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ATTORNEY-CLIENT COMMUNICATION/PRIVILEGED AND CONFIDENTIAL**MEMORANDUM**

TO: NYSCOPBA Executive Board

FROM: Natalie A. Carraway, Esq. 

RE: Labor Law § 168 Litigation

DATE: August 18, 2003

I have been asked to review potential litigation on behalf of officers at Marcy Correctional Facility ("CF") under *Labor Law* § 168. Since this issue has been unsuccessfully arbitrated and litigated under Council 82 (appealed unsuccessfully by NYSCOPBA) and since it may have some potentially serious ramifications, I am providing this legal opinion for your consideration.

Labor Law § 168 prohibits the State, as an employer, from requiring certain state employees, including correctional officers/sergeants, to work, "more than eight hours in any day or more than forty hours or more than six days in any calendar week except in cases of fire, riot, flood, famine, pestilence or other cases of emergency endangering life or property"

Sergeants at Marcy CF are routinely required to work "State doubles", which are two contiguous shifts, i.e., 3 p.m. to 11 p.m. and 11 p.m. to 7 a.m., within a normal work week. These double shifts are scheduled as part of the sergeants' normal work week and are not worked on an overtime basis. The 3 p.m. to 11 p.m. shift is considered as one work day, while the second shift from 11:00 p.m. until 7:00 a.m. is counted as the following work day. Presumably, at no time during these occasions has there been an "emergency situation" requiring the sergeants to work additional hours as permitted under *Labor Law* § 168. Accordingly, the sergeants wish to challenge this practice either through a contract grievance or through litigation.

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By way of background, this exact issue was grieved in 1997 by Council 82 under Article 15 and Article 27 (*Labor Law* § 168) of the Collective Bargaining Agreement ("CBA"). The then Master Arbitrator, Jeffrey Selchick, denied the grievance stating that the situation did not violate Article 15 and that a prior Supreme Court decision required him to dismiss under Article 27 (*Labor Law* § 168).

Council 82 thereafter brought a class action for a declaratory judgment in Albany County Supreme Court contending that DOCS' practice of scheduling back to back shifts, requiring sergeants to work more than sixteen hours in a day, was unlawful under *Labor Law* § 168. As a remedy, Council 82 sought to enjoin DOCS from requiring sergeants to work in excess of eight hours during a day, except in emergency situations as permitted by the statute. They also sought a judgment compelling DOCS to comply with *Labor Law* § 168. The Supreme Court dismissed the petition stating that the arbitrator has authority to decide the statutory issue and since he denied the grievance the review ends there. NYSCOPBA acquired this file from Council 82 and appealed the decision to the Supreme Court, Appellate Division (3rd Department).

In its appeal, NYSCOPBA primarily argued that the action should not have been dismissed because the sergeants in that case did not waive their statutory protections under *Labor Law* § 168, despite the fact that they have a CBA and that they submitted the issue to arbitration. The Appellate Division disagreed. The Court held that, "by commencing this action, plaintiffs are simply attempting to relitigate the arbitrator's adverse finding that the subject practice does not violate *Labor Law* § 168, i.e., they are seeking to invoke judicial review of an alleged statutory violation *after* the precise issue was raised by them in the context of the grievance process and resolved against them on the merits." NYSCOPBA did not appeal that decision.

Since the arbitrator and the courts decided against the Union under *Labor Law* § 168, any further attempt to arbitrate or litigate this issue most likely will be unsuccessful. Additionally, a review of case law under *Labor Law* § 168 shows that it has not been successfully challenged since it was signed into law back in 1936. As a matter of fact, the only reported case on it is the Appellate Division decision on NYSCOPBA's appeal mentioned above. Therefore, there is no favorable precedence upon which we could challenge DOCS' practice of scheduling "State doubles."

Even if we could get over the negative arbitral and appellate precedent discussed above, there could be ramifications from litigating this issue which NYSCOPBA must consider in deciding whether to go forward with a lawsuit. As explained, essentially what we would be arguing against is correctional officers/sergeants being required to work more than eight (8) hours in a day (a calendar day, under law, is defined as the time from midnight to midnight). While the operative word in our argument would be that DOCS could not "require" any officer/sergeant to work more than 8 hours in a day, any decision on this issue could potentially have an impact on overtime and/or swaps.

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One of the reasons why *Labor Law* § 168 was introduced was to protect workers against oppressive work schedules. Legislation aimed at protecting workers was introduced around this time before the Taylor Law was passed and mandated collective bargaining. Since then, employee organizations have formed as a means of protecting workers and under the Taylor Law parties have entered into collective bargaining agreements as a way to provide workers rights and protections.

Since the policy consideration behind *Labor Law* § 168 was to protect workers against working long hours, any argument where we challenge this practice will necessarily bring into question an officer's (or sergeant's) ability to work sixteen (16) hours for swaps or overtime. A court or arbitrator may ask why it is a safety and security concern if officers/sergeants work "State doubles" during their work week and it is not a concern where those same officers/sergeants work those shifts on swaps or overtime.

Furthermore, under Article 15 of the CBA, the Union has permitted the State to require officers/sergeants to work overtime (which most likely requires sixteen (16) hours). This could be viewed as a waiver of officers/sergeants' statutory rights under *Labor Law* § 168. Finally, despite all of the obstacles, a court could agree and hold that *Labor Law* § 168 prohibits officers/sergeants from working back-to-back shifts in any situation, including swaps and overtime. This would obviously not be looked upon too favorably by a majority of the officers/sergeants who choose to work 16 hour shifts for their convenience.

While it may be unlikely that a court will make a blanket prohibition against swaps and overtime where it exceeds eight hours in a day, the fact that officers/sergeants routinely work 16 hours shifts will definitely work against us in arguing that 16 hours shifts present a security concern under *Labor Law* § 168. This, coupled with the negative precedent, will make this an extremely difficult case to achieve a favorable result.

I will be available for the Board meeting scheduled on August 19, 2003, to discuss this matter and to answer any of your questions.