic Psychiatric Center in which it was alleged that the member conducted a restraint with excessive force and improper technique. Such technique included grabbing a service recipient by his shirt, lifting him up by his collar, pushing him to the floor, dragging him into the hallway, and/or punching him in the face. On July 4, 2015, during the lunch time, two service recipients started fighting while seated at one of the cafeteria tables. Although other staff members were present, they were not in the immediate area to provide assistance to the member. The fight escalated and both patients began exchanging closed fist blows. After standing up, one patient grabbed a plastic knife and attempted to stab the other patient in the face. At that time, the member intervened, grabbed the patient with the knife to restrain him in an OMH-approved maneuver called a "standing wrap." However, in doing so, the member backed into the table behind him, causing both the member and the patient to fall to the floor.

The ALJ found that allegation unsubstantiated because the member's actions were reasonable emergency interventions to prevent the imminent risk of harm to a person -- he had to prevent the other patient from being stabbed in the face. While the patient was on the floor, the member observed that the knife previously used in the attack was on the floor, and within reach. The member reasonably believed that the patient might harm someone - - another patient, another staff member, or himself -- so with no staff assistance immediately available, he grabbed the patient, who had previously possessed the knife, and dragged him 6 to 8 feet out of the dining room and into the hallway. With respect to that

allegation, the Administrative Law Judge found the abuse allegation substantiated because dragging the patient out of the cafeteria was not a reasonable emergency intervention.

In the Article 78, we alleged that the finding in the Recommended Decision after Hearing, that the act of dragging the Service Recipient out of the dining room by the back of his shirt was not a reasonable emergency intervention to prevent imminent risk of harm, was irrational and not supported by substantial evidence. We have completed the Record on Appeal for review by the Attorney General.

**Ulster Correctional Facility:** The Appellate Division, Third Department, ordered that the matter be remanded to the arbitrator to issue a penalty consistent with the analysis of the court. Hearings were held before Arbitrator Dais on July 28, and August 17, 2017. A third day of hearing took place October 11, 2017, and briefs were submitted on December 22, 2017. On March 7, 2018, Arbitrator Dais issued his Award terminating the member's employment. At the last Executive Board meeting, we were asked by the Board to research whether Arbitrator Dais had the right to conduct further hearings in this matter. An analysis was issued to the Board in a memorandum that was e-mailed on March 23, 2018.

### Discipline

**Interrogations:** For the months of February 2018 and March 2018, we represented fifty (50) members who were interrogated by DOCCS.

**Auburn Correctional Facility:** The Notice of Discipline alleges that the member, in concert with another member, allegedly set up an inmate to be in possession of a weapon during a Code 2 incident in the South Yard. Additionally, the member is charged with issuing an incorrect To/From Memorandum detailing the incident as well as endorsing an Inmate Misbehavior Report against the inmate. The member is also accused of providing false or misleading statements during his interrogation. We met with the member and NYSCOPBA Western Region Business Agent Dave Tessmer on December 20, 2017, to prepare a defense to these charges. We represented the member at his disciplinary hearing on March 8 and 9, 2018, before Arbitrator Samuel Butto at the Auburn Holiday Inn, Auburn, New York. At the hearing, the State indicated it may need to present a rebuttal witness. The State has indicated it will not be presenting a rebuttal case. Briefs will be submitted thirty (30) days after receipt of the transcript.

**Bare Hill Correctional Facility:** This NOD is for using improper and racial language in front of inmates. We have submitted our arbitrator requests and are awaiting the assignment of an arbitrator.

**Bare Hill Correctional Facility:** The member received a Notice of Discipline for referring to the inmates as "niggers." The arbitration for this case was held on January 24, 2018. Closing briefs were submitted on March 1, 2018. On March 22, 2018, we received the Award from Arbitrator Edward Battisti, who found the Grievant guilty of the charge

but found that the appropriate penalty was a six-month suspension. DOCCS was seeking termination and would not settle this matter.

**Bedford Hills Correctional Facility:** The member received a Notice of Discipline for allegedly not reporting that an inmate claimed that a correction officer was retaliating against her because of the termination of the employment of another officer. The first hearing day was held on January 10, 2018. Day 2 was held on February 20, 2018, and closing briefs were submitted on March 22, 2018.

**Broome DDSO:** This member was charged with misconduct/incompetence for allegedly allowing a subordinate staff member to help her put on her bullet proof vest as well as button her uniform shirt and some other similarly related allegations allegedly violating OPWDD Sexual Harassment Police. An arbitration has been scheduled before Arbitrator William Babiskin on April 30, 2018. The parties have also been discussing a settlement of this matter. If the matter settles, the April 30, 2018 hearing will be cancelled.

**Clinton Correctional Facility:** A hearing in this matter has been scheduled for February 27 and 28, 2018, before Arbitrator Battisti. The NOD in this case alleges that the member was insubordinate, communicated unprofessionally, failed to punch his time card, and left the facility at the conclusion of his shift without permission to do so. The matter settled prior to the hearing.

**Downstate Correctional Facility:** An expedited arbitration hearing in this matter was held on January 16 and 30, 2018, before Arbitrator Butto. The NOD in this case alleges that the member made threatening, profane, and/or harassing statements to an inmate; used unnecessary force; failed to submit paperwork related to the use of force; submitted a use of force memorandum with omissions or inaccuracies; and made false statements in an OSI interrogation. Briefs in this case were submitted on February 7, 2018.

**Fishkill Correctional Facility:** The NOD alleges that the member shoved an elderly man to the ground in a pizzeria. The matter was heard at arbitration on March 22, 2018, before Arbitrator Dennis Campagna. The parties have thirty (30) days to submit closing briefs.

**Fishkill Correctional Facility:** This NOD is for allegedly leaving the facility with a canister of OC spray without permission and failing to cooperate with the facility's efforts to retrieve the canister. We have submitted our arbitrator requests and are awaiting the assignment of an arbitrator.

**Fishkill Correctional Facility:** This member has been charged with using unnecessary and excessive force. The first day of hearing was held on September 8, 2017, before Arbitrator Lise Gelernter. A second day of hearing has been scheduled for December 19, 2017. Because Arbitrator Gelernter will be out of the country, the third and fourth day of hearings will be held on May 8 and 9, 2018.

**Fishkill Correctional Facility:** The NOD alleges that the member provided false and misleading statements regarding a use of force. The first day of the arbitration took place

on September 28, 2017, before Arbitrator Dennis Campagna. The second day of the arbitration took place on December 4, 2017. After the second day, we made a motion to restore the member to duty or, in the alternative, to restore him to the payroll pending the results of the disciplinary arbitration on the grounds that the member worked for six (6) months without incident after the alleged excessive use of force, and even had the alleged victim work as his porter without incident during that time. Therefore, the State did not have probable cause to believe that the member's continued presence would be a risk to the safety and security of the facility. The State submitted its answer to the motion. The Arbitrator determined that DOCCS improperly suspended the member and ordered that the member be restored to pay status pending the result of the disciplinary arbitration. A third day of hearing took place on January 24, 2018, and a fourth day of hearing is scheduled for March 7, 2018. However, the Arbitrator cancelled the hearing due to severe winter weather. The final day of hearing took place on March 19, 2018. Closing briefs are due thirty (30) days after receipt of transcripts.

**Fishkill Correctional Facility:** The member is charged with failing to maintain secure control of and properly dispose of a respirator mask. This matter is scheduled for an expedited arbitration on April 2, 2018.

**Fishkill Correctional Facility:** This member received a Notice of Discipline for failing to maintain control of a Class A Tool. Specially, it is alleged that he was observed by supervisory staff having in his possession or wearing an N-95 Type face mask and failing to maintain and secure control of the mask and/or securely dispose of it. This matter was appealed to arbitration utilizing the expedited disciplinary procedures and Arbitrator Joel Douglas has been assigned to hear this case. A hearing has been scheduled for April 18, 2018.

**Fishkill Correctional Facility:** This NOD for allegedly failing to properly dispose of a Tool (a mask) is in expedited arbitration and assigned to Arbitrator David Lande. The hearing is scheduled for April 9, 2018.

**Fishkill Correctional Facility:** The NOD alleges that the member improperly disposed of a Class A Tool (N-95 facemask) in the facility. The matter will be heard at expedited arbitration on April 20, 2018, before Arbitrator Gaba.

**Franklin Correctional Facility:** This member has been charged with using excessive and unjustified use of force, among other charges. Hearings were held before Arbitrator Louis Patack on August 23, 2017, in Plattsburgh, New York, on October 20, 2017, in Albany, New York, and on January 31, and February 1, 2018, in Plattsburgh, New York. The parties have completed the hearing phase of the case. Transcripts were received on March 8, 2018, and briefs are due on or about April 16, 2018.

**Franklin Correctional Facility:** This NOD is for allegedly failing to properly secure a firearm. We have submitted our arbitrator requests and are awaiting the assignment of an arbitrator.

**Great Meadow Correctional Facility:** This NOD is for allegedly failing to report another officer's alleged excessive force and providing false information. No arbitrator has yet been assigned to this NOD.

**Green Haven Correctional Facility:** This member is charged with operating a motor vehicle on a public highway while impaired and/or under the influence of alcohol and/or an illegal drug. Additionally, among other charges, she is charged with reporting to duty in a physically impaired condition. A hearing was held on December 14, 2017, at the Ramada Inn in Fishkill, New York, before Arbitrator Louis Patack. A second day of hearing is scheduled for April 25, 2018.

**Mid-Hudson Forensic Psychiatric Center:** The arbitration of this matter took place on December 13, 2017, and February 12, 2018, at Mid-Hudson Forensic Psychiatric Center before Arbitrator Lise Gelernter, who directed the parties to submit post-hearing briefs by April 11, 2018. The notice of discipline alleges that the member failed to call for assistance for a patient in a timely manner and used an improper restraint technique to restrain a patient causing an injury to his lip. The member is not suspended.

**Mid-Hudson Forensic Psychiatric Center:** The member is accused of biting a patient. The first day of hearing was held on July 12, 2017. The second hearing day was held on November 10, 2017. Closing briefs were filed on December 20, 2017. We are awaiting a decision.

**Mid-Hudson Forensic Psychiatric Center:** The notice of discipline dated June 27, 2016, alleges that on March 4, 2016, the member punched a patient in the face while initiating a manual restraint. The arbitration in this matter was scheduled for March 19, 2018, but has since been rescheduled to May 24, 2018, before Arbitrator Dennis Campagna. The member is not suspended.

**Mid-Hudson Forensic Psychiatric Center:** The suspension notice of discipline dated February 15, 2018, alleges that on May 15, 2017, the member performed an unwarranted restraint with excessive force and improper technique; specifically, it is alleged that the member applied pressure to a patient's neck, threw him against a wall and fractured his nose. The notice of discipline seeks termination. The arbitration in this matter is scheduled for May 7 and 8, 2018, before Arbitrator Bruce Trachtenberg.

**Moriah Shock Incarceration Correctional Facility:** The CO charged in this NOD has a criminal action pending. When the criminal matter is resolved, the NOD will proceed if the criminal resolution does not result in termination.

**New York State Education Department:** The notice of discipline dated October 17, 2017, alleges that the member, while on duty, disclosed confidential information to another employee, improperly entered a private office and glared at an employee in an improper manner. The notice of discipline also alleges that the member made false statements during an interrogation. The arbitration of this matter is scheduled for April 25 and 26, 2018, before Arbitrator Timothy Taylor.

**New York State Education Department:** This member has been charged with leaving his post assignment at the Cultural Education Center for approximately thirty (30) minutes without supervisory approval and for failing to notify supervisory staff of his whereabouts. A hearing was held on February 21, 2018, before Arbitrator Timothy Taylor. Briefs were submitted on March 21, 2018. On April 2, 2018, Arbitrator Taylor issued his award finding the Grievant not guilty of Charge 1, Specifications 1 and 2, but finding Grievant guilty of Charge 1, Specification 3, and Charge II, Specification 1, as stated in the June 15, 2016, Notice of Discipline. The arbitrator found that the proposed 8-week suspension without pay was not appropriate and awarded a penalty of a 3-day suspension without pay. For this penalty Grievant may not use his accrued annual leave to cover the period of his suspension.

**New York State Education Department:** A hearing in this matter was scheduled for February 6, 2018, before Arbitrator Butto. The NOD in this case alleges that the member engaged in misconduct when he yelled into a telephone in view of the public and yelled at a Chief Security Officer in the presence of co-workers. The matter settled at the hearing.

**Otisville Correctional Facility:** The CO charged in this NOD has a criminal action pending. When the criminal matter is resolved, the NOD will proceed if the criminal resolution does not result in termination.

**Shawangunk Correctional Facility:** The CO charged in this NOD has a criminal action pending. When the criminal matter is resolved, the NOD will proceed if the criminal resolution does not result in termination.

**Sing Sing Correctional Facility:** The member received a Notice of Discipline for allegedly failing to stop one inmate from assaulting another inmate; failing to get medical attention for an injured inmate; improper use of force; and failing to file appropriate reports. The case has been assigned to Arbitrator David Lande. The first day of hearing took place March 29, 2018, at Lincoln C.F.

**Sing Sing Correctional Facility:** A hearing in this matter was held on February 23, 2018, before Arbitrator Taylor. The NOD in this case alleges that the member failed to comply with a lawful order when he left the facility at the end of his shift after being ordered to work mandatory overtime. Post-hearing briefs in this matter were due February 23, 2018.

**Washington Correctional Facility:** The member received a Notice of Discipline for using unnecessary and excessive force. We have now had four days of hearings on this case. The final hearing days were held on December 13 and 14, 2017. Closing Briefs were submitted on March 2, 2018.

**Washington Correctional Facility:** The member received a Notice of Discipline for sexual harassment against three female Correction Officers. The NOD alleged that the member sexually harassed the complainants both verbally and physically. The case was scheduled for hearing on January 31, 2018, but the member chose to resign from state service.



**Washington Correctional Facility:** Hearings have been held on September 11 and 12, October 16, November 13, 2017, and January 10, 2018. The grievant was restored to the payroll on Administrative Leave from January 11 to February 6, 2018, when DOCCS requested a continuation to adjourn the hearing to call a witness who was not identified on their witness list. The hearing is scheduled to continue, and hopefully conclude, on February 7 and 8, 2018, before Arbitrator Louis Patack. Grievant is charged with excessive force, failure to report, failure to report employee misconduct, and proving false and misleading statements during his interrogation. The final hearing transcript was received on March 5, 2018, and closing briefs are due on April 6, 2018.

### Justice Center

**Central New York Psychiatric Center:** The member was issued a Category 3 Report of Substantiated Finding alleging physical abuse and neglect for pushing a service recipient and directing derogatory and inappropriate language toward a service recipient and/or threatening a service recipient. We attended the pre-hearing conference in this matter on November 28, 2017. We now await an administrative hearing date.

**Mid-Hudson Forensic Psychiatric Center:** A report of Category 3 abuse (deliberate inappropriate use of restraints) and Category 3 physical abuse was issued on February 12, 2018. The report alleges that on October 14, 2017, the member conducted a restraint with excessive force and improper technique, during which time a service recipient was thrown on his bed and punched. We submitted a request for amendment to the Justice Center on February 23, 2018, and await a response.

**Mid-Hudson Forensic Psychiatric Center:** A report of Category 3 abuse (deliberate inappropriate use of restraints) and Category 3 physical abuse was issued on February 12, 2018. The report alleges that on October 14, 2017, the member used excessive force and restrained a service recipient with improper technique, including by initiating a restraint without the assistance of another staff member, during which time a service recipient was thrown on his bed and punched. We submitted a request for amendment to the Justice Center on February 23, 2018, and await a response.

**Mid-Hudson Forensic Psychiatric Center:** A report of Category 3 abuse (deliberate inappropriate use of restraints) and Category 3 physical abuse was issued on February 12, 2018. The report alleges that on October 14, 2017, the member conducted a restraint with excessive force and improper technique, during which time a service recipient was thrown on his bed and punched. We submitted a request for amendment to the Justice Center on February 23, 2018, and await a response.

**Mid-Hudson Forensic Psychiatric Center:** A report of Category 3 abuse (deliberate inappropriate use of restraints) and Category 3 neglect was issued on February 12, 2018. The report alleges that on October 14, 2017, the member approved the use of a four-point

restraint for a service recipient without approval. We submitted a request for amendment to the Justice Center on February 23, 2018, and await a response.

**New York City Children's Center:** A report of Category 3 abuse/neglect was substantiated against the member for allegedly applying handcuffs to a service recipient as a behavioral response inconsistent with the service recipient's treatment plan. The matter has been appealed and we await the results. If the initial appeal does not change the report of substantiated findings, the matter will be appealed to hearing.

### Improper Practice Charges

**Statewide - Civil Service Promotional Exam Fees (U-29179):** NYSCOPBA, along with other unions, filed an IP alleging that the State unilaterally changed its policy/procedure with respect to the fees charged for promotional civil service examination. The case was heard by an ALJ, went up the Board, and was remanded back to the ALJ for further proceedings. Ultimately, ALJ Sargent found that the State, specifically the Department of Civil Service, violated § 209-a.1(d) of the Act when it unilaterally began requiring employees to pay a fee for promotional/transition examinations, and ordered the State to make whole employees for any fees paid. Subsequently, the State filed exceptions to the Board on this decision. NYSCOPA, along with the other unions, are scheduled to submit their responses to the exceptions on April 13, 2018.

**Statewide – DOCCS (Consolidated Clear Bag and Staff Allowable List Case) (U-35624 and U-35745):** The Improper Practice Charge relative to the clear bag was scheduled to proceed to a hearing on March 28 and 29, 2018. These dates were changed, over the union's objection.

GOER requested an adjournment based upon the Governor's Executive Budget proposal which includes language which would specifically provide the Commissioner the exclusive authority to implement the clear bags. The ALJ scheduled a conference call to discuss and hear the parties' positions. The union objected to the requested adjournment, particularly in light of the Senate and Assembly's one house budget resolutions which rejected this language. Ultimately, the ALJ did grant the adjournment due to the fact that budget negotiations are not finalized until after the date the hearing was originally scheduled.

The ALJ did indicate that this would be a short adjournment and required the parties to set a new date while on the conference call. The hearing has been rescheduled for May 8, 2018, pending confirmation of availability of witnesses.

**Statewide – Commissioner Annucci's Memorandum (U-35773):** This office filed an Improper Practice Charge in response to Acting Commissioner Annucci's May 3, 2017, memorandum. The memorandum was read at lineup to correction staff for ninety-six (96) hours, which, among other things, effectively accused the Union of disseminating "half-truths" and perpetuating a "negative outlook" about the Department. We received the State's Answer in response. An initial conference took place on October 19, 2017. This

matter has been complicated by GOER indicating that it will consider issuing strike notices to members for alleged job actions that occurred at Auburn CF, Clinton CF, and Great Meadow CF in April-May 2017 if this IP is not withdrawn. That is because the Annucci memo was (in DOCCS' words) a "knock-it-off" response to the job actions. On January 8, 2018, this office met with NYSCOPBA Executive VP Tammy Sawchuk, Northern Region VP John Roberts, Business Agent Ricky Brunelle, and Stewards from Clinton CF and Great Meadow CF to present and discuss the facts surrounding the IP and possible strike notices, and its potential impact on members at Clinton CF. The matter has been scheduled for a hearing on May 3, 2018.

**Statewide – Directive 2115 (U-35942):** This office filed an Improper Practice Charge in response to the recent change to Directive 2115, which addresses drug testing DOCCS employees. The change made discipline mandatory for failing to report for a drug test when the direct order to submit to the drug test happened when the member was off-duty. Therefore, an employee would be disciplined regardless of if the employee faced travel or other legitimate issues that would make it difficult to comply with a lawful order to submit to a drug test. An initial conference took place on November 10, 2017, before ALJ Mitchell. The matter was placed on PERB's hold calendar until April 17, 2018, to allow the parties the time to determine the best course of action. The parties have stipulated to language removing the mandatory discipline imposed by the new version of the directive. The matter will be withdrawn after execution of the stipulation.

**Statewide – Directive 0750 (U-35987):** This office filed an Improper Practice Charge in response to DOCCS adding a brand new Directive 0750, which addresses an employee's responsibility to report suspicious activities of inmates and fellow staff that may be indicative of terrorist activities. The directive labels as "suspicious" commonplace activities like owning a large amount of weapons, frequenting gun ranges, engaging in martial arts, interests in surveillance, etc. The matter was scheduled for a preliminary conference on November 15, 2017, before ALJ Frederick Reich. Prior to the conference date, the parties agreed to adjourn so as to meet and discuss their respective positions on the directive. The parties then met on December 20, 2017. The parties agreed that NYSCOPBA would draft language to potentially be included in the directive, clarifying what is suspicious and that members' routine hobbies and activities would not be considered suspicious if they were not connected with potential terrorist activity. The agreed to stipulate to the clarifying language that DOCCS is not interested in curbing legitimate recreational activities of its members. The matter has been placed on the PERB hold calendar until April 12, 2018, and the parties have agreed to settle the matter pursuant to the clarifying language. The matter will be withdrawn after full execution of the stipulation of settlement.

**Statewide – Duty of Fair Representation (Fishkill CF) (U-36027):** We submitted our Answer on behalf of NYSCOPBA in an Improper Practice charge filed by a member, alleging that NYSCOPBA breached its duty of fair representation in the manner in which it allegedly withheld union representation from the member at Fishkill Correctional Facility. A conference was held at the Albany PERB Office on March 14, 2018, at 11 am.

At the hearing, Judge Reich indicated that the matter would be scheduled for a hearing, but has yet to advise the parties of a hearing date.

**Statewide – Duty of Fair Representation (Collins CF) (U-36028):** We submitted an Answer in response to this Improper Practice charge filed by a member, alleging that NYSCOPBA breached its duty of fair representation in the manner in which sergeants vacation schedules were addressed at Collins Correctional Facility. A conference has been scheduled at the Buffalo PERB Office, via telephone conference on May 2, 2018.

**Statewide – Employee’s Manual (U-33638):** On February 23, 2018, we discussed settlements with GOER to resolve this charge. This IP is from 2014 and involves changes in the Employee’s Manual. Specifically, the changes include: section 2.2 regarding a change in the licensure practice; section 2.3 regarding reporting requirements in domestic violence situations; section 4.9 regarding copying documents; section 4.15 regarding dissemination of criminal history; section 6.3 regarding official stationary; and section 2.44 regarding alerting of supervisory rounds. We will keep you informed regarding progress of negotiations.

**Statewide – ISO Scheduling Issues (U-36232):** We filed an Improper Practice charge challenging the unilateral change of the hours of work and lunch schedules for ISOs at a number of reporting locations in the Long Island area. A conference has been scheduled on May 14, 2018 at the Albany PERB office.

**Statewide – Office for People with Developmental Disabilities (U-35979):** On September 26, 2017, we filed an Improper Practice Charge with PERB, stemming from a statewide OPWDD job posting for specialized SSO1 positions as Family Care Inspectors. The job posting requires interested candidates to submit a cover letter and resume. Past practice has been to bid these positions regionally and award them by seniority. The charge alleges that OPWDD violated the Act by unilaterally changing the posting and bidding procedures without negotiating with NYSCOPBA. The initial conference of this matter was held December 20, 2017. An improper practice charge was filed after a statewide OPWDD job posting for specialized SSO1 positions as Family Care Inspectors required applicants to submit a resume and cover letter and did not award the jobs by seniority. This matter has been placed on PERB’s hold calendar in order for both parties to investigate it further.

**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 injured 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 May 29, 2018. During that time, the Union will continue to review various assault alert forms completed by members in order to ascertain whether they received medical treatment or were ignored by facility physicians.

**Central New York Psychiatric Center (U-35970):** A conference was held on January 17, 2018. On September 21, 2017, we filed an Improper Practice Charge alleging that Central New York Psychiatric Center, (“CNYPC”) interfered, restrained, retaliated against and coerced employees in the exercise of their rights guaranteed under the *Taylor Act*. Specifically, we alleged that on August 27, 2017, the member, a NYSCOPBA member, Union Steward, and a Central Service Staff member, was directed to cover a mandatory overtime post at SUNY Upstate Medical Center. On September 13, 2017, NYSCOPBA filed a grievance regarding the mandating of overtime to the member and the change in overtime policy generally. After the grievance was filed, on September 15, 2017, Mr. Paparella confronted Central Service Staff members regarding the grievance on overtime mandating and distribution. During the discussion, Mr. Paparella stated, among other things: 1) Things are going to happen if [the grievance] goes through; 2) That he is sick and tired of all the whining and complaining; 3) That he planned to remove responsibilities from those who filed the grievance; 4) That Central Staff SHTA’s duties would be changed such that, upon entering the building, they would be assigned different posts and locations. On September 19, 2017, in further retaliation to the grievance, Mr. Paparella directed supervisory staff to assign Central Service Staff members to cover all Mandatory Overtime at the SUNY Upstate Medical Center. Such direction is inconsistent past practice, as well as the local Labor/Management agreement. The case is on hold pending further discovery.

**Central New York Psychiatric Center (U-36192):** This office filed an Improper Practice Charge in response to CNYPC’s reinterpretation of the existing call-in procedure that changes how an ill employee reports an illness-related absence and how such absence is counted for discipline purposes. The matter was heard at a pre-hearing conference with ALJ Weisblatt on March 26, 2018. The Judge placed the matter on PERB’s hold calendar until April 26, 2018, to give the parties the opportunity to discuss possible settlement.

**Coxsackie Correctional Facility (U-36054):** On January 30, 2018, we appeared at a conference for this Improper Practice Charge in front of ALJ Burritt. We filed an Improper Practice Charge alleging a failure to negotiate regarding a mandatory subject of bargaining. Coxsackie CF unilaterally rescinded the practice of paying a \$12 meal allowance to officers with bids at Coxsackie who are assigned to Albany Medical Center and return at least two hours beyond the end of their normal 8-hour shift. This same issue also previously occurred at Greene CF. A contract grievance addressing this was previously filed. At the conference, the parties agreed that this matter is to be deferred to the contract grievance. If the arbitration in the contract grievance does not produce a decision on the merits, or should the arbitrator determine that the issue is not covered by the agreement, we will have the right to return to PERB and ask that the IP be processed. At this time, the IP is conditionally dismissed and deferred to the grievance.

**Livingston Correctional Facility (Retaliation and Interference):** On November 28, 2017, we attended a conference at PERB on this charge, which alleges that facility administrators intentionally bypassed the steward who was designated by the local as the individual with whom management should deal on a labor/management issue involving sergeants’ job descriptions. The steward who was bypassed is the only sergeant among

Livingston's stewards and the only steward with substantial knowledge of the issue. We contend that by ordering other stewards to meet on this issue at times when the sergeant wasn't working, the administration interfered with NYSCOPBA's ability to decide for itself the union representative(s) it chooses to handle particular matters. The administrative law judge has put the case on hold while the parties see if a settlement can be negotiated.

**Mid-Hudson FPC Bag Restriction (U-36147):** We filed an Improper Proper Practice Charge alleging a failure to negotiate regarding a mandatory subject of bargaining. Mid-Hudson FPC unilaterally changed a significant work rule, impacting the comfort and convenience of employees. Specifically, the facility implemented a new rule restricting all employees to entering the facility with only one bag (of restricted size) for clothing, etc. and one small cooler for food. The prior practice at the facility did not limit employees in the size and number of bags they could bring into the facility for each shift. We appeared at a conference on March 21, 2018 before ALJ Weisblatt. The parties had a substantive conversation about settling this case. The ALJ placed the matter on the hold calendar so that the discussions could continue.

**NYS Department of Labor (U-35136 and U-35815):** We met with GOER and agency representatives to discuss resolution of these two Improper Practice Charges. The two charges were filed after the Department of Labor announced changes to officers' length of lunch, ability to change into and out of uniform during pre-shift briefing and prior to the end of their shifts, and to built-in non-compensatory time.

**Rochester Psychiatric Center (U-36177):** We filed an improper practice charge with PERB, after Rochester PC announced a new paycheck distribution policy whereby employees will no longer be able to pick up live paychecks at Rochester PC. On March 20, 2018, we attended an initial conference before Judge Nancy Burritt. Judge Burritt scheduled a follow-up phone conference for April 30, 2018, to facilitate resolution of this charge.

**Southport Correctional Facility (U-34184):** On December 12, 2017, we participated in a conference call initiated by PERB on this charge, which 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. A hearing in the case was held in December of 2015 and briefs were later filed, but the administrative law judge who heard the case left PERB before issuing a decision. The case is now assigned to another judge who, if a settlement is not otherwise reached, will review the record and briefs and issue a decision. On the conference call, the judge asked the attorneys to present their legal arguments in support of their respective positions and she also asked the parties to consider whether there was a possibility of settling the case. We are exploring that.

**Training Academy (U-33924):** We filed an improper practice charge with PERB, after Albany Training Academy Assistant Director James Huff threatened and refused to provide the member with Union representation during investigatory questioning that took place during a chemical agents instructor school at the Albany Training Academy in November 2017. The charge alleges that Assistant Director Huff denied the member Union

representation during questioning which could result in discipline, and that Assistant Director Huff's behavior constituted interference and retaliation, all in violation of the Act. We await a conference date.

### Contract Enforcement

**Appeals to Arbitration:** We received sixteen (16) request from NYSCOPBA's grievance department to appeal contract grievances to arbitration during the months of February 2018 and March 2018. We have reviewed the grievance files and drafted and submitted the arbitration appeals to the Governor's Office of Employee Relations (GOER).

During the past month, we triaged forty-two (42) grievances. We withdrew five (5) grievances at triage.

**Bedford Hills Correctional Facility:** The member, now retired, filed a contract grievance seeking to charge alternate accruals for two days of absence. Upon investigation of the grievance, it was discovered that the member had over 200 hours of vacation accruals that were not cashed out upon his retirement. After contacting facility personnel, the member was issued a check for the dollar value of the accruals that he would not otherwise have known he had.

**Clinton Correctional Facility:** This grievance alleged that the State violated Article 14 of the Agreement when it improperly AWOLed the member for two (2) days after he allegedly failed to provide medical documentation for his absences. The grievance was bifurcated for a determination on timeliness. On March 20, 2017, Master Arbitrator Joel Douglas determined that the grievance was not timely filed within twenty (20) days of the first date that the member received notice from the facility that he would be AWOLed. As such, the grievance was denied.

### Retirement

**Greene Correctional Facility:** The member's disability retirement application was denied. The Retirement System's Orthopedic Surgeon found that the member had limitations that made it dangerous for him to work as a correction officer, but stated that he could not determine if the member was permanently disabled, because he has refused surgeries that might make it possible for him to perform his duties. The member's medical records show that he has refused surgery on his lower back, right knee, and right shoulder. We are looking at whether the member's doctors are able give opinions that surgery would not improve his prognosis. At this time, we are not able to produce a doctor who will testify that the member is permanently disabled from performing his duties. On May 23, 2017, we filed the Scheduling Information Form to proceed on medical records. The initial hearing was held on January 17, 2018, at which time the member testified. The hearing has been continued to permit the member to present medical testimony.

**Green Haven Correctional Facility:** This is a disability retirement matter where the member sustained a head injury. On March 21, 2016, the member and his treating psychologist testified. This matter was continued to allow the Retirement System to put in the testimony of its psychiatrist. The System's psychiatrist testified on February 3, 2017. This matter was continued for the testimony of the System's neurologist. The System's neurologist has filed a supplemental report but will not testify because he is no longer under contract with the System. We have agreed with the System to close the proof in this matter. The System permitted us to enter into evidence medical records that were not submitted to the System within forty-five days after receipt of the acknowledgement letter. Closing briefs were submitted on March 23, 2018.

**Kirby Forensic Psychiatric Center:** 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 her duties as an SHTA. 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. The member's testimony was taken on March 6, 2018. The matter has been continued for the testimony of the System's doctor.

**Sullivan Correctional Facility:** The member was injured when he was struck in the head with a baton swung by an inmate. The member's disability retirement application was denied by the Retirement System, which found that the member was not permanently disabled from performing his duties. The initial hearing was held on March 6, 2018. The matter has been continued for the testimony of the System's doctor.

**SHTA Retirement:** We filed a demand for a hearing to the NYS Retirement System on behalf of the member relating to Article 14 credit for his prior service as an SHTA before becoming a correction officer.

### Workers' Compensation

**Workers' Compensation Discrimination:** On March 30, 2018, we received the Court's decision in the above-referenced matter. The Court denied the claims holding that there were other legitimate reasons for non-promotion of claims, but found that "the record supports a finding that the Claimants have met their burden of showing that the lists were created detailing workers' compensation usage for promotional candidates. *These lists were made in violation of WCL section 120.* The lists were made in close proximity to the time candidates were being interviewed in June/July 2016 and October 2016. The lists were taken into the interviews. Both OMH and CNYPC found the lists to be inappropriate." In other words, CNYPC violated the law, but the claimants did not have a sufficient entitlement to promotion. We believe these findings are inconsistent and intend



to appeal the Court's decision, which must be filed within thirty (30) days of receipt of the decision.

By way of background, in October 2016, we filed a complaint of discrimination under the New York Workers' Compensation Law, section 120 for discrimination at Central New York Psychiatric Center (CNYPC). In the complaint, we alleged that CNYPC unlawfully used, and continues to use, the amount of Workers' Compensation benefits in its employment and promotion decisions and that the management of CNYPC maintained a Worker's Compensation "scorecard" for use in its promotion process. *Workers' Compensation Law* § 120 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 alleged that employees at CNYPC were adversely impacted for utilizing Workers' Compensation leave and that certain members were not promoted despite superior test, scores, experience and qualifications.

The sole remedy for a violation of *Workers' Compensation Law* relating to employment discrimination 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 and sole remedy. Although the reported cases concerning regard termination of an employee's employment, the section specifically prohibits discrimination *in any other manner*. 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 anti-discriminatory provision applies equally in the public sector. In such cases, the preliminary inquiry is whether civil servants, who are injured on the job, are treated detrimentally when compared to those who must take leaves of absence for non-work-related injuries. *Duncan, supra*. If the action complained of is not made in retaliation for the employee's compensation claim or testimony, the section not violated. In the present case, as indicated in the "scorecard" the three most recent promotees had the lowest workers' compensation days used since December 2015. The coincidence is statistically unreasonable. Moreover, most of the individuals we spoke with were not promoted despite superior test, scores, experience and qualifications.

### Employee Health Services

**Mohawk Correctional Facility:** From approximately September 18, 2017, through November 6, 2017, the member was placed on an involuntary leave of absence pursuant to Civil Service Law 72(5). We preserved the member's right to a hearing to contest the Department's determination that she was unfit for duty. The member has since been found fit for duty, but remains out on workers' compensation for a different injury. She is still entitled to a hearing.

**New York State Education Department:** We are attempting to schedule a hearing for the member. State Ed has adjourned the member's termination date. State Ed alleges that medical evidence indicates that the member is unable to perform the duties of his position.

**Southport Correctional Facility:** On January 18, 2018, following an EHS exam, DOCCS placed the member on involuntary leave pursuant to Civil Service Law 72(5). Thereafter, the member submitted a medical note to DOCCS triggering a second EHS exam. DOCCS determined that the member was unfit for duty after both of these EHS exam. We have appealed both DOCCS determinations and preserved the member's right to a hearing to contest the Department's fitness determinations. We await a hearing date.

### General

**ADA Violations:** We previously filed charges of disability discrimination under the Americans with Disabilities Act (ADA) against DOCCS with the Buffalo Regional Office of the U.S. Equal Employment Opportunity Commission (EEOC), based upon: (1) DOCCS' failure to promote members to Sergeant while out on workers' compensation leave for a work-related injury even when expected to be able to return to full duty within a short time period, by refusing to consider promotion based on workers' compensation leave, and failing to consider any reasonable accommodation such as placement in the Light Duty program or additional short-term leave; and (2) DOCCS' automatic termination of employment under Civil Service Law § 71 upon the expiration of a one-year leave of absence due to a work-related injury, without considering any reasonable accommodation such as placement in the Light Duty program or additional short-term leave (Millard). In both cases, the EEOC issued a Determination finding "reasonable cause" to believe the DOCCS engaged in disability discrimination in violation of the ADA when it: (1) failed to engage in an interactive process with the member to determine whether or not a reasonable accommodation was available that would allow the member to accept a promotion or return to work; (2) failed to provide the member a reasonable accommodation to enable the member to accept a promotion or return to work; and, (3) applied a qualification standard that discriminated against the member based upon a disability. Having also found that that DOCCS also discriminated against other similarly situated employees (class of employees), the EEOC invited the Department to participate in conciliation in an effort to reach an agreement that would eliminate such discriminatory employment practices, but DOCCS declined to participate in conciliation. As a result of finding reasonable cause to believe that DOCCS engaged in systemic discrimination on account of disabilities in violation of the ADA, the EEOC referred the matter to the U.S. Department of Justice (DOJ) for review to determine whether or not it would initiate an enforcement action against DOCCS in the United States District Court.

Since the EEOC referral to the DOJ by letter dated March 6, 2015, no further action has been taken by either the EEOC or DOJ to initiate an enforcement action, although we periodically contacted the EEOC for a status report. Since no response has been forthcoming, we submitted a formal letter on February 27, 2018, requesting EEOC and DOJ to initiate an enforcement action, or issue a "Right to Sue" to enable us to commence a civil enforcement action against DOCCS in the United States District Court within 90 days of such notification (42 USC § 2000e-5[b], [f]), on behalf of the members and all

those class members similarly situated. While the EEOC's "reasonable cause" Determinations are not binding or determinative of the issues before the court, such determinations are viewed favorably by the court since the EEOC is the federal administrative agency charged by Congress with the responsibility to administer and achieve compliance with the ADA.

**Auditor's Report:** On March 13, 2018, we submitted a report to NYSCOPBA's auditors, Whittemore, Downen & Ricciardelli, LLP, providing certain information regarding pending or unasserted claims against NYSCOPBA in connection with its audit of NYSCOPBA's financial statements.

**Correction Sergeant, Spanish Language:** Subsequent to the Executive Assembly's direction to challenge the creation of the Correction Sergeant (Spanish Language) position and the method of appointments made to the position, we have notified the Executive Board of the details we will need in order to file a challenge and injunction as directed. We have notified the Executive Board that the best course of action is to file an Article 78 proceeding challenging the creation of the position and the manner within which the appointments were made. We have just received a list of individuals willing to be petitioners in the litigation. We are in the process of drafting papers as we await a response to a FOIL request to Civil Service which is needed for the litigation. We will reach out to the individual petitioners for further information shortly.

**JCOPE Proceeding (SSO1 and retired SSOII):** JCOPE notified two members that it is considering commencing a formal investigation relating to allegations of requesting and receiving overtime payments in violation of the Public Officers Law. We responded to this notice with a detailed explanation of the members' conduct and the authority for his actions. We requested that JCOPE not commence a formal investigation. We are awaiting JCOPE's response.

**NYSCOPBA-OMH Statewide Labor-Management Meeting.** On April 5, 2018, we will be attending the NYSCOPBA-OMH Statewide Labor-Management Meeting at the Office of Mental Health Headquarters in Albany, New York.

**Steward Training:** We have attended and presented at Steward Training all across the state. In total, we presented at twenty-one (21) training sessions.

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



# Lippes Mathias Wexler Friedman LLP

Attorneys at Law

## FEBRUARY 2018 LEGAL REPORT TO THE EXECUTIVE ASSEMBLY

This is our report for the February 2018 Executive Assembly, regarding the recent developments in some of the cases and legal matters we are handling for NYSCOPBA.

### Negotiations

We attended a negotiating session with the State's bargaining team on December 6, 2017. On December 20, 2017, we attended a meeting of the collective bargaining committee. On January 11 and 23, 2018, we attended meetings of the collective bargaining committee and assisted the committee in preparing for an upcoming negotiations session with the State's representatives.

### Litigation

**Statewide – Retiree Health Insurance Litigation (NYSCOPBA v. State, et al., USDC, NDNY, 11-CV-1523):** On December 20, 2017, we filed papers in opposition to the State defendants' summary judgment motion, including declarations and affirmations with supporting exhibits, a reply and counter-statement of material facts, and memorandum of law in opposition. Based upon the defendants' own witness deposition testimony, we asserted that the State's pattern bargaining in 1982, and thereafter in subsequent bargaining, used language that was intended to implement a continuation of contribution rates in retirement at the same rate in effect when the employee retired. We further supported our opposition based upon the declarations obtained from two former Counsel 82 bargaining agents that, during the 1982 negotiations, the State negotiated and agreed to such a continuation of contribution rates in retirement, and that the agreement was memorialized in the 1982 MOU and the enabling legislation (Chapter 14, Laws of 1983), establishing the contribution rates in 1982 (10%/75%) for employees and retirees who retired "on or after" January 1, 1983. Finally, we took exception to their asserted financial emergency claim to justify the impairment of contract rights based upon a failure to identify the witness, and a failure to detail the financial emergency or demonstrate that the determination to increase retiree contribution rates was the result of any budgetary analysis and a conscious choice among available financial alternatives. In fact, the State chief negotiator, Joe Bress, testified at his deposition that it was his idea to extend the increased rates to retirees for the purposes of providing flexibility to the State, and without any financial or budgetary valuation or assessment.

On January 26, 2018, the State defendants submitted their reply papers in response to our opposition papers to the State defendants' summary judgment motion that we filed on December 20, 2017. While the matter is now fully submitted to the Court, it appears that the defendants submitted exhibits to their reply papers that were not produced during

discovery, and we will need to request permission from the Court to submit a sur-reply to address the issue and request that the non-produced documents be stricken. As previously reported, we believe that there are genuine issues of material fact preventing summary judgment in favor of the State defendants, and result in a trial regarding whether or not the State defendants negotiated health insurance contribution rates for represented employees in retirement during the 1982-1985 bargaining and contracts.

**[Member] v. State of New York (Orange County Supreme Court/Appellate Division, Second Department):** On November 3, 2017, we filed a Reply Brief in the *Matter of [Member] v. State of New York* in the Appellate Division, Second Department. By way of background, the member was hired as an SHTA on May 14, 2015. Pursuant to Civil Service Rules, he was to serve a one (1) year probationary term. The member was involved in an incident with a patient, which resulted in a Justice Center investigation. Based upon the findings from that investigation, the member was terminated from his employment, effective April 14, 2016, one month prior to the completion of his probationary term. We filed an article 78 proceeding to challenge the determination as arbitrary and capricious. The lower court denied our petition and dismissed the proceeding. The basis for the court's decision was that the member did not exhaust his administrative remedies. The court noted in its decision, "by his own papers, [the member] admits that the Report which is cited for his termination is under appeal, and that no decision has yet been rendered."

The incident which resulted in the termination occurred on February 12, 2016. On that date, the member was performing his routine SHTA duties. At approximately 2:55 p.m., a patient remained in the bathroom, contrary to facility rules. The member directed the patient to leave the bathroom, but the patient refused. The patient then threw a cup of water in the member's face. After throwing a cup of water, the patient began striking the member with closed fist punches. The member reported the incident to the Safety and Security Officers on the Mid-Hudson Forensic Psychiatric Center campus and filed a supporting deposition, seeking criminal charges against the patient.

On April 8, 2016, the member received a letter from MHFPC indicating that "a recommendation has been made and approved by the Executive Director for termination of your probationary services as a Security Hospital Treatment Assistant pursuant to Civil Service Rule 4.5." The member was terminated from his employment from MHFPC, effective April 14, 2016, one month prior to the completion of his probationary term.

As indicated above, the lower court did not address the merits of the case. Instead, the lower court noted that the member had requested a Justice Center hearing on whether he committed the alleged abuse and/or neglect, and that the hearing has not been conducted. The court further noted, "it is hornbook law that one who objects to the act of an administrative agency must exhaust available administrative before being permitted to litigate in a court of law." Based upon the failure to exhaust administrative remedies, the lower court denied the petition and dismissed the proceeding.

On July 25, 2017, we filed a brief and record on appeal challenging the decision of the lower court. On November 3, 2017, the State responded, arguing that the Article 78

proceeding was merely a collateral attack on the Justice Center findings and, as such, the matter was not ripe until after the Justice Center hearing. Further, the State addressed the merits of the Article 78, arguing that there was a good faith basis for the termination.

In our November 14, 2017, reply brief, the Union argued that even if the request to the Justice Center is granted in its entirety, the result would be that the two Category 2 abuse and neglect findings are unsubstantiated and the Justice Center's records sealed, the member would not be returned to his prior employment. Therefore, the determination that the member challenged, the termination of employment, is separate and distinct from the Justice Center's determination. We further argued that, as the Justice Center is continuing to investigate the incident and has not reached *any* final disposition of the administrative appeal, the decision to terminate Petitioner's employment should be set aside. "An action which has not reached *any* conclusion should not be used as a basis to terminate someone's employment." We await the Appellate Court's decision on the matter.

***DOCCS, et al. v. NYSCOPBA:*** The member received an arbitration award dated July 18, 2017. The arbitrator found the member not guilty of Charges #1 and #2 of the Notice of Discipline, but did not make a determination regarding Charge #3 as the criminal adjudication had not been resolved. The State is seeking vacatur of the award, which NYSCOPBA and the member are opposing. NYSCOPBA's papers are due on December 15, 2017, and the Petitioners' Reply papers are due on January 11, 2018, with a return date of January 12, 2018. We await the Supreme Court's decision on this matter.

***[Member] v. State Department of Civil Service (Albany County, Supreme Court):*** On November 14, 2017, we commenced an Article 78 proceeding challenging a determination by the New York State Department of Civil Service denying disabled veteran credits to the member, a U.S. Marine Corp veteran, for use on the Correction Lieutenant test. Specifically, we challenged the Department's decision to use the date in which the Department of Veterans Affairs back-dated the member's disability to, rather than the date of its actual disability determination. The State used the "retroactive" date of the determination and by so doing, denied the member disabled veteran's points toward the lieutenant's examination. We contended that the Department's determination was made in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion. We await the State's answer.

***Fishkill Correctional Facility:*** We initiated an Article 75 proceeding to confirm a contract arbitration award on July 7, 2017. The parties had reached a settlement agreement resolving the member's contract grievance on July 8, 2016, and the master arbitrator signed off on the settlement. As part of that settlement, the State was to cease deductions relative to a particular overpayment and reimburse the member for any deductions made after April 21, 2016. As of July 7, 2017, the State had not yet made the member whole in accordance with the parties' settlement agreement. Subsequent to the filing of the Article 75, the State did issue the member two checks which fulfilled their obligations under the settlement agreement. Having determined that the member received the compensation he was due under the settlement agreement, we discontinued the Article 75 special proceeding.

**[Member] v. State, (Albany County Supreme Court/Appellate Division Third Department) Gender Specific Directive (#2230):** On November 14, 2017, we presented oral argument before the Appellate Division, Third Department, on this matter. By way of background, on January 5, 2015, DOCCS updated Directive #2230 to require that special watches and suicide watches must be conducted by staff members of the same gender as the inmate who was under observation.

As relevant to this specific case, at Albion Correctional Facility, hiring for overtime is based upon seniority. On April 27, 2015, the member was on the list to be hired for overtime. However, as conceded by DOCCS, Albion CF applied the above-referenced directive to deny the member the opportunity for overtime based upon his gender. A female correction officer with less seniority than the member was hired for overtime instead. The member and another male officer were both ahead of the female officer based upon terms of seniority, but both officers, including the member, were skipped over based on the gender specific directive

Before the Division of Human Rights, we argued that the Division was incorrect because a prima facie case of discrimination was established. First, DOCCS Directive #2230 clearly discriminated upon the basis of gender. Second, based upon that discriminatory practice, the member 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 has deprived the member of material benefits in that he was denied overtime opportunity. Therefore, the member was directly impacted by Directive #2230, has suffered damages based upon this Directive, and will continue to suffer damages in the future, based upon this Directive.

On November 16, 2015, the Division dismissed the Complaint, finding the existence of a Bona Fide Occupational Qualification (BFOQ). On January 15, 2016, we commenced an Article 78 proceeding challenging the Division's determination as being arbitrary and capricious. On June 22, 2016, the lower court affirmed the Division's finding that there was a BFOQ. We appealed that decision to the Appellate Division, Third Department. The basis for the appeal was that DOCCS did not establish a valid BFOQ defense and that the Division's determination was legally insufficient, arbitrary and capricious, and not supported by a rational basis. To establish a BFOQ, a Respondent must make a strong factual showing that no reasonable alternatives existed. DOCCS failed to do so before the Division. Furthermore, because a BFOQ determination must be so factually specific, we submit that a full evidentiary hearing was necessary; lacking that, the determination should be annulled as arbitrary and capricious. Specifically, the decision does not adequately consider whether any reasonable alternatives exist. We argued that the only aspect of the special and suicide watches that might involve impermissible cross-gender surveillance is in observance of defection, and a female officer could be used for that task. Therefore, a reasonable alternative exists. Mere inconvenience does not establish a Bona Fide Occupational Qualification. Because the court did take reasonable alternatives into account, we believe the lower court erred.

The next step is to apply to the New York Court of Appeals for Leave to Appeal. Under the procedural rules, there is no automatic right to appeal to the Court of Appeals – it is by permission only. Unlike in the Appellate Division, which emphasizes factual questions such as whether the weight of the credible evidence supports a trial verdict or whether a court abused its discretion in making a ruling, the papers seeking leave from the Court of Appeals must identify issues of law to be addressed. The Court of Appeals hears very few cases each year and focuses on cases that involve novel or unique issues of law, and/or issues of public importance. A Motion for Leave to Appeal must be filed within 30 days, which would require filing by February 16, 2018

**Mohawk Correctional Facility:** On December 15, 2017, we filed an Article 78 proceeding in Supreme Court, Albany County, challenging DOCCS' refusal to grant this officer a two-year leave of absence in connection with injuries he suffered when coming to the aid of a fellow officer who was being assaulted by a non-compliant inmate. In assisting in subduing the inmate and gaining compliance, the member injured his shoulder and later had surgery, but he still has significant limitations and is unable to return to work. He has applied for disability retirement (both ordinary and performance of duty). We contend that the member was injured as the result of an assault and is therefore entitled to a two-year leave of absence under Section 71 of the Civil Service Law. The case is returnable on February 23, 2018.

**Rochester Psychiatric Center (NYSCOPBA and [Member] v. OMH, Rochester PC, et al):** We filed an Article 78 petition to challenge Rochester PC's unlawful summary termination of the member. Rochester PC terminated the member's employment based on his probationary status, but an argument can be made that the member had completed his probationary period prior to summary termination. The Petition seeks his reinstatement. We filed the Petition and received the State's Answer, we then submitted our Reply and a Supplemental Reply. On March 2, 2017, we appeared on behalf of the member in Supreme Court, Monroe County, before Judge William Taylor. We received a decision from the Judge, which denied and dismissed our petition because the Judge found that the member was not qualified to hold the title of SSO Trainee on his first day of work and his probation could not have started until he was qualified. Therefore, according to the Judge, the member was properly summarily terminated within his probationary period. This office filed a Notice of Appeal, and the matter will be heard before the Appellate Division, Fourth Department. This office finalized the Record on Appeal and additional legal documents necessary to perfect and pursue the appeal, and filed the paperwork on August 14, 2017. The appeal will be heard at oral argument before the Appellate Division, Fourth Department, in Rochester, on the February 27, 2018.

**[Member] v. Justice Center (Supreme Court, Albany County):** On November 7, 2017, we submitted a reply memorandum requesting that the matter be forwarded to the Appellate Division, Third Department, for review of an issue of substantial evidence. By way of background, on August 3, 2017, we commenced a special proceeding pursuant to CPLR Article 78 to review a determination of the Justice Center, which denied the member's request to amend and seal a report of alleged abuse. The challenged decision was issued after an administrative hearing conducted before Administrative Law Judge Sharon Golish



Blum on March 8, 2017, at the Adam Clayton Powell Jr. State Office Building in New York, New York. In the Decision after Hearing, the Administrative Law Judge denied the member's request to amend the substantiated finding of abuse and to seal the file.

The case resulted from an incident on July 4, 2015, at the Kirby Forensic Psychiatric Center in which it was alleged that the member conducted a restraint with excessive force and improper technique. Such technique included grabbing a service recipient by his shirt, lifting him up by his collar, pushing him to the floor, dragging him into the hallway, and/or punching him in the face. On July 4, 2015, during the lunch time, two service recipients started fighting while seated at one of the cafeteria tables. Although other staff members were present, they were not in the immediate area to provide assistance to the member. The fight escalated and both patients began exchanging closed fist blows. After standing up, one patient grabbed a plastic knife and attempted to stab the other patient in the face. At that time, the member intervened, grabbed the patient with the knife to restrain him in an OMH-approved maneuver called a "standing wrap." However, in doing so, the member backed into the table behind him, causing both the member and the patient to fall to the floor.

The ALJ found that allegation unsubstantiated because the member's actions were reasonable emergency interventions to prevent the imminent risk of harm to a person – he had to prevent the other patient from being stabbed in the face. While the patient was on the floor, the member observed that the knife previously used in the attack was on the floor, and within reach. The member reasonably believed that the patient might harm someone - - another patient, another staff member, or himself -- so with no staff assistance immediately available, he grabbed the patient, who had previously possessed the knife, and dragged him 6 to 8 feet out of the dining room and into the hallway. With respect to that allegation, the Administrative Law Judge found the abuse allegation substantiated because dragging the patient out of the cafeteria was not a reasonable emergency intervention.

In the Article 78 papers, we alleged that the finding in the Recommended Decision after Hearing, that the act of dragging the Service Recipient out of the dining room by the back of his shirt was not a reasonable emergency intervention to prevent imminent risk of harm, was irrational and not supported by substantial evidence.

**Ulster Correctional Facility:** The Appellate Division, Third Department, ordered that the matter be remanded to the arbitrator to issue a penalty consistent with the analysis of the court. Hearings were held before Arbitrator Dais on July 28, and August 17, 2017. A third day of hearing took place October 11, 2017, and briefs were submitted on December 22, 2017. We are awaiting a decision from Arbitrator Dais.

## Discipline

**Interrogations:** For the months of December 2017 and January 2018, we represented eighty-seven (87) members who were interrogated by DOCCS.

**Auburn Correctional Facility:** The Notice of Discipline alleges that the member, in concert with another member, allegedly set up an inmate to be in possession of a weapon during a Code 2 incident in the South Yard. Additionally, the member is charged with issuing an incorrect To/From Memorandum detailing the incident as well as endorsing an Inmate Misbehavior Report against the inmate. The member is also accused of providing false or misleading statements during his interrogation. We met with the member and NYSCOPBA Western Region Business Agent Dave Tessmer on December 20, 2017, to prepare a defense to these charges. A hearing has been scheduled for March 8 and 9, 2018, before Arbitrator Samuel Butto at the Auburn Holiday Inn, Auburn, New York.

**Bare Hill Correctional Facility:** The member received a Notice of Discipline for referring to the inmates as “niggers.” The arbitration for this case was held on January 24, 2018. Closing briefs are due on March 1, 2018.

**Bedford Hills Correctional Facility:** The member received a Notice of Discipline for allegedly not reporting that an inmate claimed that a correction officer was retaliating against her because of the termination of the employment of another officer. The first hearing day was held on January 10, 2018. A second day is scheduled for February 20, 2018, and a third day is scheduled for March 21, 2018.

**Clinton Correctional Facility:** A hearing in this matter has been scheduled for February 27 and 28, 2018, before Arbitrator Battisti. The NOD in this case alleges that the member was insubordinate, communicated unprofessionally, failed to punch his time card, and left the facility at the conclusion of his shift without permission to do so.

**Creedmoor Psychiatric Center:** A hearing in this matter was scheduled for January 31, 2018. The NOD in this case alleged that the member failed to reconcile charges on his state-issued credit card; allowed a visitor to leave the facility without confirming her identity; failed to report his involvement in a motor vehicle accident; and directed an officer not to enter the accident in the official blotter. Prior to the hearing in this matter, the member decided to settle the case for five (5) days of accruals.

**Coxsackie Correctional Facility:** This case was scheduled for an expedited disciplinary arbitration hearing on December 22, 2017, before Arbitrator Lande. The NOD in this case alleged that the member used unnecessary physical force, failed to immediately report the use of force, failed to detain the inmate following the use of force, and failed to insure that the inmate was immediately seen by medical staff. The member accepted a settlement prior to the date of the hearing.

**Downstate Correctional Facility:** We received a decision on January 22, 2018, which found the member guilty of possessing marijuana and that the appropriate penalty was

termination. The member received a Notice of Discipline for criminal charges resulting from possession of marijuana. The member testified that his uncle had left marijuana in his vehicle the night prior to the stop. The underlying criminal charges were resolved. In the case, the arbitrator did not believe that the marijuana belonged to the member's uncle. Moreover, even if the marijuana belonged to the uncle, the member had constructive possession as the marijuana was in a driver's side door compartment. Finally, the member admitted that the car smelled of marijuana as he drove the vehicle. The arbitrator found that fact extremely reckless – why would the member operate a vehicle that smelled like marijuana without first investigating the source of the odor. We do not recommend proceeding with any article 75 proceeding. Although a party may move to vacate the award pursuant to Article 75 of the New York Civil Law and Practice Rules (*CPLR*), the courts will only vacate an arbitration award under very limited circumstances. The courts have refused to examine the merits of an arbitration award and substitute their judgment for that of the arbitrator. Even where the arbitrator has made errors of law and fact, the courts will not engage in review of the merits of an arbitration award. Significantly, the court is only interested in, and only reviews, the “award” itself. Courts generally do not engage in a review or analysis of the reasoning by which an arbitrator arrived at that award. “The path of analysis, proof and persuasion by which an arbitrator reaches a conclusion is beyond judicial scrutiny.” Based upon the above discussion, there is not a basis to vacate the Award.

**Downstate Correctional Facility:** An expedited arbitration hearing in this matter was held on January 16 and 30, 2018, before Arbitrator Butto. The NOD in this case alleges that the member made threatening, profane, and/or harassing statements to an inmate; used unnecessary force; failed to submit paperwork related to the use of force; submitted a use of force memorandum with omissions or inaccuracies; and made false statements in an OSI interrogation. Briefs in this case are due February 7, 2018.

**Downstate Correctional Facility:** The member received a notice of Discipline for yelling at and being disrespectful to inmates. This matter was heard at an expedited arbitration on January 12, 2018. On January 22, 2018, we received the Arbitration Award. The Arbitrator found the member guilty of the Charges in the NOD and imposed a three-month suspension.

**Fishkill Correctional Facility:** The NOD alleges that the member shoved an elderly man to the ground in a pizza shop. The matter has been scheduled for arbitration on March 22, 2018, before Arbitrator Dennis Campagna.

**Fishkill Correctional Facility:** The NOD alleged that the member licked/stuck his tongue in the ear of a female correction officer while on duty at Fishkill CF. On December 23, 2017, the matter was heard at an expedited arbitration before Arbitrator Timothy Taylor. The parties gave oral closing arguments and the matter concluded. Arbitrator Taylor found the member guilty of the charge alleged in the NOD, found his testimony that it was incidental contact to be less than credible, and issued an award that included a demotion from sergeant to officer, a transfer out of Fishkill CF, and a suspension to date.

**Fishkill Correctional Facility:** The member is charged with violating DOCCS' Workplace Violence Policy. This matter was heard at expedited arbitration on January 19, 2018. This matter was settled on January 25, 2018.

**Fishkill Correctional Facility:** The NOD alleged that the member committed the criminal charge of obstructing governmental administration. The matter was heard at arbitration on October 20, 2017, before Arbitrator Lise Gelernter. The parties submitted closing briefs. Arbitrator Gelernter found the member guilty of only part of one of the charges, and either dismissed or found the member not guilty of the remaining charges. Arbitrator Gelernter issued a forty-five day suspension with back pay and lost accruals for time spent suspended from October 31, 2016, to the date of reinstatement, minus the 45-day suspension. Unfortunately, the member was also suspended for a separate NOD, which affected her back pay. The parties have since negotiated a settlement agreement to the outstanding NOD and the member has returned to work with back pay and lost accruals from April 2017 to her reinstatement.

**Fishkill Correctional Facility:** This member has been charged with using unnecessary and excessive force. The first day of hearing was held on September 8, 2017, before Arbitrator Lise Gelernter. A second day of hearing has been scheduled for December 19, 2017. Because Arbitrator Gelernter will be out of the country, the third and fourth day of hearings will be held on May 8 and 9, 2018.

**Fishkill Correctional Facility:** The NOD alleges that the member provided false and misleading statements regarding a use of force. The first day of the arbitration took place on September 28, 2017, before Arbitrator Dennis Campagna. The second day of the arbitration took place on December 4, 2017. After the second day, we made a motion to restore the member to duty or, in the alternative, to restore him to the payroll pending the results of the disciplinary arbitration on the grounds that the member worked for six (6) months without incident after the alleged excessive use of force, and even had the alleged victim work as his porter without incident during that time. Therefore, the State did not have probable cause to believe that the member's continued presence would be a risk to the safety and security of the facility. The State submitted its answer to the motion. The Arbitrator determined that DOCCS improperly suspended the member and ordered that the member be restored to pay status pending the result of the disciplinary arbitration. A third day of hearing took place on January 24, 2018, and a fourth day of hearing is scheduled for March 7, 2018.

**Franklin Correctional Facility:** This member has been charged with using excessive and unjustified use of force, among other charges. Hearings were held before Arbitrator Louis Patack on August 23, 2017, in Plattsburgh, New York, on October 20, 2017, in Albany, New York, and on January 31, and February 1, 2018, in Plattsburgh, New York. The parties have completed the hearing phase of the case and are awaiting transcripts. Briefs are due thirty (30) days from receipt of the transcript.

**Green Haven Correctional Facility:** This member is charged with operating a motor vehicle on a public highway while impaired and/or under the influence of alcohol and/or

an illegal drug. Additionally, among other charges, she is charged with reporting to duty in a physically impaired condition. A hearing was held on December 14, 2017, at the Ramada Inn in Fishkill, New York, before Arbitrator Louis Patack. A second day of hearing needs to be scheduled.

**Mid-Hudson Forensic Psychiatric Center:** The arbitration of this matter took place on December 13, 2017, at Mid-Hudson Forensic Psychiatric Center before Arbitrator Lise Gelernter. Day 2 of the arbitration is scheduled for February 12, 2018. The notice of discipline alleges that the member failed to call for assistance for a patient in a timely manner and used an improper restraint technique to restrain a patient causing an injury to his lip.

**Mid-Hudson Forensic Psychiatric Center:** The member is accused of biting a patient. The first day of hearing was held on July 12, 2017. The second hearing day was held on November 10, 2017. Closing briefs were filed on December 20, 2017. We are awaiting a decision.

**New York State Education Department:** The notice of discipline dated October 17, 2017, alleges that the member, while on duty, disclosed confidential information to another employee, improperly entered a private office and glared at an employee in an improper manner. The notice of discipline also alleges that the member made false statements during an interrogation. The arbitration of this matter is scheduled for April 25 and 26, 2018, before Arbitrator Timothy Taylor.

**New York State Education Department:** The member received a Notice of Discipline for allegedly having sex with an unknown visitor in a conference room at the Manhattan Office of the State Education Department. The first hearing day was held on November 8, 2017, and Day 2 was held on November 20, 2017. Closing Briefs were filed on December 21, 2016. We received the Arbitrator's Award on January 25, 2018. The Arbitrator found the member guilty of the Charges and terminated his employment.

**New York State Education Department:** A hearing in this matter has been scheduled for February 6, 2018, before Arbitrator Butto. The NOD in this case alleged that the member engaged in misconduct when he yelled into a telephone in view of the public and yelled at a Chief Security Officer in the presence of co-workers. The matter settled at the hearing.

**New York State Education Department:** This member has been charged with leaving his post assignment at the Cultural Education Center for approximately thirty minutes without supervisory approval and for failing to notify supervisory staff of his whereabouts. A hearing has been scheduled before Arbitrator Timothy Taylor on February 21 and 22, 2018.

**Ogdensburg Correctional Facility:** The Notice of Discipline alleges that the member, while working in the Special Housing Unit at Ogdensburg Correctional Facility, entered an inmate's cell without proper cause or supervisory approval. The officer is also being accused of using unjustified, physical force on the inmate and failing to report the incident

to his supervisor and failing to complete a Use of Force report. There are also other charges relating to this incident set forth in the Notice of Discipline. A hearing has been scheduled for February 13, 2018, before Arbitrator Samuel Butto.

**Ogdensburg Correctional Facility:** The member received a Notice of Discipline for criminal charges resulting from an assault. Although he was convicted of only a violation, he spent seven (7) days in jail, but returned to work. The parties have been unable to settle back pay. The hearing took place on October 25, 2017, in Ogdensburg. Briefs were served on December 21, 2017. We await the Arbitrator's decision.

**Queensboro Correctional Facility:** The member received a Notice of Discipline for improper use of force. The case has been accepted for expedited arbitration and is scheduled for a hearing on February 20, 2018, before Arbitrator Rice.

**Sing Sing Correctional Facility:** The member received a Notice of Discipline for allegedly failing to stop one inmate from assaulting another inmate; failing to get medical attention for an injured inmate; improper use of force; and failing to file appropriate reports. The case has been assigned to Arbitrator David Lande. No hearing date has been set.

**Sullivan Correctional Facility:** The NODs alleged that the member used a racial slur directed at a supervisor and that she was insubordinate when she failed to comply with a direct order to return her badge and identification to the facility. The matters were heard at a consolidated arbitration hearing on November 3, 2017, before Arbitrator Lise Gelernter. The parties submitted closing briefs. Arbitrator Gelernter found the member guilty of insubordination, but not guilty of using a racial slur, and issued a suspension of eight (8) weeks. The member received back pay and lost accruals for the time spent suspended in excess of the eight (8) weeks.

**Ulster Correctional Facility:** This member was charged with bringing a cell phone into the facility and allegedly intentionally hiding his cell phone in an area that potentially could be unsecured and neither reported nor controlled the contraband. The matter was filed for expedited arbitration before Arbitrator Richard Gaba for December 27, 2017. Prior to the hearing, the matter was resolved where the member received a 10-day suspension without pay, as well as a monetary fine of \$1,000 to be paid at a rate of \$50 per pay period. The member also agreed to serve a 12-month disciplinary evaluation period for the same or similar misconduct.

**Washington Correctional Facility:** The member received a Notice of Discipline for using unnecessary and excessive force. We have now had four days of hearings on this case. The first day of arbitration was supposed to be September 14, 2017. The State was having some difficulty getting into evidence the testimony of its medical expert and DOCCS requested an adjournment in an attempt to locate further photographic evidence to support the doctor's testimony. The final hearing days were held on December 13 and 14, 2017. Closing Briefs are due February 19, 2018.

**Washington Correctional Facility:** The member received a Notice of Discipline for sexual harassment against three female Correction Officers. The NOD alleged that the member sexually harassed the complainants both verbally and physically. The case was scheduled for hearing on January 31, 2018, but the member chose to resign from state service.

**Washington Correctional Facility:** Hearings have been held on September 11 and 12, October 16, November 13, 2017, and January 10, 2018. The grievant was restored to the payroll on Administrative Leave from January 11 to February 6, 2018, when DOCCS requested a continuation to adjourn the hearing to call a witness who was not identified on their witness list. The hearing is scheduled to continue, and hopefully conclude, on February 7 and 8, 2018, before Arbitrator Louis Patack. Grievant is charged with excessive force, failure to report, failure to report employee misconduct, and providing false and misleading statements during his interrogation.

### Justice Center

**Central New York Psychiatric Center:** The Justice Center charged the member with failing to stay alert and giving the appearance of sleeping, a Category 3 charge. This office appealed the finding and requested that the finding be unsubstantiated and sealed. The Justice Center denied the request to appeal and amend the findings. A pre-hearing phone conference with ALJ Molik took place on December 21, 2017, during which the parties briefly discussed the matter and agreed to move forward to a full hearing. The matter will be scheduled for a hearing in the coming months.

**Central New York Psychiatric Center:** The member was issued a Category 3 Report of Substantiated Finding alleging physical abuse and neglect for pushing a service recipient and directing derogatory and inappropriate language toward a service recipient and/or threatening a service recipient. We attended the pre-hearing conference in this matter on November 28, 2017. We now await an administrative hearing date.

**Mid-Hudson Forensic Psychiatric Center:** On January 18, 2018, we attended a pre-hearing conference in this matter. We await an administrative hearing date. The Category 2 report alleges that on June 20, 2017, the member conducted a restraint with excessive force and improper technique, which included placing his arm around a service recipient's neck.

**Mid-Hudson Forensic Psychiatric Center:** A report of Category 2 abuse (deliberate inappropriate use of restraints) and Category 2 physical abuse and Category 3 abuse (obstruction of reports of reportable incidents) was issued on January 11, 2018. The report alleges that on May 15, 2017, the member choked a service recipient, conducted an unwarranted restraint with improper technique and excessive force and falsified records related to a service recipient's safety or supervision. We submitted a request for amendment to the Justice Center on January 31, 2018, and await a response.

## Improper Practice Charges

**Statewide – DOCCS (Consolidated Clear Bag and Staff Allowable List Case) (U-35624 and U-35745):** The parties have reached a favorable agreement with respect to the staff allowable list Improper Practice charge. Specifically, DOCCS has agreed to allow employees to continue to bring cans into a correctional facility, until such time that all inmates statewide are restricted from access to cans within a correctional facility. The Department also agreed to a number of other revisions to the Staff Allowable List (directive 4936), which were requested by NYSCOPBA. We are currently in the process of finalizing this settlement agreement and having DOCCS issue the revised Directive to reflect the agreement. The Improper Practice Charge relative to the clear bag will proceed as scheduled. The next hearing dates are March 28 and 29, 2018.

**Statewide – Commissioner Annucci’s Memorandum (U-35773):** This office filed an Improper Practice Charge in response to Acting Commissioner Annucci’s May 3, 2017, memorandum. The memorandum was read at lineup to correction staff for ninety-six (96) hours, which, among other things, effectively accused the Union of disseminating “half-truths” and perpetuating a “negative outlook” about the Department. We received the State’s Answer in response. An initial conference took place on October 19, 2017. This matter has been complicated by GOER indicating that it will consider issuing strike notices to members for alleged job actions that occurred at Auburn CF, Clinton CF, and Great Meadow CF in April-May 2017 if this IP is not withdrawn. That is because the Annucci memo was (in DOCCS’ words) a “knock-it-off” response to the job actions. On January 8, 2018, this office met with NYSCOPBA Executive VP Tammy Sawchuk, Northern Region VP John Roberts, Business Agent Ricky Brunelle, and Stewards from Clinton CF and Great Meadow CF to present and discuss the facts surrounding the IP and possible strike notices, and its potential impact on members at Clinton CF. The matter has been scheduled for a hearing on March 20, 2018, but will be rescheduled for a time yet to be determined due to a scheduling conflict.

**Statewide – Directive 2115 (U-35942):** This office filed an Improper Practice Charge in response to the recent change to Directive 2115, which addresses drug testing DOCCS employees. The change made discipline mandatory for failing to report for a drug test, when it had previously been discretionary discipline. Therefore, an employee will be disciplined regardless of if the employee faces travel or other legitimate issues that make it difficult to comply with a lawful order to submit for a drug test. An initial conference took place on November 10, 2017, before ALJ Mitchell. The matter has been placed on PERB’s hold calendar until February 19, 2018, to allow the parties the time to determine the best course of action. The parties are currently discussing reverting back to the language of the previous version of the directive making discipline discretionary for a missed drug test, as opposed to the mandatory discipline imposed by the new version of the directive.

**Statewide – Directive 0750 (U-35987):** This office filed an Improper Practice Charge in response to DOCCS adding a brand new Directive 0750, which addresses an employee’s



responsibility to report suspicious activities of inmates and fellow staff that may be indicative of terrorist activities. The directive labels as “suspicious” commonplace activities like owning a large amount of weapons, frequenting gun ranges, engaging in martial arts, interests in surveillance, etc. The matter was scheduled for a preliminary conference on November 15, 2017, before ALJ Frederick Reich. Prior to the conference date, the parties agreed to adjourn so as to meet and discuss their respective positions on the directive. The parties then met on December 20, 2017. The parties agreed that NYSCOPBA would draft language to potentially be included in the directive, clarifying what is suspicious and that members’ routine hobbies and activities would not be considered suspicious if they were not connected with potential terrorist activity. The matter has been placed on the PERB hold calendar until February 13, 2017.

**Statewide – Duty of Fair Representation (Harrington) (U-36027):** We will be appearing on behalf of NYSCOPBA in an Improper Practice charge filed by a member, alleging that NYSCOPBA breached its duty of fair representation in the manner in which it allegedly withheld union representation from CO Harrington at Fishkill Correctional Facility. PERB granted our request to extend the time to answer the DFR. We will be submitting an answer to the charge by February 15, 2018. After that, a conference will be held at the Albany PERB Office on March 14, 2018, at 11 am.

**Statewide – Duty of Fair Representation (Lockwood) (U-36028):** We will be appearing on behalf of NYSCOPBA in an Improper Practice charge filed by a member, alleging that NYSCOPBA breached its duty of fair representation in the manner in which sergeants vacation schedules were addressed at Collins Correctional Facility. We will be submitting an answer to the charge by February 9, 2018. After that, a conference will be scheduled at the Buffalo PERB Office.

**Statewide – ISO Scheduling Issues:** A number of Parole reporting locations have unilaterally changed the hours of work and lunch schedules for ISOs at those locations. We have filed an IP challenging this change, as a unilateral change in a mandatory subject of bargaining. The charge was recently filed and will be processed by PERB shortly.

**Statewide – Office for People with Developmental Disabilities (U-35979):** On September 26, 2017, we filed an Improper Practice Charge with PERB, stemming from a statewide OPWDD job posting for specialized SSO1 positions as Family Care Inspectors. The job posting requires interested candidates to submit a cover letter and resume. Past practice has been to bid these positions regionally and award them by seniority. The charge alleges that OPWDD violated the Act by unilaterally changing the posting and bidding procedures without negotiating with NYSCOPBA. The initial conference of this matter was held December 20, 2017. An improper practice charge was filed after a statewide OPWDD job posting for specialized SSO1 positions as Family Care Inspectors required applicants to submit a resume and cover letter and did not award the jobs by seniority. This matter has been placed on PERB’s hold calendar in order for both parties to investigate it further.

**Auburn Correctional Facility (U-35866):** This Improper Practice Charge was filed following a July 14, 2017, incident wherein an officer was pulled from his bid job after declining to speak with the NYS BCI. The charge alleges that Auburn Correctional Facility engaged in illegal retaliation against the officer for engaging in protected activity, i.e., invoking his rights as set forth in the Outside Police Agreement between NYSCOPBA and DOCCS. On October 11, 2017, the initial PERB conference for this improper practice charge was held. The member was returned to his bid job on December 1, 2017. This improper practice charge was withdrawn on January 29, 2018.

**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 injured 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 March 29, 2018. During that time, the Union will review various assault alert forms completed by members in order to ascertain whether they received medical treatment or were ignored by facility physicians.

**Central New York Psychiatric Center (U-35970):** A conference took place on January 17, 2018. On September 21, we filed an Improper Practice Charge alleging that Central New York Psychiatric Center (“CNYPC”) interfered, restrained, retaliated against and coerced employees in the exercise of their rights guaranteed under the *Taylor Law*. Specifically, we alleged that on August 27, 2017, a NYSCOPBA member, who is also a Union Steward and a Central Service Staff member, was directed to cover a mandatory overtime post at SUNY Upstate Medical Center. On September 13, 2017, NYSCOPBA filed a grievance regarding the mandating of overtime to the member and the change in overtime policy generally. After the grievance was filed, on September 15, 2017, Mr. Paparella confronted Central Service Staff members regarding the grievance on overtime mandating and distribution. During the discussion, Mr. Paparella stated, among other things: 1) Things are going to happen if [the grievance] goes through; 2) That he is sick and tired of all the whining and complaining; 3) That he planned to remove responsibilities from those who filed the grievance; 4) That Central Staff SHTA’s duties would be changed such that, upon entering the building, they would be assigned different posts and locations. On September 19, 2017, in further retaliation to the grievance, Mr. Paparella directed supervisory staff to assign Central Service Staff members to cover all Mandatory Overtime at the SUNY Upstate Medical Center. Such direction is inconsistent past practice, as well as the local Labor/Management agreement. The case is on hold pending further discovery.

**Central New York Psychiatric Center (U-36192):** This office filed an improper practice charge in response to CNYPC’s reinterpretation of the existing call-in procedure that changes how an ill employee reports an illness-related absence and how such absence is counted for discipline purposes. The matter will soon be scheduled for a pre-hearing conference with the assigned ALJ.

**Coxsackie Correctional Facility (U-36054):** On January 30, 2018, we appeared at a conference for this Improper Practice Charge in front of ALJ Burritt. We filed an Improper Practice Charge alleging a failure to negotiate regarding a mandatory subject of bargaining. Coxsackie CF unilaterally rescinded the practice of paying a \$12 meal allowance to officers with bids at Coxsackie who are assigned to Albany Medical Center and return at least two hours beyond the end of their normal 8-hour shift. This same issue also previously occurred at Greene CF. A contract grievance addressing this was previously filed. At the conference, the parties agreed that this matter is to be deferred to the contract grievance. If the arbitration in the contract grievance does not produce a decision on the merits, or should the arbitrator determine that the issue is not covered by the agreement, we will have the right to return to PERB and ask that the IP be processed. At this time, the IP is conditionally dismissed and deferred to the grievance.

**Livingston Correctional Facility (Retaliation and Interference):** On November 28, 2017, we attended a conference at PERB on this charge, which alleges that facility administrators intentionally bypassed the steward who was designated by the local as the individual with whom management should deal on a labor/management issue involving sergeants' job descriptions. The steward who was bypassed is the only sergeant among Livingston's stewards and the only steward with substantial knowledge of the issue. We contend that by ordering other stewards to meet on this issue at times when the sergeant wasn't working, the administration interfered with NYSCOPBA's ability to decide for itself the union representative(s) it chooses to handle particular matters. The administrative law judge has put the case on hold while the parties see if a settlement can be negotiated.

**Mid-Hudson FPC Bag Restriction (U-36147):** On December 22, 2017 we filed an Improper Proper Practice Charge alleging a failure to negotiate regarding a mandatory subject of bargaining. Mid-Hudson FPC unilaterally changed a significant work rule, impacting the comfort and convenience of employees. Specifically, the facility implemented a new rule restricting all employees to entering the facility with only one bag (of restricted size) for clothing, etc. and one small cooler for food. The prior practice at the facility did not limit employees in the size and number of bags they could bring into the facility for each shift. The IP has been filed and assigned a PERB number. We will receive the formal notice providing a conference date and date for the State to answer shortly.

**NYS Department of Labor (U-35136 and U-35815):** We met with GOER and agency representatives to discuss resolution of these two Improper Practice Charges. The two charges were filed after the Department of Labor announced changes to officers' length of lunch, ability to change into and out of uniform during pre-shift briefing and prior to the end of their shifts, and to built-in non-compensatory time.

**Rochester Psychiatric Center (U-36177):** On January 18, 2018, we filed an improper practice charge with PERB, after Rochester PC announced a new paycheck distribution policy whereby employees will no longer be able to pick up live paychecks at Rochester PC. We filed an amended improper practice charge on January 22, 2018, after the facility issued a new memo changing the implementation date of the policy. The charge alleges

that Rochester PC violated the Act by unilaterally changing how and where employees pick up their paycheck without negotiating with NYSCOPBA.

**Southport Correctional Facility (U-34184):** On December 12, 2017, we participated in a conference call initiated by PERB on this charge, which 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. A hearing in the case was held in December of 2015 and briefs were later filed, but the administrative law judge who heard the case left PERB before issuing a decision. The case is now assigned to another judge who, if a settlement is not otherwise reached, will review the record and briefs and issue a decision. On the conference call, the judge asked the attorneys to present their legal arguments in support of their respective positions and she also asked the parties to consider whether there was a possibility of settling the case. We are exploring that.

**Training Academy (U-33924):** On December 5, 2017, we participated in a conference call initiated by PERB on this charge, which alleges retaliation at the Training Academy directed against the then-Chief Sector Steward. A hearing in the case was held in February of 2016 and briefs were later filed, but the administrative law judge who heard the case left PERB before issuing a decision. The case is now assigned to another judge who will review the record and briefs and issue a decision. On the conference call, the judge asked the attorneys to present their legal arguments in support of their respective positions.

### Contract Enforcement

**Appeals to Arbitration:** We received twelve (12) request from NYSCOPBA's grievance department to appeal contract grievances to arbitration during the months of December 2017 and January 2018. We have reviewed the grievance files and drafted and submitted the arbitration appeals to the Governor's Office of Employee Relations (GOER).

During the month of December, fifty-seven (57) cases were reviewed in triage. We had two (2) expedited arbitration proceedings and five (5) summary proceedings. One (1) grievance was settled and two (2) grievances were withdrawn. We received an award from a summary proceeding in November finding that the grievance was filed in a timely manner. In that case, DOCCS had deducted pay for improper medical documentation. The State asserted that the grievance was not timely because it was filed outside the twenty (20) day window. The State alleged that the "trigger" point for the twenty (20) days window was the actual pay deduction. However, the arbitrator found that the "trigger" point was notice of the pay deduction and directed that the case proceed to arbitration.

**Attica Correctional Facility:** A summary proceeding on the issue of timeliness was held on January 25, 2018. The Master Arbitrator denied the grievance as untimely, finding that the grievance was filed approximately four months after the "trigger" date (in this case, the first pay dock).

**Collins Correctional Facility:** An expedited arbitration hearing was scheduled for January 12, 2018, before the Master Arbitrator. Prior to the hearing in this matter, the parties reached a settlement agreement in principle. The parties are in the process of reducing the settlement agreement to writing.

**Gowanda Correctional Facility:** An expedited arbitration was scheduled for January 26, 2018, before Arbitrator Joel Douglas. The issues to be decided were whether the grievance was timely filed, and whether DOCCS violated Article 11.8 of the Agreement when it paid the member the flat pre-shift briefing rate and charged him ¼ hour of vacation accruals for his absence from pre-shift briefing. Prior to the arbitration, DOCCS agreed to restore the member ¼ hour vacation accruals.

**Otisville Correctional Facility:** An expedited arbitration was held on December 8, 2017, before Arbitrator Joel Douglas. The issues to be decided were whether the grievance was timely filed, and whether DOCCS violated Article 14.9 of the Agreement when it placed the grievant in leave without pay status for approximately two months following a work-related injury. Arbitrator Douglas denied the grievance on the basis that it was not timely filed within twenty days of the member first knowing of the act/omission giving rise to the grievance.

**Sing Sing Correctional Facility:** An expedited arbitration was scheduled for February 2, 2018, before Arbitrator Joel Douglas. The issues to be decided were whether the grievances were timely filed, and whether DOCCS violated Article 14.9 of the Agreement when it deemed the member leave without pay (“LWOP”) for absences occurring over the course of twelve days. Prior to the arbitration, DOCCS agreed to remove the “LWOP” designation and allow the member to charge accruals for five of the twelve days.

**Sing Sing Correctional Facility (CON09-0118):** The second day of arbitration in this case was scheduled for July 10, 2015. On July 3, 2015, we received the State’s motion to dismiss this case on the grounds that it was not timely commenced. The initial overpayment was taken from the member’s paycheck in 2003, and the grievance was filed in 2009. The Grievant contends that DOCCS wrongfully took over \$15,000 from his pay for an alleged Workers’ Compensation overpayment. DOCCS maintained that it took \$815 from the member’s pay and stopped when it realized that it needed to charge the overpayment to accruals. The later overpayment recoveries, according to DOCCS, were not related to Workers’ Compensation. DOCCS has provided to us documentation which showed that the later recoupments from the member’s paychecks were not related to the Workers’ Compensation overpayment. On December 15, 2017, we received an Award from Master Arbitrator Douglas on the State’s motion to dismiss. The grievance was dismissed by the Arbitrator as having been untimely filed. Generally, a contract grievance must be filed within 20 days of the act or occurrence giving rise to the grievance. The first payroll deduction occurred on August 7, 2003 and the grievance was not filed until January 20, 2009. The Arbitrator, therefore, found that the grievance was not timely.

**Sing Sing Correctional Facility (CON11-0586):** With respect to the above-referenced grievance, DOCCS terminated the member’s employment, on January 3, 2010, pursuant to

Civil Service Law Section 71, on the basis that he was out of work for more than one year as a result time lost after September 28, 2009. The member contended that the lost time should have been charged to the May 7, 2001, injury, not to the October 21, 2001, injury, and, therefore, he was wrongly terminated. GOER moved to dismiss this grievance on the grounds that the Workers' Compensation Decision, made as a result of a hearing held on March 17, 2010, should be given preclusive effect. The purpose of the Workers' Compensation hearing was to apportion the member's lost time after September 28, 2009. In depositions received into evidence at the Workers' Compensation hearing, Dr. Liu (the member's physiatrist) testified that it would be very hard for him to determine whether the symptoms for which he treated the member were caused by the May or October, 2001, accidents. Dr. Guy (the member's other treating doctor) testified that he only treated the member for the October, 2001, accident. The Workers' Compensation Law Judge adopted the testimony of Dr. Moga (the IME physician) and apportioned the lost time after September 28, 2009, 20% to the May, 2001, injury; 30% to the October, 2001, injury; and 50% to the March 23, 2005, injury. A determination in an administrative proceeding may be given preclusive effect provided the issue was a material issue decided in a prior proceeding and the party against whom the issue preclusion is sought had a full and fair opportunity to contest the issue in the prior proceeding. The member maintained that he was not given a full and fair opportunity to be heard in the Workers' Compensation case, because his attorney had not properly prepared his doctors to testify. The testimony of the doctors as to the injury being treated was incorrect and they were, in fact, treating the member for his injury of May 7, 2001. On December 15, 2017, we received an Award from Master Arbitrator Douglas which granted the State's motion to dismiss this grievance.

**Wende Correctional Facility:** A summary proceeding on the issue of timeliness was held on January 25, 2018. The Master Arbitrator denied the grievance as untimely. Although the Arbitrator noted – and encouraged – the grievant's efforts to resolve the underlying issues himself, the Arbitrator nonetheless found that the grievance was filed well outside of the contractual time period.

### Retirement

**Greene Correctional Facility:** The member's disability retirement application was denied. The Retirement System's Orthopedic Surgeon found that the member had limitations that made it dangerous for him to work as a correction officer, but stated that he could not determine if the member was permanently disabled, because he has refused surgeries that might make it possible for him to perform his duties. The member's medical records show that he has refused surgery on his lower back, right knee, and right shoulder. We are looking at whether the member's doctors are able give opinions that surgery would not improve his prognosis. At this time, we are not able to produce a doctor who will testify that the member is permanently disabled from performing his duties. On May 23, 2017, we filed the Scheduling Information Form to proceed on medical records. The initial hearing was held on January 17, 2018, at which time the member testified. The hearing has been continued to permit the member to present medical testimony.

**Green Haven Correctional Facility:** This is a disability retirement matter where the member sustained a head injury. On March 21, 2016, the member and his treating psychologist testified. This matter was continued to allow the Retirement System to put in the testimony of its psychiatrist. The System's psychiatrist testified on February 3, 2017. This matter was continued for the testimony of the System's neurologist. The System's neurologist has filed a supplemental report but will not testify because he is no longer under contract with the System. We have agreed with the System to close the proof in this matter. The System permitted us to enter into evidence medical records that were not submitted to the System within forty-five days after receipt of the acknowledgement letter.

### Workers' Compensation

**Workers' Compensation Discrimination:** A hearing is scheduled for December 18, 2017, in Utica. In October, 2016, we filed a complaint of discrimination under the New York Workers' Compensation Law, Section 120, for discrimination at Central New York Psychiatric Center (CNYPC). In the complaint, we alleged that CNYPC unlawfully used, and continues to use, the amount of Workers' Compensation benefits in its employment and promotion decisions and that the management of CNYPC maintained a Worker's Compensation "scorecard" for use in its promotion process. *Workers' Compensation Law* § 120 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 alleged that employees at CNYPC were adversely impacted for utilizing Workers' Compensation leave and that certain members were not promoted despite superior test, scores, experience and qualifications.

The sole remedy for a violation of *Workers' Compensation Law* relating to employment discrimination 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 and sole remedy. Although the reported cases concern termination of an employee's employment, the section specifically prohibits discrimination *in any other manner*. 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 anti-discriminatory provision applies equally in the public sector. In such cases, the preliminary inquiry is whether civil servants, who are injured on the job, are treated detrimentally when compared to those who must take leaves of absence for non-work-related injuries. *Duncan, supra*. If the action complained of is not made in retaliation for the employee's compensation claim or testimony, the section not violated. In the present case, as indicated in the "scorecard" the three most recent promotees had the lowest workers' compensation days used since December 2015. The coincidence is statistically unreasonable. Moreover, most of the individuals we spoke with were not promoted despite superior test, scores, experience and qualifications. A hearing was conducted and completed on December 18, 2017. Briefs are due 30 days after the record is received.

**Rockland Psychiatric Center:** The member has been put out of work on involuntary Section 72 leave. On December 1, 2017, we requested a hearing to determine the member's fitness for duty. On January 18, 2018, we learned that the member has submitted his retirement application effective January 31, 2018.

### General

**Brockport REOC (Data Recorders):** We are looking into the merits of filing an improper practice charge based on REOC's implementation of Morse Watchmen Data Recorders for use in security rounds.

**Constitution and By-Laws Committee:** On December 13, 2017, we attended the Constitutional and By-Laws Committee meeting. On January 19, 2018, we appeared via telephone to discuss an amendment to the Constitution and By-Laws relating to the increase in dues for associate and honorary members.

**Correction Sergeant, Spanish Language:** We have addressed Board questions and concerns regarding DOCCS' recent use of the Civil Service exam list for the position of Correction Sergeant (Spanish Language). We will be drafting a memorandum which can be sent to NYSCOPBA members addressing the Civil Service Law which allows the use of such an exam, as well as the logistics of how appointments occur.

**CPSO title:** We have reviewed information we received regarding a title structure change for the Campus Public Safety Officer (CPSO title). This title has been renamed University Police Communications and Security Specialist. This occurred at the request of the agency due to confusion with a similar title that exists at County Community Colleges (where as this title is at SUNY), that previously caused issues at testing locations for each of these Civil Service exams. The name change does not impact the individuals in the title at all. All duties, work locations, bargaining unit, and salary schedule remain the same. We have reviewed the Civil Service Classification Standard issued as a result of the title change and noted that there are no changes in the duties. Furthermore, this newly named title now includes a promotional title - University Police Communications and Security Specialist II. This is a positive step that provides an excellent promotional opportunity for members.

**Employee Handbook:** On January 11, 2018, we met with Mary Gulino to discuss the NYSCOPBA Employee Handbook.

**Law Enforcement Officers Safety Act (LEOSA):** On January 18, we provided a legal opinion to the Grievance Department concerning a question from a member at Watertown C.F. as to whether LEOSA, and a recent court case interpreting it, precludes DOCCS from rescinding a member's firearms privileges (that is, the right to carry while off-duty based on peace officer status). We concluded that LEOSA does not do so and, in fact, specifically defers to agency determinations in such matters.



**Rochester Psychiatric Center (Paychecks):** We are looking into the merits of filing an improper practice charge based on RPC mailing paychecks to employees and ceasing to make paychecks available to employees for pick-up in the RPC business office.

**SHTA Injury:** We drafted a memorandum to the Executive Board recommending that an Article 78 proceeding be filed for a member based upon a denial of two years of Workers' Compensation leave. We believe the facts support a finding that the member was in fact assaulted by an inmate. The Board approved the Article 78 and we have begun drafting the papers.

**SHTA Retirement:** We provided the Executive Board with a Legal Memorandum detailing the rights of a correction officer who previously worked as an SHTA regarding the member's years of creditable service in the 25 year plan for the member's previous years as an SHTA.

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