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SEPTEMBER 2019 LEGAL REPORT TO THE EXECUTIVE ASSEMBLY

This is our report for the September 2019 NYSCOPBA Executive Assembly regarding the recent developments in some of the cases and legal matters we are handling for NYSCOPBA. For the matters cited, we have described activity occurring since the last report and scheduled future activity.

Legislative Developments

This office will provide a legislative update to the Board at this month's Board meeting.

Negotiations

Since the recently negotiated collective bargaining agreement was ratified by the NYSCOPBA membership on January 24, 2019, we have been working regularly with GOER on the implementation of the agreement and the resolution of issues relating to the new agreement. We have been involved in many issues including, but not limited to retroactive pay, overtime denominator, employee benefit fund, Article 7, 8, and 8.9 arbitrators, pre-shift briefing payments, etc. We will continue to work with GOER, the Governor's staff and the Comptroller to fully implement the agreement.

Litigation

Statewide – Retiree Health Insurance Litigation (*NYSCOPBA v. State, et al.*, NDNY, 11-CV-1523): This is the case where NYSCOPBA (and other unions) filed litigation under the Contracts Clause of the US Constitution and under a breach of contract theory when the State raised the health insurance contribution rates for retirees (to a percentage higher than the percentage in existence in the CBA when they retired). NYSCOPBA (and the other unions) appealed this case to the US Court of Appeals for the 2nd Circuit challenging the lower court's (NDNY) decision granting Summary Judgment in favor of the Defendants. On March 6, 2019, all the unions filed their briefs. The State submitted its response on July 7, 2019. On August 7, 2019, we submitted a reply brief. The matter is now fully briefed and oral arguments will be scheduled sometime between October and December.

Statewide – Civil Service Exam Fee Improper Practice Charge Appeal: The state (GOER), filed an Article 78 proceeding challenging the PERB Board's decision granting an Improper

Practice Charge filed by a number of unions when the State began unilaterally charging exam fees for promotional exams. The State's Article 78 challenge raises a number of legal issues, and also alleges that the decision was not based on substantial evidence. Since substantial evidence was raised in the claim, the proceeding was transferred to the Appellate Division, Third Department. On August 28, 2019, we were served the State's papers, consisting of the Record on Appeal and Memorandum of Law. The unions, including NYSCOPBA, have until October 1, 2019 to file a responsive Memorandum of Law.

[Member] v. NYSCOPBA and Michael Powers (U.S. District Court, Northern District of New York) (17-CV-937). During December, 2017, a correction officer at Riverview Correction Facility, commenced this action alleging a number of constitution claims based on allegations that overtime was not distributed in a fair and non-discriminatory manner. Our Motion to dismiss was filed in January, 2018. The Plaintiff opposed the Motion and moved for leave to file an Amended Complaint. We opposed the motion to amend on the grounds that the proposed amendments were futile. On March 22, 2019, the Court issued its Decision and Order which granted the Plaintiff's motion to amend. The Court then proceeded to dismiss the Plaintiff's Amended Complaint. All of the Plaintiff's Federal Claims against NYSCOPBA have been dismissed and the Court has declined to exercise jurisdiction as to Plaintiff's State Law claims. Unless Plaintiff files a Notice of Appeal, this litigation is at an end. We have not received a Notice of Appeal, but it appears that the Plaintiff has, or is attempting to, file a lawsuit on his State law claims in the Supreme Court, county of St. Lawrence. On April 22, 2019, we received a Notice of Judicial Assignment which means that the Plaintiff filed a Request for Judicial Intervention ("RJI") in St. Lawrence County. On April 23, 2019, NYSCOPBA was served with Summons and Complaint in State court action commenced by the Plaintiff. The Complaint has to be answered or moved against by May 13, 2019. We filed a Motion to Dismiss the Complaint which is returnable on June 7, 2019. We appeared in St. Lawrence County Supreme Court for oral argument. The court will issue a written decision on our motion. The State filed a motion to dismiss which was returnable on July 12, 2019. We are waiting for the court's decision.

[Member] and NYSCOPBA v. NYS DOCCS (Albany County Index No. 2805-19): This an Article 78 Proceeding involving DOCCS' termination of the employment of the member (Taconic CF) pursuant to Section 71 of the Civil Service Law. The member was injured during the restraint of an inmate who had refused to be escorted to keep lock and who punched another officer in the face. Once again, DOCCS determined that his was not an assaulted and only gave the member a one-year leave. We contend that the member was assaulted and is entitled to a two-year leave. This Proceeding was commenced on May 7, 2019, and is returnable on June 21, 2019. At the request of the State this matter was adjourned to July 5, 2019. We are awaiting a decision.

Estate of Samuel D. Harrell v. DOCCS, et al (U.S. District Court for Southern District of New York, Index no. 1:15-cv-07065) [Fishkill CF]: On August 14, 2019, the District Court for the Southern District of New York dismissed an action brought against NYSCOPBA and certain state agencies and individuals for allegedly conspiring to violate and violating an inmates civil rights. As background, on April 21, 2015, Samuel Harrell, an inmate at Fishkill Correctional Facility, died while in custody. The U.S. Attorney and the office of Dutchess County District Attorney immediately began an investigation into the death. Neither investigation resulted in any charges. On September 10, 2015, Diane Harrell, filed a lawsuit, Index No. 1:15-cv-07065, in the District

Court for the Southern District of New York against numerous parties, including NYSCOPBA and members of NYSCOPBA, alleging violations of Mr. Harrell's civil rights pursuant to 42 U.S.C. § 1983, 42 U.S.C. § 1985(2), 42 U.S.C. § 1985(3), and 42 U.S.C. § 1986. More specifically, the Amended Complaint alleged that NYSCOPBA members conspired to cover-up Mr. Harrell's death while he was an inmate at Fishkill Correctional Facility. The Plaintiff sought both compensatory and punitive damages as well as attorney's fees. On June 15, 2016, NYSCOPBA moved for dismissal of all claims asserted against NYSCOPBA. Plaintiff moved to and was granted leave to amend its complaint and in August 2018, NYSCOPBA then renewed its motion to dismiss. In dismissing the claims in the Amended Complaint asserted against NYSCOPBA, the Court found that the Plaintiff did not plausibly allege a conspiracy action under Section 1983 – "without any allegation of an agreement between two or more defendants, the Amended Complaint does not state a claim for conspiracy based on the assault itself." The Court further explained that Plaintiffs had failed to plead or provide any evidence of discriminatory animus and because of that failure, the Court dismissed the remaining Section 1985 and Section 1986 claims against NYSCOPBA. This case is significant because the Court rejected, without discovery, Plaintiff's attempt to use allegations regarding typical union conduct as the basis for a civil rights claim under Section 1983.

[Member] v. DOCCS: This is another case involving a denial of two (2) years of Workers' Compensation leave based upon DOCCS' determining that the incident was not an assault. This is currently on appeal to the Appellate Division, Third Department, following dismissal of the petition by the Supreme Court Justice. Once the appeal was submitted, the member was granted Disability Retirement benefits (3/4 disability) due to his injury. These benefits are retroactive, meaning that there is no longer a financial remedy to be gained in this Article 78 on the question of one or two years of leave. We were required to notify the court that there was a potential mootness question. We submitted a letter noting that although the member has been made financially whole, that this matter should continue based upon exceptions to the mootness doctrine (likelihood of the issue to occur again and evade review, important question). The court will consider the mootness question following the submission of papers by the State on March 11, 2019 (with an opportunity for us to submit a reply). If the court does not dismiss this case as moot, but instead continues to review on the merits of the underlying question, we may get a positive decision which could help in other cases. We reviewed the paper submitted by the State on March 11, 2019, and then drafted and submitted a reply memorandum on March 21, 2019. The matter is now fully submitted and will be placed on the court's calendar for argument and decision.

[Member] (CON16-0177). On March 11, 2019, we commenced a CPLR Article 75 proceeding to compel arbitration in this grievance. This grievance involves a claim that the State violated Article 14 by not paying the grievant his accumulated vacation credits after he was terminated by the disciplinary arbitrator. The State has refused to arbitrate the case asserting that the claim should have been addressed by the disciplinary arbitrator. We contend that assertion is incorrect and this case should proceed to full arbitration immediately.

By way of background, on March 12, 2014, the member escorted inmate Raffia Matta to a cell in Greene CF's SHU-200, which was occupied by inmate Matthew Thornton. Once Matta was placed in the cell, the inmates fought. The State alleged that the officers conspired to have inmate Matta placed in inmate Thornton's cell to inflict corporal punishment upon him. To cover up their misconduct, the State alleges that they created a false story for the investigators.

Arbitrator Butto found that the member was guilty of instigating an altercation by telling inmate Matta he was “going in with a real asshole;” and that the member was guilty of failing to provide sufficient care, custody, and control over both inmates. Based upon that evidence, the arbitrator found that “it is inconceivable that the member could not have noticed that an altercation was taking place while he was present on B-Gallery during the period from approximately 8:54am to 8:59 am on March 12, 2014.” Furthermore, he found that the member’s failure to actively respond to the clear and repeated pleas for help by the inmate is inexcusable. Based upon the foregoing, Arbitrator Butto found that termination from service was appropriate, but that the suspension was not based upon probable cause and awarded him back pay and accruals for the period of suspension. The State has paid the member back wages, but not the value of the accruals.

After the State refused to pay the member the vacation accruals, he filed a grievance alleging a violation of Article 14. Article 14.1(e) of the Agreement provides that vacation credits may be accumulated up to a maximum of 40 days, provided, however, that in the event of death, retirement, or separation from service, employees shall be compensated in cash for accrued and unused vacation credits up to a maximum of 30 days. As indicated, neither grievant was paid for the value of their vacation credits which were restored by the Arbitrator.

As the State has refused to arbitrate, we are now seeking to compel them to arbitrate. Where there is no substantial question whether a valid agreement was made or complied with, and the claim is not barred by time limitations, the court shall direct the parties to arbitrate. *CPLR* § 7503. The moving party has the burden to show a “clear and unequivocal” agreement to arbitrate the claim. *Gerling Global Reinsurance Corp. v. Home Ins. Co.*, 302 A.D.2d 118, 123 (1st Dep’t 2002). Contrary to the State’s rationale for denying arbitration, the underlying grievance is not a re-examination of the disciplinary proceeding or the disciplinary award. Instead, the grievance requests payout in accordance with the terms of the Agreement. The State’s responding papers were due June 7, 2019.

[Member] (Edgecombe Correctional Facility) v. DOCCS: 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 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. This proceeding is also based upon the definition of Assault in the Second Degree contained in Sections 120.05(3) and 120.5(6) 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. On December 19, 2019, we received a Decision dismissing our Petition. We filed a Notice of Appeal on January 11, 2019. On April 9, 2019, our Record and Brief was filed in the Appellate Division, Third Department. The State’s Brief was filed on June 10, 2019. We filed our Reply Brief on June 18, 2019. The matter will be scheduled for the November Term of the court.

[Member] v. New York State Justice Center: This matter is an Article 78 challenge to a Justice Center determination based upon legal arguments of *res judicata* and collateral estoppel. We argue that the Justice Center was bound by the favorable decision in the identical disciplinary matter. Our papers argue that the Justice Center decision must be dismissed based upon the disciplinary

decision, or in the alternative, that the Justice Center decision was not based upon substantial evidence. As this matter involves a question of substantial evidence, it is before the Appellate Division, Third Department. We received the State's brief on February 25, 2019. The State's brief admits to some collateral estoppel (based upon a recent decision by the Third Department), but argues that one piece of the Justice Center charge is different and can still be sustained, as it was not specifically charged in the disciplinary matter. On June 3, 2019, we presented oral arguments before the Appellate Division. The matter has been fully briefed and we expect a decision from the Appellate Division approximately six to eight weeks after the oral arguments.

[Member] v. DOCCS: This Article 78 challenging the member termination after one year of workers' compensation leave, instead of two years for an assault was filed in May. We received the State's response in opposition to the petition on July 22, 2019. The State raised the same types of defenses they have in all of the other *Civil Service Law* Section 71 cases on this issue of the definition of assault. We submitted a reply memorandum on July 25, 2019. The matter has now been sent to the assigned judge for a decision.

[Member] (Ulster Correctional Facility) v. DOCCS (Index No. 00880-19): We filed an Article 78 proceeding on February 15, 2019, on behalf of the member, who was injured during a use of force on November 19, 2017. On that date, the member was the first responder to an inmate's violent assault on an officer. The inmate refused the member's direct orders to stop and get on the wall, and then proceeded to swing at the member, missing him. The member, along with the officer, proceeded to use body holds to take the combative inmate to the ground, during which time the member was injured. The inmate assaulted the member under both criminal and civil definitions of assault. DOCCS terminated the member's employment on November 21, 2018, after only one year of cumulative workers' compensation leave. The Article 78 petition challenges DOCCS' definition of 'assault' and requests that the court give the member a two-year leave of absence because he sustained injury as a result of an inmate assault. The State filed responding papers, and we filed a reply brief on March 21, 2019. The Article 78 return date was March 22, 2019. We now await a decision from the court.

New York State Office of Mental Health, Central New York Psychiatric Center, Petitioner/Employer vs. [member] and [member], Respondents/Employees, Index No. 02930-19: The Employer, Central New York Psychiatric Center, is seeking permission from the court seeking video footage from CNYPC involving the member and a patient. OMH's papers seek to have the video tape sent to the arbitrator. On behalf of the member, who is a Security Hospital Treatment Assistant at CNYPC, we challenged the release of those records as a demand for arbitration has not been made and there is no arbitrator currently assigned. The matter is pending before the court and we await a determination.

[Member] (Fishkill Correctional Facility) and NYSCOPBA v. NYS DOCCS: The member, in an arbitration, was found guilty of using excessive force and his employment was terminated. The Arbitrator found that the initial suspension was not for probable cause and ordered back pay for the period of suspension. The Arbitrator, however, provided that the back pay award was to be offset by the member's income during the period of suspension. We prepared a special proceeding seeking to vacate the arbitration award on the grounds that the Arbitrator exceeded her authority. The proceeding was filed on March 8, 2019, with a return date of May 1, 2019. At the request of

the Attorney General's Office this matter was adjourned to June 7, 2019. We received a Decision and Order/Judgment from the Supreme Court which granted our Petition to the extent that it vacated that portion of the Arbitration Award which provided that the back pay award was to be offset by any earned income or other work-related insurance. The court held that providing for a deduction from back pay of anything other than unemployment insurance violated the collective bargaining agreement. It is possible that DOCCS could appeal this 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. The Appellants-Respondents perfected their appeal. Briefs have been submitted and this matter has been scheduled for the Appellate Division's January Term.

[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 Petitioner 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 served on November 8, 2018. We expect a decision soon.

[Member] (Buffalo PC) and NYSCOPBA v. OMH (Albany County Supreme Court, Index No. 02864-19): On May 13, 2019, we filed an Article 75 petition to vacate the arbitration decision in this disciplinary matter. The member received notices of discipline alleging, in relevant part, 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. Arbitrator Thomas Rinaldo found the member guilty of the charges in the notices of discipline and terminated his employment. Arbitrator Rinaldo also determined that OMH's suspension of the member was proper. In our Article 75 petition, we argued that Arbitrator Rinaldo exceeded his authority when he (1) permitted OMH to amend a time-barred charge in the notice of discipline during the arbitration; (2) terminated petitioner on the basis of time-barred charges; and (3) used the wrong suspension standard in assessing whether OMH's suspension of petitioner was proper. The return date on this petition is July 19, 2019.

Discipline

Interrogations: For the months of July and August 2019 we represented seventy-seven (77) members who were interrogated by DOCCS.

Suspension Review Process: The new suspension review process contained in the most recent collective bargaining agreement is in effect. Since March 12, 2019, we have reviewed each suspension NOD to determine: (a) if it qualifies under the suspension review program; and (b) if it is a viable case to take to the Master Arbitrator to argue that, on the face of the NOD, the grounds for the suspension have not been met.

To date, we have requested suspension review for fourteen suspension NODs and submitted the required paperwork to the Master Arbitrator. To date we have decisions on eight of these cases. Out of these eight cases, we have been successful in getting four members back on the payroll. There are four cases where we have requested the suspension review, but then the matter settled, so there was no final decision by the Master Arbitrator. For the remaining two cases, written submissions (due within 5 days of request) have either been submitted or will be this week, then we await the decision of the Master Arbitrator.

Auburn Correctional Facility: The officer in this NOD was accused of spraying an inmate with a fire extinguisher and participating in other abuse of the inmate. Hearing dates were held before Arbitrator Timothy Taylor on May 1, 2 and 3, 2019. Closing briefs were submitted on June 14 and Arbitrator Taylor issued a decision on July 8, 2019, finding that the member was not guilty of the charges and ordering full back pay and benefits. Subsequently, we were involved in issues relating to the questioning of the member for outside employment issues.

Auburn Correctional Facility: The NOD in this case alleged that the member failed to perform proper fire and safety checks, failed to take proper action in response to an inmate's request for medical attention, and made false statements during an OSI interrogation. A hearing in this matter was scheduled for September 11 and 13 and October 18, 2019. Prior to the hearing in this matter, the member accepted a settlement offer.

Bare Hill Correctional Facility: The NOD alleges that the member used unprofessional and inappropriate communications when speaking with a visitor who had become argumentative with the member after the member informed the visitor that the items she was attempting to bring into the facility were in violation of facility and Department rules and regulations. The matter was scheduled for arbitration on September 6, 2019, before Arbitrator Samuel Butto, but has since been adjourned as the member has submitted his retirement paperwork.

Bedford Hills Correctional Facility: The member received an NOD after being arrested, during a traffic stop, for resisting arrest and possession of marijuana. The member pled guilty to a Vehicle and Traffic Law violation. The member's arbitration was held on June 17, 2019. Closing briefs were filed on July 19, 2019. On July 29, 2019, we received the Arbitrator's Award finding the member guilty on all charges and terminating his employment.

Bedford Hills Correctional Facility: The NOD in this case alleged that the member choked and/or impeded the normal breathing or circulation of a civilian, causing her to lose consciousness, and was arrested and charged with strangulation in the second degree and assault with intent to cause physical injury. This matter was originally scheduled for hearing on July 9 before Arbitrator Campagna, but was adjourned to allow Arbitrator Campagna to rule on a second NOD issued to the member. In that case, we recently received a decision from Officer Campagna terminating the member's employment. Accordingly, the hearing on this NOD, regarding the alleged strangulation, will not be needed.

Bedford Hills Correctional Facility: The NOD alleges that the member was insubordinate towards a supervisor while on her post. The matter was scheduled for a hearing on July 23, 2019,

before Arbitrator Timothy Taylor, but has since been postponed due the unavailability of a key witness.

Bedford Hills Correctional Facility: The member has received an NOD for having a sexual relationship with an inmate, maintaining a sexual relationship with a parolee, and failing to report that he had a prior relationship with an inmate. On April 23, 2019, we moved to dismiss the Charges relating to communicating with a parolee and having a sexual relationship with a parolee on the basis that these two charges are beyond the nine-month contractual limitation. DOCCS has taken the position that having a sexual intercourse with a parolee is rape in the third degree. From our reading of the statute, it is not a crime for a corrections officer to have sex with a parolee although this statutory language has not yet been examined by a court. We have moved to dismiss these two Charges, as well as the Charge that the officer had sex with an inmate, on the grounds that the Charges lack the specificity required by the CBA. This first hearing was held on June 14, 2019. The Second hearing day was held on August 19, 2019. Closing briefs are due on September 13, 2019.

Bedford Hills Correctional Facility: The Notice of Discipline alleges misconduct for failing to ensure that an inmate was present and alive in her cube. Additionally, the six charges all stem from basically the same incident. A hearing was scheduled before Arbitrator Mary Crangle on July 19, 2019. After marking the documents and opening statements, the parties discussed resolving the matter through a Consent Award. The member will receive a 90-day suspension and a same or similar DEP which commences on July 19, 2019, through July 18, 2020. Arbitrator Crangle has signed the Consent Award and Grievant returned to duty.

Capital District DDSO: The NOD alleges that the member was charged with actions related to various crimes of stalking and trespassing. Once the criminal charges have been resolved, the matter may proceed to settlement negotiations or a hearing.

Clinton Correctional Facility: The NOD in this case alleged that the member drove his vehicle under the influence of alcohol, left the scene of a property damage accident, and was subsequently arrested and charged with misdemeanor DWI and leaving the scene of a property damage accident. A hearing in this matter was scheduled for July 22, 2019, before Arbitrator Butto. Prior to the hearing in this matter, the member decided to retire.

Coxsackie Correctional Facility: The NOD in this case alleges that the member filed a false or inaccurate statement regarding a workers' compensation claim, was arrested and charged with various felonies, and brought discredit upon DOCCS when reports of his arrest were publicized by various news outlets. Specifically, the allegation in this case is that the member worked at a bar in Troy, NY, but indicated on workers' compensation paperwork that he had not been working. A hearing in this matter was held before Arbitrator Taylor on July 15 and 16, 2019. Briefs were submitted on August 16, 2019. We await Arbitrator Taylor's decision.

Downstate Correctional Facility: This officer in this NOD is accused of failing to secure the housing unit entrance door, the door to the officer's station, permitted an inmate to access of a secure post and offered a bribe to a sergeant who was reporting his misconduct. We have not yet selected an arbitrator for this case.

Downstate Correctional Facility: This member is charged with misconduct for authoring an inmate count and hour and a half ahead of time; failing to secure the Housing Unit, introducing contraband into the facility, and also reporting to his work area without his collar brass on. The first hearing was on August 6, 2019, before Arbitrator Richard Gaba. Day 2 is scheduled for September 17, 2019.

Fishkill Correctional Facility: The officer in this NOD was charged criminally. The criminal matter has been dismissed with prejudice. Arbitrator Lise Gelertner has been assigned to this NOD and a hearing is scheduled for September 5, 2019.

Fishkill Correctional Facility: The officer in this NOD was accused of leaving the facility with a canister of OC spray without permission and failing to cooperate with the facility's efforts to retrieve the canister. Arbitrator Lande was assigned to the NOD. The NOD was settled on July 22, 2019.

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: The NOD in this case alleged that the member was insubordinate when she failed to comply with a direct order from a sergeant to relieve another officer. Following discussions with DOCCS regarding the weaknesses in the Department's case, the Department withdrew the NOD issued to the member.

Franklin Correctional Facility: A hearing was scheduled on August 1, 2019 before Arbitrator Trachtenberg regarding this suspension NOD which alleges a number of outside criminal charges including DWI, assault (misdemeanor), and bribing a witness (felony). The member went to trial on his criminal charges just prior to the disciplinary hearing and was found guilty of the DWI (and other alcohol related charges), but not the assault and bribery. Ultimately, DOCCS did settle the NOD just prior to the hearing with a suspension to date, DEP for same or similar to run concurrently with any probation assigned by the court, OAP, and no driving of a state vehicle.

Gouverneur Correctional Facility: The member received an NOD for making a racially insensitive post on his Facebook page and for lying at his interrogation. The arbitration was held on July 12, 2019. Closing Briefs are due on September 6, 2019.

Green Haven Correctional Facility: This officer in this NOD was charged criminally. The officer has accepted a plea agreement in settlement of the criminal charges. It is not clear at this time if the officer will be terminated as a result of his criminal plea or afforded an NOD hearing by DOCCS.

Green Haven Correctional Facility: This member is charged with engaging in inappropriate and physical abuse towards another employee in violation of DOCCS' Employees' Manual, including its Workplace Violence Programs. Specifically, while serving at the Albany Training Academy as a drill instructor, the member allegedly grabbed a correction officer while striking him in the area of his face and placing his hands on or near his neck while forcing him backwards towards the wall. Additionally, there are other charges which stem from this initial incident. A hearing in this matter has been scheduled before Arbitrator Dennis Campagna on October 18, 2019.

Hudson Correctional Facility: The member received a Notice of Discipline for unnecessary and excessive force. This is scheduled to be heard on July 17, 2019. Closing Briefs were filed on August 20, 2019.

Kirby Forensic Psychiatric Center: Senior SHTA was issued a notice of discipline alleging that on November 2, 2018, he directed a patient to wipe up another patient's drool from a day room chair and cornered him against a wall in an aggressive manner. OMH is seeking 4 weeks suspension without pay. Arbitrator Battisti has been assigned to this matter and we await a hearing date.

Manhattan Psychiatric Center: The member receive an NOD for failing to investigate an alleged sexual assault of a female SSO. The hearing was scheduled for May 23, 2019. This matter was adjourned to July 23, 2019. This case has now been adjourned without date.

Mid-State Correctional Facility: The officer in this NOD is accused of leaving his post unsecured, falsely documenting rounds that were not conducted, falsely submitting count slips and watching a movie while on duty. An arbitrator has not been selected yet for this matter.

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

Shawangunk Correctional Facility: The NOD alleges that the member introduced contraband (dietary supplements) into the facility for use by an inmate, which resulted in criminal charges. The member admitted the conduct/charges to the Department and, if this matter does proceed to a hearing, this will be a penalty-only hearing. Arbitrator Joel Douglas has been assigned to the matter. We await a hearing date.

Shawangunk Correctional Facility: The NOD alleged that the member was insubordinate when he exited the facility prior to an all-staff frisk, ignored multiple direct orders from supervisory staff to return to the facility, accessed his vehicle, and deposited an item from his clear plastic bag prior to returning to the facility frisking area. Most significantly, the NOD alleged that the member was affiliated with a racist/white supremacist organization and had attempted to enter the facility with promotional materials from the white supremacist organization. This was an expedited disciplinary arbitration assigned to Arbitrator Larry Dais. The matter was heard on March 22 and May 28, 2019. The parties received transcripts and submitted closing briefs by June 7, 2019. By decision dated July 29, 2019, Arbitrator found the member guilty of all charges and terminated his employment with DOCCS.

Sullivan Correctional Facility: This member is charged with misconduct for allegedly providing false information to a superior officer regarding the medications he has been taking at the time of an employee drug test and for being under the influence of certain medications which he allegedly did not have a valid physician's prescription for. This matter is scheduled for a hearing before Arbitrator Edward Battisti on October 11, 2019.

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

Taconic Correctional Facility: The member received an NOD for making telephonic contacts with two parolees. We had our first hearing on June 11, 2019. We believe that Charge 1 is timed out and a portion of Charge 2 is timed out. DOCCS has taken the position that the officer's actions constitute the crime of official misconduct. We have made a written motion to dismiss Charges 1 and 2 on the grounds that these charges are barred by the nine-month limitation and on the basis that the Charges lack the specificity required by Section 6.2 (a) of the CBA. The Arbitrator has directed DOCCS to respond to our motion by June 21. A second hearing was held on for July 9, 2019, for consideration of the motion to dismiss. Closing briefs were submitted on August 5, 2019. We are awaiting a decision.

Taconic Correctional Facility: The member received a Notice of Discipline for allegedly handing in a fraudulent medical note. This was a no offer case for DOCCS. The expedited arbitration was held on May 16, 2019. Closing Briefs were submitted on May 23, 2019. On June 6, 2019, we received an Arbitration Award finding the member not guilty and reinstating her with all back pay and accruals. The member was placed on administrative leave and DOCCS is continuing to investigate other medical notes submitted by the member.

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.

Justice Center

Bronx Psychiatric Center: This Category 3 report of deliberate inappropriate use of restraints alleges that the member conducted an unwarranted restraint with excessive force improper technique, which included slamming the service recipient into a wall, scratching and/or striking him. We submitted a request for amendment, which was denied. We await a notice of pre-hearing conference to schedule the administrative hearing of this matter.

Bronx Psychiatric Center: This Category 3 report of deliberate inappropriate use of restraints alleges that the member conducted an unwarranted restraint with excessive force improper technique, which included slamming the service recipient into a wall, scratching and/or striking

him. We submitted a request for amendment, which was denied. We await a notice of pre-hearing conference to schedule the administrative hearing of this matter.

Kirby Psychiatric Center: This Category 3 report of neglect alleges that the member committed neglect on November 2, 2018, when he directed derogatory statements toward a service recipient. We submitted a request for amendment which was denied. We await a pre-hearing conference in this matter for the purpose of scheduling an administrative hearing.

Mid-Hudson Forensic Psychiatric Center: This Category 3 report of neglect alleges that the member committed neglect on September 6, 2018, when he directed derogatory and/or inappropriate language at a service recipient and failed to provide proper supervision to a service recipient. The member missed the 30-day time limit within which to submit a request for amendment. We nonetheless submitted a request for amendment. The Justice Center rejected the request for amendment as untimely.

Mid-Hudson Forensic Psychiatric Center: This Category 2 report of physical abuse (deliberate inappropriate use of restraints) alleges that on October 21, 2017, the members struck a service recipient. The matter was appealed and a pre-hearing conference was held with the Justice Center in order to schedule a hearing. A consolidated hearing on June 19, 2019, before ALJ Julianne O'Brien. In a joint decision dated August 1, 2019, ALJ O'Brien found that the JC failed to meet its burden of proof with regard to all charges, ordered that the report of substantiated findings be amended to unsubstantiated, and ordered that the matter and all its documentation be sealed. The members never received NODs.

Improper Practice Charges

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 (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 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. Judge Reich has since left PERB and the matter was reassigned to Judge Nancy Burritt. The parties rested, have received transcripts, and submitted closing briefs. We await the decision.

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 – DOCCS Light Duty (U-36658): On January 11, 2019, we attended a pre-hearing conference at PERB before ALJ Mitchell to address this Improper Practice charge filed when DOCCS began assigning light duty officers to two new types of posts, construction and one on one watches. This IP alleges that these new posts change the long-standing parameters for light duty post (ie – counted toward minimum staffing – not an extra). At the conference we explained the arguments in our case. DOCCS agreed to review our arguments now that they better understood them and to see if any potential settlement could be reached. The matter has been placed on hold.

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 parties attended a pre-hearing conference with ALJ Ellen Mitchell on January 31, 2019, at PERB in Albany. We requested that the matter be scheduled for a hearing and PERB scheduled the hearing for December 4, 2019. GOER has since provided draft language for a revised version of the directive, which purportedly preserves the status quo and exempts NYSCOPBA members from the Department’s requirement that self-employed individuals obtain permission prior to engaging in such employment. The draft revised version of the directive also restates the current state of the law regarding conflicts of interest with regard to outside employment. We reviewed the directive and determined that its new content exempted NYSCOPBA members from the reporting requirements now to be required of all DOCCS employees not represented by NYSCOPBA. The Department has since re-issued the directive and this matter will likely be withdrawn as the new version of the directive renders this charge moot.

Albany Training Academy (U-33924): We received a decision from the ALJ dismissing this improper practice charge in its entirety. This charge alleged that the Department discriminated and retaliated against the member when he filed a grievance regarding travel reimbursement on behalf of NYSCOPBA members on detached assignment to the Training Academy. The charge alleged that the Department retaliated against the member for the filing of this grievance when it changed its instructor rotation policy and did not contact him to return to the Training Academy as an instructor after he was rotated out. In an attempt to settle the matter, the Department invited the member back to the Academy, which he accepted for two (2) days, and then the member was promoted to correction sergeant and left the Academy. The ALJ determined that the Department had legitimate business purposes for its actions (changes in policy were in response to a NYS Comptroller audit). This office has provided an analysis to the executive board regarding the decision and whether there exists a legal argument for filing exceptions to this decision with PERB and awaits a response from the board. This office has extended the time to file such exceptions to preserve our right to do so. Exceptions must be filed by October 16, 2019.

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 NYSCOPBA representative of his choice during investigatory questioning that took place at the Albany Training Academy on September 14, 2018. The charge states that Mr. Brandow's actions, in light of the member's request for Union representation, constituted retaliation and interference in violation of the Act. On or about August 6, 2019, DOCCS agreed to resolve this improper practice charge by removing any recordings, notes, memoranda, etc. created as a result of the questioning by Dennis Brandow, Jr., from the member's personal history folder and not use same against the member for any purpose. DOCCS also agreed that all parties present, including Dennis Brandow, Jr., acknowledge their rights and obligations under Taylor Law and the Contract to permit union representation by a representative of NYSCOPBA's selection.

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, 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 but has since been placed on hold. The facility is in the process of negotiating with both NYSCOPBA and CSEA regarding resolution of this matter. However, since the facility has not made reasonable progress, we have requested that the matter be scheduled for a hearing. PERB has scheduled the matter for an additional pre-hearing conference on September 24, 2019, and a hearing on December 11, 2019, if the matter is not resolved prior thereto.

Helen Hayes Hospital (U-36939): On May 10, 2019, we filed an improper practice charge on behalf of the member against Helen Hayes Hospital. The member received a temporary appointment to the position of Security Services Assistant, Helen Hayes Hospital, effective May 15, 2015. Notwithstanding the fact that she had been a temporary appointment, the member continued service at Helen Hayes Hospital from May 2015 through April 23, 2019, when she was abruptly discharged. The member filed her first grievance on March 25, 2019, regarding shift selection. The member then filed her second and third grievances on April 23, 2019—the same date as her termination from Helen Hayes Hospital. We alleged that the termination was to interfere with, restrain, and retaliate against the member for exercising her guaranteed rights under the Taylor Act. On August 5, 2019, we appeared at a PERB Conference for the member. During the conference, the ALJ stated that we had established a prima facie case that the employer terminated the member based upon union activity. The ALJ directed the employer to investigate whether the member could be reinstated.

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.

Otisville Correctional Facility (U-36770): This office filed an Improper Practice Charge alleging retaliation and interference against various supervisory staff at Otisville CF for discouraging NYSCOPBA members from voting for certain stewards. A pre-hearing conference before ALJ William Weisblatt took place on April 25, 2019, at PERB in Albany. ALJ Weisblatt directed NYSCOPBA to submit an offer of proof on certain portions of the charge, in order to specify the connection between various instances of retaliation. ALJ Weisblatt directed the State to issue an amended Answer after NYSCOPBA submits its offer of proof. This office has submitted the necessary paperwork on NYSCOPBA's behalf and met with representatives from DOCCS and GOER in order to inspect various at-issue documents on June 3, 2019. DOCCS and GOER will provide us with additional documentation.

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 were due on January 18, 2019. The parties await the response of the Judge. The parties have agreed to a conditional deferral of the matter to the parties' grievance procedure. The Judge issued a decision granting the conditional deferral and the matter will now be processed as a grievance.

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.

State University of New York and State University of New York Downstate Medical Center (U-36999): We filed an Improper Practice Charge against SUNY and SUNY Downstate Medical Center for failure to provide parking to its employees. On March 4, 2019, the parking garage where all employees parked was closed. As a result, the employer would no longer be providing adequate parking to its employees. The current annual rate for parking has been \$79.81. As a result of the employer's decision to close the parking lot, employees' parking costs will increase to \$2,607.00 per year. Employer-provided parking is an economic benefit which is a term and condition of employment and a mandatory subject of bargaining. A conference was scheduled before Administrative Law Judge Nancy Burritt on August 20, 2019 but was adjourned at the joint request of NYSCOPBA and GOER. The conference has been re-scheduled for October 22, 2019.

Contract Enforcement

Appeals to Arbitration: We received one (1) request from NYSCOPBA's grievance department to appeal contract grievances to arbitration during the months of July and August 2019.

Since the last Executive Assembly meeting: we triaged 93 grievances; held expedited hearings on 4 grievances; held summary hearings on 6 cases; settled 8 grievances; and withdrew 6 grievances.

Bare Hill Correctional Facility: This grievance alleged that DOCCS violated Articles 11 and 27 of the Agreement when it failed to pay the member appropriate inconvenience pay. DOCCS agreed to resolve this grievance and pay the member inconvenience pay full evenings for the pay period during which he was improperly paid.

Upstate Correctional Facility: This grievance alleged that DOCCS violated Articles 11 and 27 of the Agreement when it failed to pay the member appropriate inconvenience pay. DOCCS agreed to resolve this grievance and pay the member inconvenience pay partial for a total period of approximately three years and six months during which he was improperly paid.

Retirement

Coxsackie Correctional Facility: This is a disability retirement matter. The Applicant's physician testified on February 14, 2018. The member testified on September 14, 2018. The State's doctor's testimony was scheduled for July 22, 2019. This testimony has been adjourned by the Retirement System. The State's doctor is scheduled to testify on October 2, 2019.

Downstate Correctional Facility: The member's disability retirement application was denied on the grounds that he was not permanently disabled from performing his duties and on the grounds that his injury was not inmate related. The member's right leg was amputated below the knee after two knee replacements and an antibiotic resistant MRSA infection. After his right leg was amputated, under the Americans with Disabilities Act, the member was granted a reasonable accommodation and a perimeter patrol vehicle was retrofitted so that the member could continue to work his post. We have now had the opportunity to review the Records Compact Disc from the Retirement System. The initial Determination of Retirement System held that the incident of April 10, 1997, was the act of an inmate. The System's orthopedic surgeon, in his report, conceded that the incident of April 10, 1997, was the cause of the loss of the member's right leg. The System denied the application on the basis that the member was not permanently disabled from performing his duties. This Determination was based on the IME finding that the member was not disabled from performing the duties of his perimeter patrol post. The IME Report stated that the member could not work inside a facility with inmates. There is authority for the System's position that an officer is not permanently disabled from performing his or her duties where the officer has been assigned to a light duty or restricted duty post. In the case of the member, however, the System overlooked the fact that the member is required to work mandatory overtime which takes him inside of the facility. The initial hearing was held on January 17, 2019, at which one of the member's doctor testimony. The second hearing scheduled for August 28, 2019, at which the member and a second doctor will testify.

Greene Correctional Facility: This is a disability retirement matter. The initial hearing was held on January 17, 2018. The testimony of the member's doctor was taken on July 31, 2019. The matter has been continued for the submission of additional medical record and for the testimony of the System'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. Our Article 78 was filed on January 16, 2019, with a return date of February 15, 2019. Because this is a substantial evidence question, this matter was transferred to the Appellate Division, Third Department. The Record and our Brief was filed in the Appellate Division on August 6, 2019. The State's Brief is due on September 26, 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 were filed on February 1, 2019. We are waiting for a determination.

Orleans Correction Facility: This a disability retirement appeal. The issue is whether the member is permanently disabled for performing the duties of a correction officer. The member testified on December 12, 2018. The matter has been continued for additional medical proof.

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. The testimony of the System's doctor was held on July 18, 2019. The System's doctor admitted that Applicant was permanently disabled. Closing Briefs were not required. We are waiting for a decision.

Upstate Correctional Facility: We filed a demand for a hearing with the NYS Retirement System on behalf of the member relating to Article 14 credit for his service as an SHTA. We have provided the Retirement System with a witness list for the hearing and are still awaiting a hearing date. We were informed by the Retirement System that a hearing should be scheduled this summer.

Civil Service Law

Downstate Correctional Facility: On May 28, 2019, we conducted a hearing under Civil Service Law section 73 for the member. The member was terminated on August 10, 2018, for being absent from work for more than one year. We contended that the termination was not proper because: (1) the one year included days other than sick leave; and (2) the absences were caused by multiple injuries to multiple body parts—not just one reason for the absences. The hearing closed and briefs were due June 25, 2019. On July 12, 2019, we received a decision finding that DOCCS had properly terminated the member based upon the fact that he had been on continuous personal sick for over one year. By way of background, the member, Downstate CF, was terminated on August 10, 2018 for being absent from work for more than one year. We contended that the termination was not proper because: (1) the one year included days other than sick leave; and (2) the absences

were caused by multiple injuries to multiple body parts – not just one reason for the absences. The ALJ rejected those assertions, finding that “the common sense reading of “disability” refers to one or more personal injuries or illnesses resulting in an employee being continuously absent” Thus, the fact that there was more than one condition that caused the disability was immaterial to the section 73 analysis. As the member was absent for more than one year, the ALJ found the termination proper.

General

Davis Hall (Bedford Hills Correctional Facility): We reviewed the recent rules and regulations which were issued to all residents of Davis Hall. The rules were incorrectly citing the applicable IP settlement relative to qualifications for Davis Hall. This has now been addressed and fixed. The rules and regulations also contain new provisions regarding mail being received at Davis Hall. We reviewed the issue of the mail and provided arguments to the Regional Vice President to address the issue locally with the facility.

Proposed Regulations for SHU Reform: On August 28, 2019, the Department published proposed regulations (I.D. No. CCS-35-19-00001-P) regarding various reforms to its Special Housing Units. Those proposed regulations include a gradual phase-in period of reduced maximum time spent in SHU, alternative diversionary programs to SHU, and much more. The design of the proposed regulations was to decrease SHU time and increase alternative programming and structure for rehabilitative purposes. As these are only proposed regulations that have not yet been made into law, they are subject to a comment period for the public. The comment period for these particular regulations expires on October 27, 2019. This office will provide guidance to the Board on these proposed regulations and a proposed response to the Department regarding same.

Religious Accommodation for Facial Hair: We reviewed the revisions to the NYS Human Rights Law as they relate to religious accommodations for facial hair. We provided a memorandum to the Executive Board regarding the changes to the text of the law and the minimal impact the revisions have on legal arguments on this issue as it relates to security staff in correctional facilities. We also assisted an outside attorney, hired by two correctional officers, in providing the necessary information to challenge the denial of a religious accommodation for facial hair based upon the State claiming an “undue hardship” as a reason to support the denial.

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



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JULY 2019 LEGAL REPORT **TO THE EXECUTIVE ASSEMBLY**

This is our report for the month of July, 2019, regarding the recent developments in some of the cases and legal matters we are handling for NYSCOPBA. For the matters cited, we have described activity occurring since the last report and scheduled future activity.

Negotiations

Since the newly negotiated collective bargaining agreement was ratified by the NYSCOPBA membership in January 24, 2019, we have been working regularly with GOER on the implementation of the agreement and the resolution of problems relating to the new agreement. We have been involved in many issues, including, but not limited to, retroactive pay, overtime denominator, employee benefit fund, Article 8 and 8.9 arbitrators, pre-shift brief payments, etc. We will continue to work with GOER, the Governor's staff and the Comptroller to fully implement the agreement.

Litigation

Statewide – Retiree Health Insurance Litigation (*NYSCOPBA v. State, et al.*, 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 U.S. 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 raise 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, 2019, 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. We have put together our Record on Appeal and are now working on drafting the supporting memorandum of law. All of our papers were filed by March 6, 2019.

[Member] v. NYSCOPBA and Michael Powers (U.S. District Court, Northern District of New York) (17-CV-937). During December, 2017, the member, a correction officer at Riverview Correction Facility, commenced this action alleging a number of constitution claims based on allegations that overtime was not distributed in a fair and non-discriminatory manner. Our Motion to dismiss was filed in January 2018. The member opposed the Motion and moved for leave to file an Amended Complaint. We opposed the motion to amend on the grounds that the proposed amendments were futile. On March 22, 2019, the Court issued its Decision and Order which granted the Plaintiff's motion to amend. The Court then proceeded to dismiss the Plaintiff's Amended Complaint. All of the Plaintiff's Federal Claims against NYSCOPBA have been

dismissed and the Court has declined to exercise jurisdiction as to Plaintiff's State Law claims. Unless Plaintiff files a Notice of Appeal, this litigation is at an end. We have not received a Notice of Appeal, but it appears that the member has, or is attempting to, file a lawsuit on his State law claims in the Supreme Court, county of St. Lawrence. On April 22, 2019, we received a Notice of Judicial Assignment which means that the member filed a Request for Judicial Intervention ("RJ") in St. Lawrence County. On April 23, 2019, NYSCOPBA was served with Summons and Complaint in State court action commenced by the member. The Complaint has to be answered or moved against by May 13, 2019. We filed a Motion to Dismiss the Complaint which is returnable on June 7, 2019. We appeared in St. Lawrence County Supreme Court for oral argument. The court will issue a written decision on our motion. The State has filed a Motion to Dismiss which is returnable on July 12, 2019.

[Member] and NYSCOPBA v. NYS DOCCS (Albany County Index No. 2805-19). This an Article 78 Proceeding involving DOCCS' termination of the employment of the member (Taconic Correctional Facility) pursuant to Section 71 of the Civil Service Law. The member was injured during the restraint of an inmate who had refused to be escorted to keep lock and who punched another officer in the face. Once again, DOCCS determined that this was not an assault and only gave the member a one-year leave. We contend that the member was assaulted and is entitled to a two-year leave. This Proceeding was commenced on May 7, 2019, and is returnable on June 21, 2019. At the request of the State this matter has been adjourned to July 5, 2019.

Estate of Samuel D. Harrell v. DOCCS, et al (U.S. District Court for Southern District of New York, Index no. 1:15-cv-07065) [Fishkill CF]: On September 10, 2015, Diane Harrell, individually and as the Administrator of the Estate of Samuel D. Harrell, filed a lawsuit, index no. 1:15-cv-07065, in federal district court against numerous parties, including NYSCOPBA and certain unnamed agents and members of NYSCOPBA. The underlying Complaint alleges violations of Mr. Harrell's civil rights pursuant to 42 U.S.C. 1983, 42 U.S.C. 1985 (2), 42 U.S.C. 1985 (3), and 42 U.S.C. 1986. More specifically, while littered with speculative and conclusory statements and lacking in factual detail, the Complaint alleges that NYSCOPBA agents and members conspired to cover up Mr. Harrell's death while he was an inmate at Fishkill Correctional Facility in New York State. The Complaint seeks both compensatory and punitive damages as well as attorney's fees, which are statutorily provided for in 42 U.S.C. 1983. The Complaint was later amended, but only to identify previously unknown defendants. A federal investigation occurred and no members of NYSCOPBA were indicted or charged with any wrongdoing in the federal investigation. The investigation did not result in any charges. NYSCOPBA moved for dismissal of the Complaint in its entirety on June 15, 2016. Because the amendment to the Complaint mooted the prior motion to dismiss, NYSCOPBA filed a motion to dismiss the Amended Complaint in August of 2018 and requested oral argument. NSYCOPBA denies all of the allegations and will vigorously defend against the claims. To date, NYSCOPBA's motion to dismiss is still pending and no oral argument date has been set. New York State and the other defendants have also moved to dismiss the Amended Complaint in its entirety.

[Member] v. DOCCS: This is another case involving a denial of two (2) years of Workers' Compensation leave based upon DOCCS' determining that the incident was not an assault. This is currently on appeal to the Appellate Division, Third Department, following dismissal of the petition by the Supreme Court Justice. Once the appeal was submitted, the member was granted

Disability Retirement benefits (3/4 disability) due to his injury. These benefits are retroactive, meaning that there is no longer a financial remedy to be gained in this Article 78 on the question of one or two years of leave. We were required to notify the court that there was a potential mootness question. We submitted a letter noting that although the member has been made financially whole, that this matter should continue based upon exceptions to the mootness doctrine (likelihood of the issue to occur again and evade review, important question). The court will consider the mootness question following the submission of papers by the State on March 11, 2019 (with an opportunity for us to submit a reply). If the court does not dismiss this case as moot, but instead continues to review on the merits of the underlying question, we may get a positive decision which could help in other cases. We reviewed the paper submitted by the State on March 11, 2019 and then drafted and submitted a reply memorandum on March 21, 2019. The matter is now fully submitted and will be placed on the court's calendar for argument and decision.

[Member] (CON16-0177). On March 11, 2019, we commenced a CPLR Article 75 proceeding to compel arbitration in this grievance. This grievance involves a claim that the State violated Article 14 by not paying the grievant his accumulated vacation credits after he was terminated by the disciplinary arbitrator. The State has refused to arbitrate the case asserting that the claim should have been addressed by the disciplinary arbitrator. We contend that assertion is incorrect and this case should proceed to full arbitration immediately.

By way of background, on March 12, 2014, the member escorted inmate Raffia Mata to a cell in Greene CF's SHU-200, which was occupied by inmate Matthew Thornton. Once Matta was placed in the cell, the inmates fought. The State alleged that the officers conspired to have inmate Raffia placed in inmate Thornton's cell to inflict corporal punishment upon him. To cover up their misconduct, the State alleges that they created a false story for the investigators.

Arbitrator Butto found that the member was guilty of instigating an altercation by telling inmate Matta he was "going in with a real asshole;" and that the member was guilty of failing to provide sufficient care, custody, and control over both inmates. Based upon that evidence, the arbitrator found that "it is inconceivable that the member could not have noticed that an altercation was taking place while he was present on B-Gallery during the period from approximately 8:54am to 8:59am on March 12, 2014." Furthermore, he found that the member's failure to actively respond to the clear and repeated pleas for help by the inmate is inexcusable. Based upon the foregoing, Arbitrator Butto found that termination from service was appropriate, but that the suspension was not based upon probable cause and awarded him back pay and accruals for the period of suspension. The State has paid the member back wages, but not the value of the accruals.

After the State refused to pay the member the vacation accruals, he filed a grievance alleging a violation of Article 14. Article 14.1(e) of the Agreement provides that vacation credits may be accumulated up to a maximum of 40 days, provided, however, that in the event of death, retirement or separation from service, employees shall be compensated in cash for accrued and unused vacation credits up to a maximum of 30 days. As indicated, neither grievant was paid for the value of their vacation credits which were restored by the Arbitrator.

As the State has refused to arbitrate, we are now seeking to compel them to arbitrate. Where there is no substantial question whether a valid agreement was made or complied with, and the claim is

not barred by time limitations, the court shall direct the parties to arbitrate. *CPLR* § 7503. The moving party has the burden to show a “clear and unequivocal” agreement to arbitrate the claim. *Gerling Global Reinsurance Corp. v. Home Ins. Co.*, 302 A.D.2d 118, 123 (1st Dep’t 2002). Contrary to the State’s rational for denying arbitration, the underlying grievance is not a re-examination of the disciplinary proceeding or the disciplinary award. Instead, the grievance requests payout in accordance with the terms of the Agreement. The State’s responding papers were due June 7, 2019.

[Member] (Edgecombe Correctional Facility) v. DOCCS: 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 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. This proceeding is also based upon the definition of Assault in the Second Degree contained in Sections 120.05(3) and 120.5(6) 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. On December 19, 2019, we received a Decision dismissing our Petition. We filed a Notice of Appeal on January 11, 2019. On April 9, 2019, our Record and Brief was filed in the Appellate Division, Third Department. The State’s Brief was filed on June 10, 2019. We filed our Reply Brief on June 18, 2019. The matter will be scheduled for the October Term of the court.

[Member] v. New York State Justice Center: This matter is an Article 78 challenge to a Justice Center determination based upon legal arguments of *res judicata* and collateral estoppel. We argue that the Justice Center was bound by the favorable decision in the identical disciplinary matter. Our papers argue that the Justice Center decision must be dismissed based upon the disciplinary decision, or in the alternative, that the Justice Center decision was not based upon substantial evidence. As this matter involves a question of substantial evidence, it is before the Appellate Division, Third Department. We received the State’s brief on February 25, 2019. The State’s brief admits to some collateral estoppel (based upon a recent decision by the Third Department), but argues that one piece of the Justice Center charge is different and can still be sustained, as it was not specifically charged in the disciplinary matter. On June 3, 2019, we presented oral arguments before the Appellate Division. The matter has been fully briefed and we expect a decision from the Appellate Division approximately six to eight weeks after the oral arguments.

[Member] v. DOCCS: This Article 78 proceeding challenging the member’s termination after one year of workers’ compensation leave was filed in Albany County on May 22, 2019. The matter has formally been served on the State. The current return date before the court is June 28, 2019. This petition alleges that the member’s workers’ compensation leave was due to an assault by an inmate, therefore she should be entitled to two years of leave under *Civil Service Law* Section 71.

[Member] (Ulster Correctional Facility) v. DOCCS (Index No. 00880-19): We filed an Article 78 proceeding on February 15, 2019, on behalf of the member, who was injured during a use of force on November 19, 2017. On that date, the member was the first responder to an inmate’s violent assault on an officer. The inmate refused the member’s direct orders to stop and get on the wall, and then proceeded to swing at the member, missing him. The member, along with the officer, proceeded to use body holds to take the combative inmate to the ground, during which

time the member was injured. The inmate assaulted the member under both criminal and civil definitions of assault. DOCCS terminated the member's employment on November 21, 2018, after only one year of cumulative workers' compensation leave. The Article 78 petition challenges DOCCS' definition of 'assault' and requests that the court give the member's a two-year leave of absence because he sustained injury as a result of an inmate assault. The State filed responding papers, and we filed a reply brief on March 21, 2019. The Article 78 return date was March 22, 2019. We now await a decision from the court.

New York State Office of Mental Health, Central New York Psychiatric Center, Petitioner/Employer vs. [member] and [member], Respondents/Employees, Index No. 02930-19: The Employer, Central New York Psychiatric Center, is seeking permission from the court seeking video footage from CNY PC involving a member and a patient. OMH's papers seek to have the video tape sent to the arbitrator. On behalf of the member, who is a Security Hospital Treatment Assistant at CNY PC, we challenged the release of those records as a demand for arbitration has not been made and there is no arbitrator currently assigned. The matter is pending before the court and we are awaiting a determination.

[Member] (Fishkill Correctional Facility) and NYSCOPBA v. NYS DOCCS: The member, in an arbitration, was found guilty of using excessive force and his employment was terminated. The Arbitrator found that the initial suspension was not for probable cause and ordered back pay for the period of suspension. The Arbitrator, however, provided that the back pay award was to be offset by the member's income during the period of suspension. We prepared a special proceeding seeking to vacate the arbitration award on the grounds that the Arbitrator exceeded her authority. The proceeding was filed on March 8, 2019, with a return date of May 1, 2019. At the request of the Attorney General's Office this matter has been adjourned to June 7, 2019. We are waiting for a determination.

[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. The Appellants-Respondents perfected their appeal. Our response is due on July 17, 2019.

[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 served on November 8, 2018. We expect a decision soon.

[Member] (Buffalo PC) and NYSCOPBA v. OMH (Albany County Supreme Court, Index No. 02864-19): On May 13, 2019, we filed an Article 75 petition to vacate the arbitration decision in this disciplinary matter. The member received notices of discipline alleging, in relevant part, 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. Arbitrator Thomas Rinaldo found the member guilty of the charges in the notices of

discipline and terminated his employment. Arbitrator Rinaldo also determined that OMH's suspension of the member was proper. In our Article 75 petition, we argued that Arbitrator Rinaldo exceeded his authority when he (1) permitted OMH to amend a time-barred charge in the notice of discipline during the arbitration; (2) terminated petitioner on the basis of time-barred charges; and (3) used the wrong suspension standard in assessing whether OMH's suspension of petitioner was proper. The return date on this petition is July 19, 2019.

Discipline

Interrogations: For the month of May and June 2019 we represented fifty-eight (58) members who were interrogated by DOCCS.

Suspension Review Process: The new suspension review process contained in the most recent collective bargaining agreement is in effect. Since March 12, 2019, we have reviewed each suspension NOD to determine a) if it qualifies under the suspension review program and b) if it is a viable case to take to the Master Arbitrator to argue that on the face of the NOD, the grounds for the suspension have not been met.

To date, we have requested suspension review for eight suspension NODs and submitted the required paperwork to the Master Arbitrator. To date we have decisions on five of these cases. Out of these five cases, we have been successful in getting three members back on the payroll. For the remaining three cases, written submissions (due within 5 days of request) have either been submitted or will be shortly, then we await the decision of the Master Arbitrator.

Auburn Correctional Facility: This member, along with two other officers, is being accused of spraying a liquid fire extinguisher and wetting items in the inmate's cell, as well as going on the catwalk behind the cell and spraying a dry chemical agent in the cell to the vent. The member is also charged with other matters relating to the main allegation and giving a false and inaccurate statement to the DOCCS Office of Special Investigations. Hearings were held on March 12, 13, and 27, 2019 before Arbitrator Samuel Butto. At the conclusion of the case, NYSCOPBA made a motion to reinstate the member to the payroll. On April 17, 2019, we received an Interim Decision from the arbitrator ordering that the member be reinstated to the payroll. As a result, DOCCS ordered the member to return to duty at Auburn Correctional Facility. Closing briefs were submitted on May 24, 2019. On June 14, 2019, Arbitrator Butto issued an Award finding the member not guilty of the charges. He found that the suspension was not proper and ordered the Grievant to receive back pay and benefits.

Auburn Correctional Facility: The officer in this NOD is accused of spraying an inmate with a fire extinguisher and participating in other abuse of the inmate. This NOD has been assigned to Arbitrator Timothy Taylor. Hearing dates were held on May 1, 2 and 3, 2019. Closing briefs were submitted on June 14 and a decision is due on July 15, 2019.

Bedford Hills Correctional Facility: This member is charged with misconduct for allegedly failing to report an allegation of retaliation. Specifically, after being informed by an inmate that another correction officer was retaliating against the inmate in connection with a complaint the

inmate made under PREA, the officer failed to immediately notify his supervisor. A hearing in this matter was scheduled before Arbitrator Joel Douglas on June 18, 2019. Prior to the hearing, this matter scheduled for a \$750 fine payable in bi-weekly increments of \$25.

Bedford Hills Correctional Facility: The member received an NOD after being arrested, during a traffic stop, for resisting arrest and possession of marijuana. The member pled guilty to a Vehicle and Traffic Law violation. The member's arbitration was held on June 17, 2019. Closing briefs are due on July 19, 2019.

Bedford Hills Correctional Facility: The NOD alleges that the member was insubordinate towards a supervisor while on her post. The matter has been scheduled for a hearing on July 23, 2019, before Arbitrator Timothy Taylor.

Bedford Hills Correctional Facility: The member has received an NOD for having a sexual relationship with an inmate, maintaining a sexual relationship with a parolee, and failing to report that he had a prior relationship with an inmate. On April 23, 2019, we moved to dismiss the Charges relating to communicating with a parolee and having a sexual relationship with a parolee on the basis that these two charges are beyond the nine-month contractual limitation. DOCCS has taken the position that having a sexual intercourse with a parolee is rape in the third degree. From our reading of the statute, it is not a crime for a corrections officer to have sex with a parolee. We have moved to dismiss these two Charges, as well as the Charge that the officer had sex with an inmate, on the grounds that the Charges lack the specificity required by the CBA. This first hearing was held on June 14, 2019. The next hearing day is scheduled for August 19, 2019.

Bedford Hills Correctional Facility: The Notice of Discipline alleges misconduct for failing to ensure that an inmate was present and alive in her cube. Additionally, the six charges all stem from basically the same incident. A hearing has been scheduled before Arbitrator Mary Crangle on July 19, 2019.

Capital District DDSO: The NOD alleges that the member was charged with actions related to various crimes of stalking and trespassing. Once the criminal charges have been resolved, the matter may proceed to settlement negotiations or a hearing.

Coxsackie Correctional Facility: A hearing is scheduled on June 19, 2019 before Arbitrator Battisti regarding this non-suspension NOD which alleges that the member left the facility without authorization. Just prior to the hearing the matter settled for a letter of reprimand.

Downstate Correctional Facility: The member received a notice of discipline seeking his termination and alleging that on or about August 8, 2017, he failed to properly supervise staff with respect to two uses of force in the facility draft area. Two days of arbitration were held on December 7, 2018, and March 8, 2019, in Fishkill, NY, before Arbitrator Lise Gelernter. Arbitrator Gelernter found the member partially guilty of failing to intervene in one use of force and for failing to have an inmate seen by medical in a timely manner in another use of force. She found the member not guilty of failing to have a blood spill cleaned and for allowing officers to complete use of force reports in the same room, and she dismissed a charge alleging that the member failed to intervene when an officer threw a pair of pants at an inmate. Arbitrator

Gelernter imposed a 3-day suspension without pay and any supervisory training the State deems necessary to respond to future uses of force.

Eastern Correctional Facility: The Notice of Discipline alleges misconduct in that the member engaged in workplace violence, specifically striking a WTO training officer in his right hip with the butt of the shotgun and making threatening statements. This matter was appealed pursuant to the disciplinary expedited arbitration procedure. A hearing in this matter was conducted before Arbitrator J. Roger Rice on June 25, 2019. Briefs were submitted on July 2, 2019. We are awaiting a determination from Arbitrator Rice.

Eastern Correctional Facility: This member is accused of allegedly using excessive force when he was pat-frisking an inmate. The member has been charged with punching the inmate in the face without first utilizing lesser means of force. A hearing in this matter was scheduled before Arbitrator Timothy Taylor on June 6, 2019. Prior to the hearing, DOCCS withdrew the Notice of Discipline.

Fishkill Correctional Facility: The officer in this NOD was charged criminally. Recently, the criminal matter against the member was dismissed with prejudice. Arbitrator Lise Gelernter has been assigned to this NOD and a hearing is scheduled for September 5, 2019. Settlement discussions are ongoing.

Fishkill Correctional Facility: This NOD is for leaving the facility with a canister of OC spray without permission and failing to cooperate with the facility's efforts to retrieve the canister. Arbitrator David Lande has been assigned to this NOD. Hearing dates have not been scheduled and settlement discussions are ongoing.

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.

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°), 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.

Gouverneur Correctional Facility: The member received an NOD for making a racially insensitive post on his Facebook page and for lying at his interrogation. The arbitration is scheduled for July 12, 2019.

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

Hudson Correctional Facility: The member received a Notice of Discipline for unnecessary and excessive force. This is scheduled to be heard on July 17, 2019.

Manhattan Psychiatric Center: The member receive an NOD for failing to investigate an alleged sexual assault of a female SSO. The hearing was scheduled for May 23, 2019. This matter has been adjourned to July 23, 2019.

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

Shawangunk Correctional Facility: The NOD alleges that the member introduced contraband (dietary supplements) into the facility for use by an inmate, which resulted in criminal charges. We have submitted the arbitrator selection list and await the designation in order to schedule a hearing date.

Shawangunk Correctional Facility: The NOD alleges that the member was insubordinate when he exited the facility prior to an all-staff frisk. The NOD also alleges that the member attempted to enter the facility with materials from a white supremacist group and was a member of said group. This is an expedited disciplinary arbitration assigned to Arbitrator Larry Dais. The matter was heard on March 22 and May 28, 2019. The parties have received transcripts and submitted closing briefs by June 7, 2019. We await a decision from the arbitrator.

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. The first day of hearing was held on January 9, 2019, before Arbitrator David Lande. At the conclusion of DOCCS' case, we made a motion to lift the suspension and return the member to duty. By Interim Decision dated January 9, 2019, Arbitrator Lande granted our motion and Grievant has returned to duty at Sing Sing Correctional Facility. A second day of hearing was held on April 10, 2019. Closing briefs were submitted to Arbitrator Lande on May 10, 2019. By Award dated May 23, 2019, Arbitrator Lande found that the member shall be suspended without pay for four (4) weeks. The member shall also be reimbursed for loss of wages and benefits sustained throughout the period of the suspension which had been imposed and served.

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

Taconic Correctional Facility: The NOD alleges that the member engaged in an inappropriate relationship with an inmate, possessing items of a romantic nature from the inmate, and providing a false statement to DOCCS regarding the nature of his relationship with the inmate. The matter was scheduled for a hearing on June 28, 2019, before Arbitrator Joel Douglas. The matter was settled at the hearing.

Taconic Correctional Facility: The member received an NOD for making telephonic contacts with two parolees. We had our first hearing on June 11, 2019. We believe that Charge 1 is timed out and a portion of Charge 2 is timed out. DOCCS has taken the position that the officer's actions constitute the crime of official misconduct. We have made a written motion to dismiss Charges 1 and 2 on the grounds that these charges are barred by the nine-month limitation and on the basis that the Charges lack the specificity required by Section 6.2 (a) of the CBA. The Arbitrator has directed DOCCS to respond to our motion by June 21. A second hearing has been scheduled for July 9, 2019, for consideration of the motion to dismiss.

Taconic Correctional Facility: The member received a Notice of Discipline for allegedly handing in a fraudulent medical note. This was a no offer case for DOCCS. The expedited arbitration was held on May 16, 2019. Closing Briefs were submitted on May 23, 2019. We are awaiting a decision. On June 6, 2019, we received an Arbitration Award finding the member not guilty and reinstating her with all back pay and accruals.

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.

Woodbourne Correctional Facility: This officer is charged with misconduct for allegedly engaging in the possession of and use of an illegal drug which was not properly prescribed by a dentist or physician. A hearing in this matter was scheduled before Arbitrator Dennis Campagna on June 26, 2019. Prior to the hearing, the member resigned effective close of business on June 27, 2019.

Justice Center

Bronx Psychiatric Center: This Category 3 report of deliberate inappropriate use of restraints alleges that the member conducted an unwarranted restraint with excessive force improper technique, which included slamming the service recipient into a wall, scratching and/or striking him. We have submitted a timely request for amendment and await and response from the Justice Center.

Bronx Psychiatric Center: This Category 3 report of deliberate inappropriate use of restraints alleges that the member conducted an unwarranted restraint with excessive force improper technique, which included slamming the service recipient into a wall, scratching and/or striking

him. We have submitted a timely request for amendment and await and response from the Justice Center.

Kirby Psychiatric Center: This Category 3 report of neglect alleges that the member committed neglect on November 2, 2018, when he directed derogatory statements toward a service recipient. We have submitted a request for amendment and await a response.

Mid-Hudson Forensic Psychiatric Center: This Category 3 report of neglect alleges that the member committed neglect on September 6, 2018, when he directed derogatory and/or inappropriate language at a service recipient and failed to provide proper supervision to a service recipient. We have submitted a request for amendment and await a response.

Mid-Hudson Forensic Psychiatric Center: This Category 2 report of physical abuse (deliberate inappropriate use of restraints) alleges that on October 21, 2017, the members struck a service recipient. The matter was appealed and a pre-hearing conference was held with the Justice Center in order to schedule a hearing. A consolidated hearing on June 19, 2019, before ALJ Julianne O'Brien. We await the decision from the ALJ.

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 Board upheld the ALJ's decision. The State has since served on NYSCOPBA a petition for an Article 78 special proceeding to challenge PERB's determination. We submitted an Answer to this petition on February 22, 2019. The matter raises a question of substantial evidence, so it will be transferred to the Appellate Division and briefs will be submitted at that time.

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 (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 CO the member, 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. Judge Reich has since left PERB and the matter was reassigned to Judge Nancy Burritt. The parties rested, have received transcripts, and submitted closing briefs. We await the decision.

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 stationery; and section 2.44 regarding alerting of supervisory rounds. We will keep you informed regarding progress of negotiations.

Statewide – DOCCS Light Duty (U-36658): On January 11, 2019, we attended a pre-hearing conference at PERB before ALJ Mitchell to address this Improper Practice charge filed when DOCCS began assigning light duty officers to two new types of posts, construction and one on one watches. This IP alleges that these new posts change the long-standing parameters for light duty post (ie – counted toward minimum staffing – not an extra). At the conference we explained the arguments in our case. DOCCS agreed to review our arguments now that they better understood them and to see if any potential settlement could be reached. The matter has been placed on hold.

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 parties attended a pre-hearing conference with ALJ Ellen Mitchell on January 31, 2019, at PERB in Albany. We have requested that the matter be scheduled for a hearing.

Albany Training Academy (U-33924): We received a decision from the ALJ dismissing this improper practice charge in its entirety. This charge alleged that the Department discriminated

and retaliated against the then-Correction Officer when he filed a grievance regarding travel reimbursement on behalf of NYSCOPBA members on detached assignment to the Training Academy. The charge alleged that the Department retaliated against the member for the filing of this grievance when it changed its instructor rotation policy and did not contact him to return to the Training Academy as an instructor after he was rotated out. In an attempt to settle the matter, the Department invited the member back to the Academy, which he accepted for two (2) days, and then the member was promoted to correction sergeant and left the Academy. The ALJ determined that the Department had legitimate business purposes for its actions (changes in policy were in response to a NYS Comptroller audit). This office has provided an analysis to the executive board regarding the decision and whether there exists a legal argument for filing exceptions to this decision with PERB. This office has extended the time to file such exceptions to preserve our right to do so.

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 was held at PERB on March 28, 2019. ALJ Ellen Mitchell placed the matter on a 30-day hold to either resolve or set a hearing date.

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 but has since been placed on hold. The facility is in the process of negotiating with both NYSCOPBA and CSEA regarding resolution of this matter. However, since the facility has not made reasonable progress, we have requested that the matter be scheduled for a hearing.

Helen Hayes Hospital (U-36939): On May 10, 2019, we filed an improper practice charge on behalf of Yanira Cruz against Helen Hayes Hospital. Yanira Cruz received a temporary appointment to the position of Security Services Assistant, Helen Hayes Hospital, effective May 15, 2015. Notwithstanding the fact that she had been a temporary appointment, Ms. Cruz continued service at Helen Hayes Hospital from May 2015 through April 23, 2019, when she was abruptly discharged. Ms. Cruz filed her first grievance on March 25, 2019, regarding shift selection. Ms. Cruz then filed her second and third grievances on April 23, 2019—the same date as her termination from Helen Hayes Hospital. We alleged that the termination was to interfere with, restrain, and retaliate against Yanira Cruz from exercising her guaranteed rights under the Taylor Act. The initial conference is scheduled for August 5, 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.

Otisville Correctional Facility (U-36770): This office filed an Improper Practice Charge alleging retaliation and interference against various supervisory staff at Otisville CF for discouraging NYSCOPBA members from voting for certain stewards. A pre-hearing conference before ALJ William Weisblatt took place on April 25, 2019, at PERB in Albany. ALJ Weisblatt directed NYSCOPBA to submit an offer of proof on certain portions of the charge, in order to specify the connection between various instances of retaliation. ALJ Weisblatt directed the State to issue an amended Answer after NYSCOPBA submits its offer of proof. This office has submitted the necessary paperwork on NYSCOPBA's behalf and met with representatives from DOCCS and GOER in order to inspect various at-issue documents on June 3, 2019. DOCCS and GOER will provide us with additional documentation.

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 were due on January 18, 2019. The parties await the response of the Judge. The parties have agreed to a conditional deferral of the matter to the parties' grievance procedure. The Judge issued a decision granting the conditional deferral and the matter will now be processed as a grievance.

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.

State University of New York and State University of New York Downstate Medical Center (U-36999): We filed an Improper Practice Charge against SUNY and SUNY Downstate Medical Center for failure to provide parking to its employees. On March 4, 2019, the parking garage where all employees parked was closed. As a result, the employer would no longer be providing adequate parking to its employees. The current annual rate for parking has been \$79.81. As a result of the employer's decision to close the parking lot, employees' parking costs will increase to \$2,607.00 per year. Employer-provided parking is an economic benefit which is a term and condition of employment and a mandatory subject of bargaining. A conference in this matter has been scheduled before Administrative Law Judge Nancy Burritt on August 20, 2019.

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 May and June 2019.

Since the last Executive Assembly meeting, we triage 103 grievances, we had 4 Expedited Arbitrations, 7 summary proceedings, 5 settled and 5 withdrawals.

Retirement

Coxsackie Correctional Facility: This is a disability retirement matter. The Applicant's physician testified on February 14, 2018. The member testified on September 14, 2018. The

State's doctor's testimony was scheduled for July 22, 2019. This testimony has been adjourned by the Retirement System.

Downstate Correctional Facility: This is a disability retirement appeal. The member suffered a right leg amputation when a knee replacement became infected. The member was given a reasonable accommodation with a perimeter patrol vehicle which was modified to accommodate his disability. The Retirement System found that he was not permanently disabled from performing his duties. The Systems appears to have overlooked the fact that the member was required to work mandatory overtime. There is also an issue as to act of an inmate causation. The first hearing was held on January 8, 2019, at which Dr. Scott Russinoff testified. The hearing has been continued of an additional medical witness and for the member's 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 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. Our Article 78 was filed on January 16, 2019, with a return date of February 15, 2019. On April 4, 2019, we received the Order of Transfer to the Appellate Division, Third Department.

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 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 were filed on February 1, 2019. We are waiting for a determination.

Orleans Correction Facility: This a disability retirement appeal. The issue is whether the member is permanently disabled for performing the duties of a correction officer. The member testified on December 12, 2018. The matter has been continued for additional medical proof.

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. The testimony of the State's doctor is scheduled for July 18, 2019.

Upstate Correctional Facility: We filed a demand for a hearing with the NYS Retirement System on behalf of the member relating to Article 14 credit for his service as an SHTA. We have provided the Retirement System with a witness list for the hearing and are still awaiting a hearing date. We were informed by the Retirement System that a hearing should be scheduled this summer.

Civil Service Law

Downstate Correctional Facility: On May 28, 2019, we conducted a hearing under Civil Service Law section 73 for the member from Downstate. The member was terminated on August 10, 2018 for being absent from work for more than one year. We contended that the termination was not proper because: (1) the one year included days other than sick leave; and (2) the absences were caused by multiple injuries to multiple body parts—not just one reason for the absences. The hearing closed and briefs were due June 25, 2019.

General

Central Registry: A former correction sergeant retired from his employment with DOCCS. At the time of his resignation, the member had a pending Notice of Discipline seeking a sixty (60) day penalty. DOCCS notified DCJS that the member has ceased to serve in its Agency with a pending NOD. As a result, DCJS sent the member a letter advising that his peace officer basic training certificate has been invalidated due to the notification by DOCCS. We sent a letter requesting the determination be revised in a manner that does not invalidate his peace officer basic training certificate. We maintain that he was not removed from his employment as DOCCS was only seeking a sixty (60) day penalty and never seeking his dismissal from service.

We spoke with DOCCS, and subsequent to our conversation, DOCCS has sent a letter to DCJS advising that the March 6, 2019, letter requesting that the withdrawal of the member's peace officer certification be reinstated and restore his certification to the registry. We contacted DCJS and was advised by email that DCJS has corrected the member's record.

Joint Labor Management Committee: The Joint Labor Management Committee facilitates the funds which are allocated under Article 13.1 (Tuition Reimbursement) and Article 25.6 (QWL) of the collective bargaining agreement. These funds have policies regarding applications, review, and expenditures. We have provided a review of each of these policies and model local bylaws regarding QWL/TACS.

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



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MAY 2019 LEGAL REPORT TO THE EXECUTIVE ASSEMBLY

This is our report for the month of May, 2019, regarding the recent developments in some of the cases and legal matters we are handling for NYSCOPBA. For the matters cited, we have described activity occurring since the last report and scheduled future activity.

Negotiations

Since the newly negotiated collective bargaining agreement was ratified by the NYSCOPBA membership on January 24, 2019, we have been working with GOER on the implementation of the agreement. All non-monetary terms of the agreement that do not require labor management agreements and/or meetings have been implemented. The monetary terms of the agreement require a legislative pay bill, which has since passed both Houses. We will work with GOER, the legislature, the Governor's office and the Comptroller to implement the monetary terms of the agreement as soon as possible.

Litigation

Statewide – Retiree Health Insurance Litigation (*NYSCOPBA v. State, et al.*, 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 U.S. 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 raise 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, 2019, 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. We have put together our Record on Appeal and are now working on drafting the supporting memorandum of law. All of our papers were filed by March 6, 2019.

[Member] v. NYSCOPBA and Michael Powers (U.S. District Court, Northern District of New York) (17-CV-937). During December, 2017, the member, a correction officer at Riverview Correction Facility, commenced this action alleging a number of constitution claims based on allegations that overtime was not distributed in a fair and non-discriminatory manner. Our Motion to dismiss was filed in January, 2018. The member opposed the Motion and moved for leave to file an Amended Complaint. We opposed the motion to amend on the grounds that the proposed amendments were futile. On March 22, 2019, the Court issued its Decision and Order which granted the Plaintiff's motion to amend. The Court then proceeded to dismiss the Plaintiff's Amended Complaint. All of the Plaintiff's Federal Claims against NYSCOPBA have been

dismissed and the Court has declined to exercise jurisdiction as to Plaintiff's State Law claims. Unless Plaintiff files a Notice of Appeal, this litigation is at an end. We have not received a Notice of Appeal, but it appears that the member has, or is attempting to, file a lawsuit on his State law claims in the Supreme Court, county of St. Lawrence. On April 22, 2019, we received a Notice of Judicial Assignment which means that the member filed a Request for Judicial Intervention ("RJ") in St. Lawrence County. On April 23, 2019, NYSCOPBA was served with Summons and Complaint in State court action commenced by the member. The Complaint has to be answered or moved against by May 13, 2019. We anticipate filing a motion to dismiss the Complaint.

Estate of Samuel D. Harrell v. DOCCS, et al (U.S. District Court for Southern District of New York, Index no. 1:15-cv-07065) [Fishkill CF]: On September 10, 2015, Diane Harrell, individually and as the Administrator of the Estate of Samuel D. Harrell, filed a lawsuit, index no. 1:15-cv-07065, in federal district court against numerous parties, including NYSCOPBA and certain unnamed agents and members of NYSCOPBA. The underlying Complaint alleges violations of Mr. Harrell's civil rights pursuant to 42 U.S.C. 1983, 42 U.S.C. 1985 (2), 42 U.S.C. 1985 (3), and 42 U.S.C. 1986. More specifically, while littered with speculative and conclusory statements and lacking in factual detail, the Complaint alleges that NYSCOPBA agents and members conspired to cover-up Mr. Harrell's death while he was an inmate at Fishkill Correctional Facility in New York State. The Complaint seeks both compensatory and punitive damages as well as attorney's fees, which are statutorily provided for in 42 U.S.C. 1983. The Complaint was later amended, but only to identify previously unknown defendants. A federal investigation occurred and no members of NYSCOPBA were indicted or charged with any wrongdoing in the federal investigation. The investigation did not result in any charges. NYSCOPBA moved for dismissal of the Complaint in its entirety on June 15, 2016. Because the amendment to the Complaint mooted the prior motion to dismiss, NYSCOPBA filed a motion to dismiss the Amended Complaint in August of 2018 and requested oral argument. NYSCOPBA denies all of the allegations and will vigorously defend against the claims. To date, NYSCOPBA's motion to dismiss is still pending and no oral argument date has been set. New York State and the other defendants have also moved to dismiss the Amended Complaint in its entirety.

[Member] v. DOCCS: This is another case involving a denial of two (2) years of Workers' Compensation leave based upon DOCCS' determining that the incident was not an assault. This is currently on appeal to the Appellate Division, Third Department, following dismissal of the petition by the Supreme Court Justice. Once the appeal was submitted, the member was granted Disability Retirement benefits (3/4 disability) due to his injury. These benefits are retroactive, meaning that there is no longer a financial remedy to be gained in this Article 78 on the question of one or two years of leave. We were required to notify the court that there was a potential mootness question. We submitted a letter noting that although the member has been made financially whole, that this matter should continue based upon exceptions to the mootness doctrine (likelihood of the issue to occur again and evade review, important question). The court will consider the mootness question following the submission of papers by the State on March 11, 2019 (with an opportunity for us to submit a reply). If the court does not dismiss this case as moot, but instead continues to review on the merits of the underlying question, we may get a positive decision which could help in other cases. We reviewed the paper submitted by the State on March 11, 2019 and then drafted and submitted a reply memorandum on March 21, 2019. The matter is now fully submitted and will be placed on the courts calendar for argument and decision.

[Member] (CON16-0177). On March 11, 2019, we commenced a CPLR Article 75 proceeding to compel arbitration in this grievance. This grievance involves a claim that the State violated Article 14 by not paying the grievant his accumulated vacation credits after he was terminated by the disciplinary arbitrator. The State has refused to arbitrate the case asserting that the claim should have been addressed by the disciplinary arbitrator. We contend that assertion is incorrect and this case should proceed to full arbitration immediately.

By way of background, on March 12, 2014, the member escorted inmate Raffia Mata to a cell in Greene CF's SHU-200, which was occupied by inmate Matthew Thornton. Once Matta was placed in the cell, the inmates fought. The State alleged that the officers conspired to have inmate Raffia placed in inmate Thornton's cell to inflict corporal punishment upon him. To cover up their misconduct, the State alleges that they created a false story for the investigators.

Arbitrator Butto found that the member was guilty of instigating an altercation by telling inmate Matta he was "going in with a real asshole;" and that the member was guilty of failing to provide sufficient care, custody, and control over both inmates. Based upon that evidence, the arbitrator found that "it is inconceivable that the member could not have noticed that an altercation was taking place while he was present on B-Gallery during the period from approximately 8:54 am to 8:59 am on March 12, 2014." Furthermore, he found that the member's failure to actively respond to the clear and repeated pleas for help by the inmate is inexcusable. Based upon the foregoing, Arbitrator Butto found that termination from service was appropriate, but that the suspension was not based upon probable cause and awarded him back pay and accruals for the period of suspension. The State has paid the member back wages, but not the value of the accruals.

After the State refused to pay the member the vacation accruals, he filed a grievance alleging a violation of Article 14. Article 14.1(e) of the Agreement provides that vacation credits may be accumulated up to a maximum of 40 days, provided, however, that in the event of death, retirement or separation from service, employees shall be compensated in cash for accrued and unused vacation credits up to a maximum of 30 days. As indicated, neither grievant was paid for the value of their vacation credits which were restored by the Arbitrator.

As the State has refused to arbitrate, we are now seeking to compel them to arbitrate. Where there is no substantial question whether a valid agreement was made or complied with, and the claim is not barred by time limitations, the court shall direct the parties to arbitrate. *CPLR* § 7503. The moving party has the burden to show a "clear and unequivocal" agreement to arbitrate the claim. *Gerling Global Reinsurance Corp. v. Home Ins. Co.*, 302 A.D.2d 118, 123 (1st Dep't 2002). Contrary to the State's rational for denying arbitration, the underlying grievance is not a re-examination of the disciplinary proceeding or the disciplinary award. Instead, the grievance requests payout in accordance with the terms of the Agreement. The State's responding papers are due June 7, 2019.

[Member] (Edgecombe Correctional Facility) v. DOCCS: 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. 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. On December 19, 2019, we received a Decision dismissing our Petition. We filed a Notice of Appeal on January 11, 2019. On April 9, 2019, our Record and Brief was filed in the Appellate Division, Third Department. The State's Brief is due on May 8, 2019.

[Member] v. New York State Justice Center: This matter is an Article 78 challenge to a Justice Center determination based upon legal arguments of *res judicata* and collateral estoppel. We argue that the Justice Center was bound by the favorable decision in the identical disciplinary matter. Our papers argue that the Justice Center decision must be dismissed based upon the disciplinary decision, or in the alternative, that the Justice Center decision was not based upon substantial evidence. As this matter involves a question of substantial evidence, it is before the Appellate Division, Third Department. We received the State's brief on February 25, 2019. The State's brief admits to some collateral estoppel (based upon a recent decision by the Third Department), but argues that one piece of the Justice Center charge is different and can still be sustained, as it was not specifically charged in the disciplinary matter.

[Member] (Ulster Correctional Facility) v. DOCCS (Index No. 00880-19): We filed an Article 78 proceeding on February 15, 2019, on behalf of the member, who was injured during a use of force on November 19, 2017. On that date, the member was the first responder to an inmate's violent assault on an officer. The inmate refused the member's direct orders to stop and get on the wall, and then proceeded to swing at the member, missing him. The member, along with the officer, proceeded to use body holds to take the combative inmate to the ground, during which time the member was injured. The inmate assaulted the member under both criminal and civil definitions of assault. DOCCS terminated the member's employment on November 21, 2018, after only one year of cumulative workers' compensation leave. The Article 78 petition challenges DOCCS' definition of 'assault' and requests that the court give the member a two-year leave of absence because he sustained injury as a result of an inmate assault. The State filed responding papers, and we filed a reply brief on March 21, 2019. The Article 78 return date was March 22, 2019. We now await a decision from the court.

[Member] (Five Points Correctional Facility) v. DOCCS: The member 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. Sergeant Walters 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. We filed an Article 78 Proceeding on December 16, 2018, with a return date of January 18, 2019. At the request of the Attorney General's Office this matter was adjourned to February 15, 2019. On April 5, 2019, we received the Decision and Judgment dismissing our Petition.

[Member] (Fishkill Correctional Facility) and NYSCOPBA v. NYS DOCCS: The member, in an arbitration, was found guilty of using excessive force and his employment was terminated. The Arbitrator found that the initial suspension was not for probable cause and ordered back pay for the period of suspension. The Arbitrator, however, provided that the back pay award was to be offset by the member's income during the period of suspension. We prepared a special proceeding seeking to vacate the arbitration award on the grounds that the Arbitrator exceeded her authority. The proceeding was filed on March 8, 2019, with a return date of May 1, 2019. At the request of the Attorney General's Office this matter has been adjourned to June 7, 2019.

[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] 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 Petitioner'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 served on November 8, 2018. We expect a decision soon.

Discipline

Interrogations: For the months of March and April, 2019, we represented ninety-eight (98) members who were interrogated by DOCCS.

Suspension Review Process: The new suspension review process contained in the most recent collective bargaining agreement is now effective. Since March 12, 2019, we have reviewed each suspension NOD to determine: (a) if it qualifies under the suspension review program; and (b) if it is a viable case to take to the Master Arbitrator to argue that on the face of the NOD, the grounds for the suspension have not been met. To date, we have requested suspension review for two suspension NODs.

In the first case, involving allegations of insubordination, the Arbitrator ruled that there was probable cause for suspension. In the second case, the member had been working during the period of allegations, and for a lengthy period after, so the arbitrator ruled that there was no probable cause for suspension and ordered the employee be placed back on the payroll.

Adirondack Correctional Facility: The NOD in this case alleged that the member engaged in, and was criminally charged with, forcible touching and endangering the welfare of a child. A

hearing in this matter was scheduled for April 17 and 18, 2019. Prior to the hearing in this matter, the member accepted a settlement offer.

Auburn Correctional Facility: The NOD alleges that the member participated in harassment and abuse of an inmate, including spraying a fire extinguisher in the inmate's cell, along with lying under oath at an interrogation. The NOD had been assigned to Arbitrator Timothy Taylor and was currently scheduled for a hearing. The member has since resigned.

Auburn Correctional Facility: This member, along with two other officers, is being accused of spraying a liquid fire extinguisher and wetting items in the inmate's cell, as well as going on the catwalk behind the cell and spraying a dry chemical agent in the cell to the vent. The member is also charged with other matters relating to the main allegation and giving a false and inaccurate statement to the DOCCS Office of Special Investigations. Arbitrator Samuel Butto has been selected as the arbitrator. Hearings were held on March 12, 13, and 27, 2019. At the conclusion of the case, NYSCOPBA made a motion to reinstate the member to the payroll. On April 17, 2019, we received an Interim Decision from the arbitrator ordering that the member be reinstated to the payroll. As a result, DOCCS ordered the member to return to duty at Auburn Correctional Facility. Closing briefs are due on May 17, 2019.

Auburn Correctional Facility: The officer in this NOD is accused of spraying an inmate with a fire extinguisher and participating in other abuse of the inmate. The NOD has been assigned to Arbitrator Timothy Taylor. Tentative hearing dates have been scheduled for May 1, 2, and 3 and June 5, 2019.

Bedford Hills Correctional Facility: The member received an NOD after being arrested, during a traffic stop, for resisting arrest and possession of marijuana. The member pled guilty to a Vehicle and Traffic Law violation. The member's arbitration is scheduled for June 17, 2019.

Bedford Hills Correctional Facility: The NOD alleges that the member was insubordinate towards a supervisor while on her post. The matter has been scheduled for a hearing on July 23, 2019, before Arbitrator Timothy Taylor.

Bedford Hills Correctional Facility: The member has received an NOD for having a sexual relationship with an inmate, maintaining a sexual relationship with a parolee, and failing to report that he had a prior relationship with an inmate. On April 23, 2019, we moved to dismiss the Charges relating to communicating with a parolee and having a sexual relationship with a parolee on the basis that these two charges are beyond the nine-month contractual limitation. DOCCS has taken the position that having sexual intercourse with a parolee is rape in the third degree. From our reading of the statute, it is not a crime for a corrections officer to have sex with a parolee. We have moved to dismiss these two Charges, as well as the Charge that the officer had sex with an inmate, on the grounds that the Charges lack the specificity required by the CBA.

Buffalo Psychiatric Center: The member received notices of discipline alleging, in relevant part, 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 sought termination of his employment. Arbitration days were held before Arbitrator Thomas Rinaldo on August 6 and 27, September 10, and October 1, 5 and 31, 2018. On February 13, 2019, Arbitrator Rinaldo issued his Opinion and Award finding the member guilty of the charges in the notices of discipline and terminating his employment. Arbitrator Rinaldo also determined that OMH's suspension of the member was proper.

Capital District DDSO: The NOD alleges that the member was charged with actions related to various crimes of stalking and trespassing. Once the criminal charges have been resolved, the matter may proceed to settlement negotiations or a hearing.

Clinton Correctional Facility: The member received a notice of discipline alleging that on or about March 2, 2019, he failed to immediately report to his supervisor that an inmate asked him to bring him in a 'sandwich bag,' which the member understood to mean drugs, and that the inmate informed the member that he needed to hire a private investigator to find the woman who testified against him. Additionally, the NOD alleges that the member engaged in inappropriate personal conversations with that inmate on a number of occasions in February 2019. DOCCS is seeking his dismissal from service and loss of any accrued annual leave. The expedited arbitration of this matter is scheduled for May 6 and 7, 2019, in Plattsburgh, NY, before Arbitrator Bruce Trachtenberg. The Union has submitted a motion to dismiss three of the five charges for failure to meet the specificity requirements provided by Article 8.2 (a) of the Agreement.

Coxsackie Correctional Facility: The NOD alleges that the member used racial and profane language while instigating a use of force on an inmate by tipping the inmate out of his wheelchair. Hearing days were held on October 16, December 5, 6, and 18, 2018, before Arbitrator James Cooper. The parties received the transcripts and submitted closing briefs by March 13, 2019. On April 30, 2019, we received the decision from Arbitrator Cooper, who found the member guilty of the charges and terminated his employment.

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. We filed a written Motion with Arbitrator seeking to dismiss the NOD because the State's primary witness had refused to testify. The State filed a response on January 11, 2019. On March 17, 2019, we received the Award from Arbitrator Campagna which dismissed the NOD and ordered that the member be reinstated with full back pay.

Downstate Correctional Facility: The member received a Notice of Discipline for failing to properly supervise a use of force, failing to report an excessive use of force and failing to report his own use of force. The expedited arbitration was held on March 11, 2018. Closing briefs were submitted on March 18, 2019. On March 26, 2019, we received an Award, from Arbitrator Mary

Crangle, finding the member not guilty of all charges, finding no probable cause for suspension, and ordering the member reinstated with all back pay and accruals.

Downstate Correctional Facility: This member was charged with initiating a physical confrontation with another employee by aggressively and/or intentionally bumping the employee as well as blowing a kiss at a female correction officer. Additionally, he was charged with leaving his post, as well as preparing a false and/or misleading memorandum to his supervisors. Hearings in this matter were held on January 30, March 18, and April 10, 2019, before Arbitrator Joel Douglas. Closing briefs are due on May 2, 2019.

Downstate Correctional Facility: The NOD in this case alleged that the member used excessive and/or unnecessary physical force on an inmate; used inappropriate, profane and/or racially charged language; and failed to accurately and/or completely document details of the use of force. An expedited disciplinary hearing in this matter was held on February 20, 2019. Briefs were submitted on February 27, 2019. On March 6, 2019, we received a decision from Arbitrator Taylor finding the member guilty of using excessive force but innocent of the other charges. The Arbitrator determined that termination was inappropriate, and instead ordered a three-month suspension.

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 his dismissal from service. Two days of arbitration were held on December 7, 2018, and March 8, 2019, in Fishkill, NY, before Arbitrator Lise Gelernter. The parties are submitting post-hearing briefs by April 19, 2019.

Eastern Correctional Facility: This member is accused of allegedly using excessive force when he was pat-frisking an inmate. The member has been charged with punching the inmate in the face without first utilizing lesser means of force. A hearing in this matter has been scheduled before Arbitrator Timothy Taylor on June 6, 2019.

Fishkill Correctional Facility: The NOD in this case alleged that the member was absent on twenty-two scheduled work days, resulting in fourteen occasions, seven of which were AWOL for failure to properly document the at-issue absences. A hearing in this matter was scheduled for March 14, 2019, before Arbitrator Battisti. Prior to the hearing, the member decided to accept a settlement.

Fishkill Correctional Facility: The officer in this NOD was charged criminally. Recently, the criminal charges against the member were dismissed with prejudice. The NOD may now proceed. If settlement negotiations are not positive, the NOD will be scheduled for arbitration.

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 await 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: 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. The member has a second NOD for failed drug test. The second NOD has now been scheduled for March 22, 2019. On March 22, 2019, the member submitted her resignation.

Fishkill Correctional Facility: This Sergeant is accused of falsely stating that restraints were placed on an inmate by an officer. The NOD has been assigned to Arbitrator David Lande. The member has since retired from State service.

Fishkill Correctional Facility: The NOD alleged that the member failed to properly report on circumstances regarding a cell extraction. The member has since resigned and taken employment with a municipal police department.

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°), 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.

Gouverneur Correctional Facility: The member received an NOD for making a racially insensitive post on his Facebook page and for lying at his interrogation. The arbitration is scheduled for July 12, 2019.

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 were filed on January 11, 2019. On February 7, 2019, we received the Arbitration Award which found the member guilty of interfering with the OSI Investigation. Appropriate Penalty was a six month suspension, but the back pay award is to be offset by other income. We are waiting for the member to provide us with an itemization of his income. On April 3, 2019, we provided John Shipley with proof of the member's outside income.

Great Meadow Correctional Facility: This NOD alleges using 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 first two days of hearings were held on December 5 and 6, 2018, before Arbitrator Timothy Taylor. The parties have scheduled a tour at Great Meadow Correctional Facility so that the arbitrator may see the pertinent areas of the facility which led to the issuance of the Notice of Discipline. Additional hearing dates were scheduled for March 25 and 26, 2019. Prior to the subsequent hearing dates, the member resigned.

Greene Correctional Facility: The NOD in this case alleged that on April 19, 2018, the member was found in the course of a traffic stop to be in possession of a controlled substance for which he did not have a prescription; the member was subsequently arrested for Criminal Possession of Controlled Substance in the 7th Degree and Operating a Motor Vehicle Impaired by Drugs in the 1st Degree. The criminal charges in this matter were resolved. A hearing was held on March 21, 2019, before Arbitrator Battisti. Post-hearing briefs were submitted on April 4, 2019. Arbitrator Battisti issued a decision finding the member guilty of the charges contained in the NOD and imposing the State's proposed penalty of termination.

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 member was charged with sleeping or having the appearance of sleeping while on duty at an outside hospital. He has been suspended. His case was scheduled for Expedited Disciplinary Arbitration on March 29, 2019, in front of Arbitrator Trachtenberg. Just prior to the hearing a settlement was reached in this matter.

Green Haven Correctional Facility: The member was suspended from duty and received a notice of discipline alleging that on or about February 3, 2019, he was found inattentive to duty giving the appearance of sleeping while watching an inmate Vassar Hospital. DOCCS was seeking dismissal from service. This matter was scheduled for expedited arbitration before Arbitrator Roger Rice on March 20, 2019. Prior to the arbitration, this matter was resolved for suspension until April 5, 2019, a \$5,000.00 fine to be paid \$200 per paid period, a 1-year DEP for same or similar conduct, and a 2-year prohibition on working outside hospital and transportation jobs.

Green Haven Correctional Facility: The NOD in this case alleges that on March 12, 2019, the member twice failed to comply with a lawful order given by supervisory staff. Specifically, the NOD states that the member was given two orders to test a green leafy substance and did not comply with those orders. An expedited arbitration in this matter is scheduled for April 29, 2019, before Arbitrator Rinaldo.

Griffin Laboratories, DOH: 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. A hearing was

scheduled before Arbitrator James Cooper on February 27, 2019. After hearing opening statements and recognizing that there was no issue of fact, Arbitrator Cooper discussed the matter with the parties. On March 21, 2019, he issued an Award finding that the member was guilty of the charges and the appropriate discipline was a four-week suspension carried out in the following manner: the member shall serve a three-week suspension with loss of pay and for which he shall not be eligible to use any accruals in lieu of the lost time; the Department shall hold one week in abeyance for one year from March 21, 2019, which shall be imposed only if the member engages in misconduct substantially similar to the conduct for which this penalty was imposed; and if the member engages in such misconduct during the one year held in abeyance, and the Department imposes same, the member may, at his discretion, use accrued leave credits in lieu of a loss of one week of pay.

Hudson Correctional Facility: This officer is charged with misconduct for allegedly being in possession and use of an illegal drug which was not properly prescribed by a physician or dentist. A urine sample provided to the facility on November 13, 2017, indicated a positive result for cocaine metabolites. A hearing in this matter was scheduled before Arbitrator Samuel Butto on April 4, 2018. Prior to the hearing, the member resigned for personal reasons effective March 6, 2019.

Manhattan Psychiatric Center: The member receive an NOD for failing to investigate an alleged sexual assault of a female SSO. The hearing is scheduled for May 23, 2019.

Manhattan Psychiatric Center: This member is charged with misconduct and/or incompetence for failure to properly investigate and assess an attempted assault of a fellow officer who was allegedly attacked by a patient. Immediately after learning that the officer had been attacked, the member is accused of directing that the fellow officer be involved in the transport to the NYPD precinct against her objection. A hearing has been scheduled before Arbitrator Dennis Campagna on May 9, 2019. Prior to the hearing, the member accepted a settlement offer.

Marcy Correctional Facility: The officer in this NOD was charged criminally for offering a false instrument (sick leave note). The criminal matter has been resolved and the member resigned his position.

Moriah Shock Incarceration Correctional Facility: The officer in this NOD was charged criminally. As a result of the resolution of the criminal matter the member has been terminated by DOCCS pursuant to Section 30 (1) of the NYS Public Officers Law.

New York State Psychiatric Institute: 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.

Rochester Psychiatric Center: Two days of hearing are scheduled for April 9 and April 10, 2019, in this non-suspension NOD where the member is alleged to have failed to properly safeguard and store his bullet proof vest. The matter settled just prior to the hearing.

Shawangunk Correctional Facility: The NOD alleges that the member was allegedly insubordinate when he exited the facility prior to an all-staff frisk. The NOD also alleges that the member attempted to enter the facility with materials from a white supremacist group. This is an expedited disciplinary arbitration assigned to Arbitrator Larry Dais. Day one of the arbitration took place on March 22, 2019, and day two will take place at a date to be determined in May 2019.

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. The first day of hearing was held on January 9, 2019, before Arbitrator David Lande. At the conclusion of DOCCS' case, we made a motion to lift the suspension and return the member to duty. By Interim Decision dated January 9, 2019, Arbitrator Lande granted our motion and Grievant has returned to duty at Sing Sing Correctional Facility. A second day of hearing was held on April 10, 2019. Closing briefs are to be submitted to Arbitrator Lande on May 10, 2019.

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

Taconic Correctional Facility: The member received an NOD for making telephonic contacts with two parolees. We have a tentative hearing date of June 11, 2019. We believe that Charge 1 is timed out and a portion of Charge 2 is timed out. DOCCS has taken the position that the officer's actions constitute the crime of official misconduct. We have made a written motion to dismiss Charges 1 and 2 on the grounds that these charges are barred by the nine-month limitation and on the basis that the Charges lack the specificity required by Section 6.2 (a) of the CBA.

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.

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. The administrative hearing of this matter is scheduled for July 12, 2019, in Brooklyn, before ALJ Susanna Requets.

Bronx Psychiatric Center: This Category 3 report of deliberate inappropriate use of restraints alleges that the member conducted an unwarranted restraint with excessive force improper technique, which included slamming the service recipient into a wall, scratching and/or striking him. We have submitted a timely request for amendment and await and response from the Justice Center.

Bronx Psychiatric Center: This Category 3 report of deliberate inappropriate use of restraints alleges that the member conducted an unwarranted restraint with excessive force improper technique, which included slamming the service recipient into a wall, scratching and/or striking him. We have submitted a timely request for amendment and await a response from the Justice Center.

Kirby Psychiatric Center: This Category 3 report of neglect alleges that the member committed neglect on November 2, 2018, when he directed derogatory statements toward a service recipient. We have submitted a request for amendment and await a response.

Kirby Psychiatric Center: This Category 3 report of physical abuse, neglect 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. A pre-hearing conference was held on March 26, 2019, scheduling the hearing of this matter for May 23, 2019. Prior to the hearing date, the member agreed to withdraw her request for a hearing and in exchange, the Justice Center agreed to unsubstantiate Allegation 2 of the Report, which alleged physical abuse and neglect.

Mid-Hudson Forensic Psychiatric Center: This Category 2 report of physical abuse (deliberate inappropriate use of restraints) alleges that on October 21, 2017, the member struck a service recipient. The matter was appealed and a pre-hearing conference was held with the Justice Center in order to schedule a hearing. The matter has been scheduled for a consolidated hearing on June 19, 2019, before ALJ Brian Hughes.

Mid-Hudson Forensic Psychiatric Center: A hearing in this combined Justice Center case involving two SHTAs who face Category 3 allegations has been re-scheduled for May 10, 2019. We have received all of the required documents and video evidence in advance of this hearing for review. The hearing had been adjourned due to a Justice Center scheduling issue. A settlement offer for each member has also been conveyed and declined.

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 administrative hearing of this matter was scheduled for February 27, 2019, in Poughkeepsie, NY. Prior to the hearing date, the member withdrew his request for a hearing, and in exchange, the Justice Center unsubstantiated the Category 2 physical abuse allegation and reduced the Category 2 abuse (deliberate inappropriate use of restraints) allegation to a Category 3 allegation. The Report, as modified, will be maintained on the VPCR for five years, and then it will be sealed.

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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 Board upheld the ALJ's decision. The State has since served on NYSCOPBA a petition for an Article 78 special proceeding to challenge PERB's determination. We submitted an Answer to this petition on February 22, 2019. The matter raises a question of substantial evidence, so it will be transferred to the Appellate Division and briefs will be submitted at that time.

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 (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 scheduled a phone conference to further discuss scheduling and the matter. The matter was heard on November 7 and 28, 2018, before Judge Reich. Judge Reich has since left PERB and the matter was reassigned to Judge Nancy Burritt. The parties rested, have received transcripts, and submitted closing briefs. We await the decision.

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 – DOCCS Light Duty (U-36658): On January 11, 2019, we attended a pre-hearing conference at PERB before ALJ Mitchell to address this Improper Practice charge filed when DOCCS began assigning light duty officers to two new types of posts, construction and one on one watches. This IP alleges that these new posts change the long-standing parameters for light duty post (ie – counted toward minimum staffing – not an extra). At the conference we explained the arguments in our case. DOCCS agreed to review our arguments now that they better understood them and to see if any potential settlement could be reached. The matter has been placed on hold.

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 parties attended a pre-hearing conference with ALJ Ellen Mitchell on January 31, 2019, at PERB in Albany. The matter has been placed on hold while DOCCS endeavors to provide to the Union additional materials.

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 was held at PERB on March 28, 2019. ALJ Ellen Mitchell put the matter on a 30-day hold to either resolve or set a hearing date.

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 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 SHTAs’ 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 but has since been placed on hold. The facility is in the process of negotiating with both NYSCOPBA and CSEA regarding resolution of this matter.

Central New York Psychiatric Center (U-36732): This office filed an Improper Practice Charge in response to CNYPC’s change to its locker and lock policy for employees. The new policy forbids the use of employee-owned locks on lockers, creates a locker application process, and places further requirements on the employees. The matter is scheduled for a pre-hearing

conference on April 8, 2019, at PERB in Albany, NY. CNYPC has since remedied its locker policy and provided NYSCOPBA with its own office at the facility. The IP has been withdrawn.

Downstate Correctional Facility (U-32691): On April 15, 2019, we executed a Stipulation of Settlement in this matter. The Stipulation provided that NYSCOPBA will withdraw this improper practice charge, and DOCCS will issue revised Directive 2208A (Workers' Compensation Benefits) within fourteen days. The revised directive implements changes negotiated by NYSCOPBA's Workers' Compensation Committee over the past several years. Changes to the directive, include, but are not limited to: medical documentation for long-term absences will be required every 30 days (or 45 days with facility approval); DOCCS will notify employees in writing of untimely/ nonconforming medical documentation and provide seven days to supply conforming documentation before placing said employee in AWOL status; and implementing a new, separate form for pre-approved workers' compensation appointments.

Gouverneur Correctional Facility (U-33490): On April 15, 2019, we executed a Stipulation of Settlement in this matter. The Stipulation provided that NYSCOPBA will withdraw this improper practice charge, and DOCCS will issue revised Directive 2208A (Workers' Compensation Benefits) within fourteen days. The revised directive implements changes negotiated by NYSCOPBA's Workers' Compensation Committee over the past several years. Changes to the directive, include, but are not limited to: medical documentation for long-term absences will be required every 30 days (or 45 days with facility approval); DOCCS will notify employees in writing of untimely/ nonconforming medical documentation and provide seven days to supply conforming documentation before placing said employee in AWOL status; and implementing a new, separate form for pre-approved workers' compensation appointments.

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.

Otisville Correctional Facility (U-36770): This office filed an Improper Practice Charge alleging retaliation and interference against various supervisory staff at Otisville CF for discouraging NYSCOPBA members from voting for certain stewards. A pre-hearing conference before ALJ William Weisblatt took place on April 25, 2019, at PERB in Albany. ALJ Weisblatt directed NYSCOPBA to submit an offer of proof on certain portions of the charge, in order to specify the connection between various instances of retaliation. ALJ Weisblatt directed the State to issue an amended Answer after NYSCOPBA submits its offer of proof. This office will submit the necessary paperwork on NYSCOPBA's behalf.

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 were due on January 18, 2019. The parties await the response of the Judge. The parties have agreed to a conditional deferral of the matter to the parties' grievance procedure. The Judge issued a decision granting the conditional deferral and the matter will now be processed as a grievance.

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 thirty-one (31) requests from NYSCOPBA's grievance department to appeal contract grievances to arbitration during the months of March and April, 2019.

Since the last legal report, we held 3 expedited arbitrations, held 12 summary proceedings, withdrew 11 grievances, and triaged 100 grievances.

We received one significant arbitration decision. In that case, grievant worked the overnight shift (10pm-6am). During his regular shift, facility management informed the grievant that he was mandated for overtime on the daytime shift, starting at 8am. The member was directed to punch out at 6am, leave the facility grounds, but return at 8am for his mandated shift. The member returned, but released him at 9am, and paid him for one hour of overtime. We argued that this was a recall and he should be paid for 4 hours. The arbitrator found that staffing shortfalls that are filled during a shift cannot be considered as previously "scheduled." Thus, the arbitrator sustained the grievance and awarded the additional (3) hours.

Retirement

Coxsackie Correctional Facility: This is a disability retirement matter. The Applicant's physician testified on February 14, 2018. The member testified on September 14, 2018. The State's doctor's testimony has been scheduled for July 22, 2019.

Downstate Correctional Facility: This is a disability retirement appeal. The member suffered a right leg amputation when a knee replacement became infected. The member was given a reasonable accommodation with a perimeter patrol vehicle which was modified to accommodate his disability. The Retirement System found that he was not permanently disabled from performing his duties. The Systems appears to have overlooked the fact that the member was required to work mandatory overtime. There is also an issue as to act of an inmate causation. The first hearing was held on January 8, 2019, at which Dr. Scott Russinoff testified. The hearing has been continued of an additional medical witness and for the member's testimony.

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. Our Article 78 was filed on January 16, 2019, with a return date of February 15, 2019. On April 4, 2019, we received the Order of Transfer to the Appellate Division, Third Department.

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 a 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 were filed on February 1, 2019.

Orleans Correction Facility: This a disability retirement appeal. The issue is whether the member is permanently disabled for performing the duties of a correction officer. The member testified on December 12, 2018. The matter has been continued for additional medical proof.

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. The testimony of the State's doctor is scheduled for July 18, 2019.

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 a witness list for the hearing and are awaiting a hearing date. Recently we were informed that a hearing will not be scheduled until late spring or summer.

Workers' Compensation

Workers' Compensation Discrimination: On March 19, 2019, we received a decision affirming the Law Judge's ruling which denied our claim. Although the Board found that the compilation of the list to track Workers' Compensation and sick time usage was improper, the Board accepted the management's explanation that there were other factors used to make promotion

determinations, such as seniority date, performance, leadership quality, patient interaction, test scores and interview scores.

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. Therefore, the Board found that there was no violation of the statute.

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. In the present case, as indicated in the "scorecard" the three most recent promotees had the lowest workers' compensation days used since December 2015.

Employee Health Services

Green Haven Correctional Facility: The member was previously found unfit for duty following an Employee Health Services exam which occurred in May, 2018 based upon a request for light duty and subsequent return to full duty. The member filed her own appeal to this determination and she also submitted a subsequent return to work note, which led to a new exam and a return to duty on July 1, 2018. When she was contacted by DOCCS' regarding her initial appeal to the unfitness determination, she contacted our office for representation. We reviewed the medical documentation in the EHS file and discussed the hearing process with the member. A hearing was scheduled for March 1, 2019. Following our review of the documents and the fact that the member did not have a physician who was willing to testify on her behalf, the member chose to withdraw her request for a hearing.

General

Taconic Correctional Facility: We provided a memorandum to the Board recommending that an Article 78 proceeding is filed for the member who was terminated pursuant to Civil Service Law Section 71 after one year of workers' compensation leave when we believe she should be entitled to two years based upon an assault.

Time off to take a Civil Service Exam: On April 23, 2019, we provided a memorandum to the Executive Board regarding the applicable Civil Service Regulations and Collective Bargaining provisions with respect to paid time off to take a civil service examination. This was in response to a question regarding this issue which was raised at the last Executive Assembly.

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



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**MARCH 2019 LEGAL REPORT
TO THE EXECUTIVE ASSEMBLY**

This is our report for the month of March, 2019, regarding the recent developments in some of the cases and legal matters we are handling for NYSCOPBA. For the matters cited, we have described activity occurring since the last report and scheduled future activity.

Negotiations

We have been working with the State (through GOER) to implement the collective bargaining agreement ratified by NYSCOPBA's membership on January 24, 2019. We have provided NYSCOPBA's Executive Board with updates as the agreement is implemented. We have negotiated terms for the implementation of the new Suspension Review process. We are working with the State to provide the Legislature with a pay bill to implement the monetary terms of the agreement. We are continuing to work toward the full implementation of the agreement.

Litigation

Estate of Samuel D. Harrell v. DOCCS, et al (U.S. District Court for Southern District of New York, Index no. 1:15-cv-07065) [Fishkill CF]: On September 10, 2015, Diane Harrell, individually and as the Administrator of the Estate of Samuel D. Harrell, filed a lawsuit, index no. 1:15-cv-07065, in federal district court against numerous parties, including NYSCOPBA and certain unnamed agents and members of NYSCOPBA. The underlying Complaint alleges violations of Mr. Harrell's civil rights pursuant to 42 U.S.C. 1983, 42 U.S.C. 1985 (2), 42 U.S.C. 1985 (3), and 42 U.S.C. 1986. More specifically, while littered with speculative and conclusory statements and lacking in factual detail, the Complaint alleges that NYSCOPBA agents and members conspired to cover-up Mr. Harrell's death while he was an inmate at Fishkill Correctional Facility in New York State. The Complaint seeks both compensatory and punitive damages as well as attorney's fees, which are statutorily provided for in 42 U.S.C. 1983. The Complaint was later amended, but only to identify previously unknown defendants. A federal investigation occurred and no members of NYSCOPBA were indicted or charged with any wrongdoing in the federal investigation. The investigation did not result in any charges. NYSCOPBA moved for dismissal of the Complaint in its entirety on June 15, 2016. Because the amendment to the Complaint mooted the prior motion to dismiss, NYSCOPBA filed a motion to dismiss the Amended Complaint in August of 2018 and requested oral argument. NYSCOPBA denies all of the allegations and will vigorously defend against the claims. To date, NYSCOPBA's motion to dismiss is still pending and no oral argument date has been set. New York State and the other defendants have also moved to dismiss the Amended Complaint in its entirety.

Statewide – Retiree Health Insurance Litigation (NYSCOPBA v. State, et al., 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 U.S. 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 raise 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, 2019, 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. We have put together our Record on Appeal and are now working on drafting the supporting memorandum of law. All of our papers must be filed on March 6, 2019.

[Member] v. State Department of Civil Service (Appeal of Civil Service Department Determination): On February 15, 2019, we received a decision from the New York State Civil Service Commission denying our application for disabled veteran's points for the member. We filed a complaint with the Civil Service Department challenging a determination denying disabled veteran credits to the member, a U.S. Marine Corps veteran, for use on the Correction Lieutenant test. Specifically, we challenged the Department's decision to use the DVA's retroactive date (November 26, 2013) instead of the date of determination (November 27, 2015), and by doing so, denied the member disabled veteran's points toward the lieutenant's examination. The complaint was denied at the Department level and we appealed to the Civil Service Commission. The Commission affirmed the lower ruling denying the additional points. In making the argument, we relied upon a recent amendment to the New York Constitution which provides an exception to the one time use rule for veteran's credits, "except where a member has been appointed or promoted from an eligible list on which he or she was allowed additional credit for military service and subsequent to such appointment he or she is *disabled as provided in this section*, such member shall be entitled to ten points additional credit less the number of points of additional credit allowed for the prior appointment." (Emphasis added). The Commission noted that Civil Service Law section 85 provides that the date of the disability is the date assigned by the DVA. In this case, the date assigned by the DVA was November 2013, which the Commission found to govern the calculation for additional credit. This matter should be concluded now. It is unlikely that a reviewing court would find the Commission's determination arbitrary and/or capricious. Moreover, the member has been promoted to Lt. based upon his test score without the additional points, making the matter moot.

[Member] v. DOCCS: This is another case involving a denial of two (2) years of Workers' Compensation leave based upon DOCCS' determining that the incident was not an assault. This is currently on appeal to the Appellate Division, Third Department, following dismissal of the petition by the Supreme Court Justice. Once the appeal was submitted, the member was granted Disability Retirement benefits (3/4 disability) due to his injury. These benefits are retroactive, meaning that there is no longer a financial remedy to be gained in this Article 78 on the question of one or two years of leave. We were required to notify the court that there was a potential mootness question. We submitted a letter noting that although the member has been made financially whole, that this matter should continue based upon exceptions to the mootness doctrine (likelihood of the issue to occur again and evade review, important question). The court will consider the mootness question following the submission of papers by the State on March 11, 2019 (with an opportunity for us to submit a reply). If the case is dismissed as moot, there will be no negative effects for the member, as it cannot negatively impact the disability retirement benefits

he is now receiving. If the court does not dismiss this case as moot, but instead continues to review on the merits of the underlying question, we may get a positive decision which could help in other cases.

[Member] (Edgecombe Correctional Facility) v. DOCCS: 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 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. 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. On December 19, 2019, we received a Decision dismissing our Petition. We filed a Notice of Appeal on January 11, 2019.

[Member] v. New York State Justice Center: This matter is an Article 78 challenge to a Justice Center determination based upon legal arguments of *res judicata* and collateral estoppel. We argue that the Justice Center was bound by the favorable decision in the identical disciplinary matter. Our papers argue that the Justice Center decision must be dismissed based upon the disciplinary decision, or in the alternative, that the Justice Center decision was not based upon substantial evidence. As this matter involves a question of substantial evidence, it is before the Appellate Division, Third Department. We received the State's brief on February 25, 2019. The State's brief admits to some collateral estoppel (based upon a recent decision by the Third Department), but argues that one piece of the Justice Center charge is different and can still be sustained, as it was not specifically charged in the disciplinary matter. We must submit a reply to this argument in 10 days.

[Member] (Five Points Correctional Facility) v. DOCCS: The member 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 set his mattress on fire. The inmate was given orders to move to the back of his cell which he refused. Sergeant Walters 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. We filed an Article 78 Proceeding on December 16, 2018, with a return date of January 18, 2019. At the request of the Attorney General's Office this matter has been adjourned to February 15, 2019. We are waiting for a decision.

[Member] (Fishkill Correctional Facility) and NYSCOPBA v. NYS DOCCS: At arbitration, the member was found guilty of using excessive force and his employment was terminated. The Arbitrator found that the initial suspension was not for probable cause and ordered back pay for the period of suspension. The Arbitrator, however, provided that the back pay award was to be offset by the member's income during the period of suspension. We are preparing a special proceeding seeking to vacate the arbitration award on the grounds that the Arbitrator exceeded her authority. The proceeding must be filed by March 8, 2019.

[Member] (Clinton Correctional Facility) v. NYS DOCCS: We received a favorable decision on December 28, 2018, in this Article 78 matter filed on behalf of the member, who was terminated after one year of workers' compensation leave when we believe he should be entitled to two years of leave because he was "assaulted." As you know, under Civil Service Law, the term "assault" is not specifically defined. DOCCS has recently been taking the position that an injury during a use of force is not an assault because it is not a specific intentional act by an inmate against the officer. We disagree.

In this case, Acting Justice Ferreira determined that based on the specific facts of the incident (including continued resistance by the inmate during the use of force), as well as the indications on DOCCS' own paperwork (it was labeled "assault") that DOCCS determination that it was not an assault was irrational. The Judge did not rule on our argument that a specific penal law assault definition should apply, but instead just ruled based on the individual facts of this case.

We immediately filed the decision and served the AG's office Notice of Entry (as required). If the State is going to appeal, we will be served a Notice within 30 days (35 with mailing). This date is almost past. If no Notice of Appeal is received in a few more days, we will contact the AG's officer regarding implementation of the decision. Because the member was already out of accruals and sick leave at half pay at his one year termination, even if re-instated, he would not be receiving pay (but it would help with health insurance). He is not medically able to work yet anyway and has filed for disability retirement. But a positive decision does keep him technically employed (just on a LWOP status) and helps with health insurance.

[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 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, 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. On January 16, 2019, we received a decision dismissing our Article 78 Petition. We filed our Notice of Appeal on February 1, 2019. On February 4, 2019, we learned that the member received his inmate-related disability retirement and we will withdraw our appeal.

[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 served on November 8, 2018. We expect a decision in March 2019.

Discipline

Interrogations: For the months of January and February, 2019, we represented forty-three (43) members who were interrogated by DOCCS.

Auburn Correctional Facility: The NOD alleges that the member participated in harassment and abuse of an inmate, including spraying a fire extinguisher in the inmate's cell, along with lying under oath at an interrogation. The NOD has been assigned to Arbitrator Timothy Taylor and is currently schedule for a hearing on May 1, 2, 4, and June 4, 5, and 6, 2019.

Auburn Correctional Facility: This member is being accused, along with two other members, of spraying a liquid fire extinguisher and wetting items in the inmate's cell, as well as going on the catwalk behind the cell and spraying a dry chemical agent in the cell to the vent. The member is also charged with other matters relating to the main allegation and giving a false and inaccurate statement to the DOCCS Office of Special Investigations. Arbitrator Samuel Butto has been selected as the arbitrator. Hearings are scheduled for March 12 and 13, 2019.

Auburn Correctional Facility: The NOD in this case alleges that the member engaged in threatening or abusive language or gestures while on duty. An expedited disciplinary hearing was scheduled for March 4, 2019. The member has submitted his retirement papers, and the hearing has been adjourned in contemplation of his retirement.

Auburn Correctional Facility: The officer in this NOD is accused of spraying an inmate with a fire extinguisher and participating in other abuse of the inmate. The NOD has been assigned to Arbitrator Timothy Taylor. Tentative hearing dates have been scheduled for May 1, 2, and 3 and June 4, 5, and 6, 2019.

Bare Hill Correctional Facility: This NOD was for allegations of using improper racial language to inmates. Hearing dates were held before Arbitrator Edward Battisti on July 11 and 12 and October 3 and 4, 2018. Closing briefs were submitted. An Arbitration Opinion and Award dated

January 7, 2019 found the member guilty of the allegations in the NOD and dismissed him from State service.

Bedford Hills Correctional Facility: The member received a Notice of Discipline for inappropriately interacting with inmates. The expedited arbitration is scheduled for March 1, 2019.

Bedford Hills Correctional Facility: The NOD in this case alleged 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 were submitted on December 20, 2018. On January 12, 2019, we received a decision from Arbitrator Taylor dismissing the NOD in this case. Arbitrator Taylor found, in short, that the State had not met its burden of proving that the member assaulted the alleged victim. The Arbitrator ordered that the member be reinstated immediately and that he should receive back pay to the date of his suspension on June 15, 2017.

Bedford Hills Correctional Facility: The NOD alleges that the member drove recklessly, causing an accident which resulted in the death of a pedestrian. The member received criminal charges, lost at trial, served sixteen (16) days in prison, appealed her criminal conviction, and won on appeal. Therefore, the member is not guilty of the criminal conduct. The matter was scheduled for a hearing on February 21, 2019, before Arbitrator Joel Douglas. The matter has since been settled.

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 have submitted closing briefs and await a decision.

Capital District DDSO: The NOD alleges that the member was charged with actions related to various crimes of stalking and trespassing. Once the criminal charges have been resolved, the matter may proceed to settlement negotiations or a hearing.

Clinton Correctional Facility: The member received an NOD for failing to conduct a proper Master Count in the Clinton Annex Tailor Shop when he was working vacation relief for the bid officer. The expedited arbitration was held on January 3 and 4, 2019. Closing Briefs were filed on January 22, 2019. On February 1, 2019, we received the Arbitration Award. The Award found the member guilty of Charge 1 and 3 and held that a six-month suspension was the appropriate penalty.

Coxsackie Correctional Facility: The NOD in this case alleged that on April 30, 2018, the member operated a motor vehicle while intoxicated. The member was arrested and charged with two felonies. After the criminal charges in this case were resolved, the member accepted a settlement offer.

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 took place on December 18, 2018. The parties have received the transcripts and closing briefs are due March 13, 2019.

Cultural Educational Center – Albany, NY: This member has received three Notices of Discipline involving his conduct at the New York State Education Department. 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. Prior to the hearing, on February 8, 2019, all three matters were resolved in a Settlement Agreement.

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. We filed a written Motion with the Arbitrator seeking to dismiss the NOD because the State's primary witness had refused to testify. The Stated filed a response on January 11, 2019. We are waiting for a decision on our Motion.

Downstate Correctional Facility: The member has received a notice of discipline for failing to properly supervise a use of force and failing to report an excessive use of force. The expedited arbitration is scheduled for March 11, 2018.

Downstate Correctional Facility: The member was charged with failing to submit an accurate count slip. He was also suspended. His case was scheduled for expedited disciplinary arbitration before Arbitrator Butto on February 27, 2019. Prior to proceeding with the arbitration, the member was offered a settlement agreement, which he chose to accept. The member has already returned to duty.

Downstate Correctional Facility: The NOD in this case alleges that the member used excessive and/or unnecessary physical force on an inmate; used inappropriate, profane and/or racially charged language; and failed to accurately and/or completely document details of the use of force. An expedited disciplinary hearing in this matter was held on February 20, 2019. Briefs are due on February 27, 2018.

Downstate Correctional Facility: This member was charged on December 31, 2018, with initiating a physical confrontation with another employee in violation of DOCCS Rules and Regulations as well as the Workplace Violence Prevention Program, including aggressively and/or intentionally bumping the member as well as throwing a kiss at a female correction officer.

Additionally, he was charged with leaving his post as well as preparing a false and/or misleading memorandum to his supervisors. A hearing in this matter was held on January 30, 2019, before Arbitrator Joel Douglas. A second hearing date has been tentatively scheduled for March 18, 2019 pending the availability of Arbitrator Douglas at the Hilton Garden Inn, Fishkill, New York.

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. Day one of arbitration took place on December 7, 2018, in Fishkill, NY, before Arbitrator Lise Gelernter. Day two of arbitration is scheduled for March 8, 2019.

Fishkill Correctional Facility: The NOD in this case alleges that the member was absent on twenty-two scheduled work days, resulting in fourteen occasions, seven of which were AWOL for failure to properly document the at-issue absences. A hearing in this matter has been scheduled for March 14, 2019, before Arbitrator Battisti.

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: The NOD in this case alleged that the member made false or inaccurate statements and/or reports when he identified another member as the staff member who placed mechanical restraints on an inmate, and when he reported that the inmate was "fishing" contraband. A hearing was scheduled for January 23, 2019, before Arbitrator Gelernter. The member accepted a settlement offer prior to the hearing in this matter.

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. The member has a second NOD for failed drug test. The second NOD has now been scheduled for March 22, 2019.

Fishkill Correctional Facility: This Sergeant 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. 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. The arbitrator found the member guilty of the charges but determined that the State did not have probable cause to suspend Officer Rodriguez without pay. Arbitrator Gelernter awarded that DOCCS shall provide him back pay and credit for any accruals or other benefits he lost as a result of being suspended from March 7, 2017, to the date of this award, December 10, 2018, minus any earnings the member received from another job or from any work-related insurance, such as unemployment insurance or Workers' Compensation insurance, during that period. We are preparing a Notice of Petition and Petition seeking to vacate the portion of the back pay award.

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°), 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 were filed on January 11, 2019. On February 7, 2019, we received the Arbitration Award which found the member guilty of interfering with the OSI Investigation. Appropriate Penalty was a six month suspension, but the back pay award is to be offset by other income. We are waiting for the member to provide us with an itemization of his income.

Great Meadow Correctional Facility: This NOD was for failing to report another officer's alleged excessive use of force and providing false information. Hearing dates were held before Arbitrator Edward Battisti on October 11, 12, and 24, 2018. Closing Briefs were served on December 21, 2018. An Arbitration Opinion and Award dated January 14, 2019, found the member not guilty of all of the charges in the NOD. The award held the DOCCS did not have probable cause to suspend the member on February 9, 2018. The member was returned to work and made whole for all pay, benefits, and accruals for the period from February 6, 2018, to his return to work.

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 about lying when he stated that he passed his assigned OC Spray to another member, were being withdrawn by DOCCS. The remaining charge alleges that the member withheld the name of staff that where physically restraining Inmate Bell, withheld information as to what her 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. On December 17, 2019, we received the Award from Arbitrator Taylor, which found the member guilty and terminated his employment.

Great Meadow Correctional Facility: This NOD alleges using 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 first two days of hearings were held on December 5 and 6, 2018, before Arbitrator Timothy Taylor. The parties have scheduled a tour at Great Meadow Correctional Facility so that the arbitrator may see the pertinent areas of the facility which led to the issuance of the Notice of Discipline. Additional hearing dates have also been scheduled for March 25 and 26, 2019.

Great Meadow Correctional Facility: The NOD in this case alleged 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 were due February 4, 2019. Prior to the due date for briefs, the member resigned his position with DOCCS in anticipation of retiring from a civilian item.

Great Meadow Correctional Facility: We submitted the post-hearing brief on February 4, 2019. We expect a decision on or about March 1, 2019.

Greene Correctional Facility: The NOD in this case alleges that on April 19, 2018, the member was found in the course of a traffic stop to be in possession of a controlled substance for which he did not have a prescription; the member was subsequently arrested for Criminal Possession of Controlled Substance in the 7th Degree and Operating a Motor Vehicle Impaired by Drugs in the 1st Degree. The criminal charges in this matter have since been resolved. A hearing in this matter has been scheduled for March 21 and 22, 2019, before Arbitrator Battisti.

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 member was charged with sleeping or the appearance of sleeping while on duty at an outside hospital. He has been suspended. His case is scheduled for Expedited Disciplinary Arbitration on March 15, 2019, before Arbitrator Joel Douglas. A settlement offer has been presented.

Griffin Laboratories, DOH: 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. A hearing has been scheduled before Arbitrator James Cooper on February 27, 2019.

Hudson Correctional Facility: This officer is charged with misconduct for allegedly being in possession and use of an illegal drug which was not properly prescribed by a physician or dentist. A urine sample provided to the facility on November 13, 2017 indicated a positive result for cocaine metabolites. A hearing in this matter has been scheduled before Arbitrator Samuel Butto on April 4, 2018.

Marcy Correctional Facility: The officer in this NOD was charged criminally for offering a false instrument (sick leave note). The criminal matter has been resolved and the NOD is scheduled before Arbitrator Edward Battisti on April 9 and 10, 2019.

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 January 11, 2019, and was settled on January 11.

NYS Department of Education: The member in this NOD was charged with numerous allegations of disrespectful behavior to supervisors and insubordination. The NOD was assigned to Arbitrator Bruce Trachtenberg and was scheduled to hearing dates on January 24 and 25, 2019. Prior to the hearing, the NOD was settled.

New York State Psychiatric Institute: The NOD in this case alleged that the member was excessively late for work on twelve occasions and had unscheduled absences on six occasions. The member accepted a settlement offer before a hearing in this matter was scheduled.

New York State Psychiatric Institute: In this NOD, the member 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: 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. The first day of hearing was held on January 9, 2019, before Arbitrator David Lande. At the conclusion of DOCCS' case, we made a motion that Arbitrator Lande should lift the suspension and return the member to duty. By Interim

Decision dated January 9, 2019, Arbitrator Lande granted our motion and Grievant has returned to duty at Sing Sing Correctional Facility. A second day of hearing has been scheduled for April 10, 2019.

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

Ulster Correctional Facility: The NOD alleged various threats and acts of violence against family, which resulted in criminal charges. We had two days of hearing scheduled for January 30–31, 2019, at Arbitrator David Lande’s office. During the hearing, the member resigned from service.

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 member 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

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 30th and 31st, 2019, in Poughkeepsie, NY. Prior to the hearing date, the member withdrew her request for a hearing, and in exchange, the Justice Center immediately sealed the report against her.

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 was scheduled for January 30th and 31st, 2019, in Poughkeepsie, NY. Prior to the hearing date, the member withdrew his request for a hearing, and in exchange, the Justice Center immediately sealed the report against him.

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 was scheduled for January 30th and 31st, 2019, in Poughkeepsie, NY. Prior to the hearing date, the member withdrew his request for a hearing, and in exchange, the Justice Center immediately sealed the report against him.

Mid-Hudson Forensic Psychiatric Center: This Category 2 report of physical abuse (deliberate inappropriate use of restraints) alleges that on October 21, 2017, the member struck a service recipient. The matter was appealed and we await a pre-hearing conference with the Justice Center in order to schedule a hearing or resolve the matter.

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 administrative hearing of this matter was scheduled for February 27, 2019, in Poughkeepsie, NY. Prior to the hearing date, the member withdrew his request for a hearing, and in exchange, the Justice Center unsubstantiated the Category 2 physical abuse allegation and reduced the Category 2 abuse (deliberate inappropriate use of restraints) allegation to a Category 3 allegation. The Report, as modified, will be maintained on the VPCR for five years, and then it will be sealed.

Mid-Hudson Forensic Psychiatric Center: A pre-hearing telephone conference regarding these two cases was held on January 22, 2019. Prior to the conference we reviewed the investigative report relative to the at-issue incident and spoke with each of the members. No offer was made during the conference. The Justice Center has been directed to turn over the video of the incident. The hearing is currently scheduled for March 20, 2019. We await receipt of the formal scheduling letter.

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. Prior to the January 11, 2019, hearing date, Judge Devane granted our motion for res judicata/ collateral estoppel as to Allegations 1 and 2 in the Report of Substantiated Finding, and unsubstantiated and sealed those Category 2 allegations of physical abuse and abuse (deliberate inappropriate use of restraints). As for Allegation 3 (obstruction of reports of reportable incidents,) the member withdrew his request for a hearing and in exchange, the Justice Center immediately sealed the Category 3 allegation.

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 was scheduled for January 30th and 31st, 2019, in Poughkeepsie, NY. Prior to the hearing date, the member withdrew her request for a hearing, and in exchange, the Justice Center immediately sealed the report against her.

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 Board upheld the ALJ's decision. The State has since served on NYSCOPBA a petition for an Article 78 special proceeding to challenge PERB's determination. We submitted an Answer to this petition on February 22, 2019. The matter raises a question of substantial evidence, so it will be transferred to the Appellate Division and briefs will be submitted at that time.

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 (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 scheduled a phone conference to further discuss scheduling and the matter. The matter was heard on November 7 and 28, 2018, before Judge Reich. Judge Reich has since left PERB and the matter was reassigned to Judge Nancy Burritt. The parties rested, have received transcripts, and submitted closing briefs. We await the decision.

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 – DOCCS Light Duty (U-36658): On January 11, 2019, we attended a pre-hearing conference at PERB before ALJ Mitchell to address this Improper Practice charge filed when DOCCS began assigning light duty officers to two new types of posts, construction and one on one watches. This IP alleges that these new posts change the long-standing parameters for light duty post (ie – counted toward minimum staffing – not an extra). At the conference we explained the arguments in our case. DOCCS agreed to review our arguments now that they better understood them and to see if any potential settlement could be reached. The matter has been placed on hold until March 8, 2019.

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 parties attended a pre-hearing conference with ALJ Ellen Mitchell on January 31, 2019, at 10 am at PERB in Albany. The matter has been placed on hold while DOCCS endeavors to provide to the Union additional materials.

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 alleged 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 executed a Stipulation of Settlement. In exchange for withdrawal of the IP charge, the State agreed to remove the to/from memorandum submitted by the member to Director Huff

on November 14, 2017, from his personal history folder, and not use any information obtained during the questioning against the member for any purpose.

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 rescheduled for March 28, 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 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.

Central New York Psychiatric Center (U-36732): This office filed an Improper Practice Charge in response to CNYPC's change to its locker and lock policy for employees. The new policy forbids the use of employee-owned locks on lockers, creates a locker application process, and places further requirements on the employees. The matter is scheduled for a pre-hearing conference on April 8, 2019, at PERB in Albany, NY.

Livingston Correctional Facility – Paycheck (U-36495): On January 15, 2019, this IP was closed based upon the facility reverting back to its prior practice with respect to the pick-up of paychecks and pay stubs. The IP was filed when Livingston CF unilaterally changed the location, method, and times of pick-up of paychecks and pay stubs. Following a conference the parties agreed to address at the local level. It was resolved by Livingston CF reverting back to the previous practice.

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.

Otisville Correctional Facility (U-36770): This office filed an Improper Practice Charge alleging retaliation and interference against various supervisory staff at Otisville CF for discouraging NYSCOPBA members from voting for certain stewards. The matter has been scheduled for a pre-hearing conference before ALJ William Weisblatt on April 25, 2019, at PERB in Albany.

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 were due on January 18, 2019. The parties await the response of the Judge. The parties have preliminarily agreed to a conditional deferral of the matter to the parties' grievance procedure.

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 fourteen (14) requests from NYSCOPBA's grievance department to appeal contract grievances to arbitration during the month of February, 2019.

Since the last legal report, we held two (2) expedited arbitrations, held eleven (11) summary proceedings, withdrew twelve (12) grievances and settled two (2) grievances.

Albion Correctional Facility: This contract grievance alleged that the State violated the parties' Collective Bargaining Agreement when it refused to accept the member's medical notes for pre-approved workers' compensation-related doctor's appointments and considered him AWOL for the associated periods of time. This contract grievance we heard in an expedited hearing on November 9, 2018. The Master Arbitrator sustained the grievance, finding that the medical notes should have been accepted and that the grievance was filed in a timely fashion.

Lincoln Correctional Facility: This grievance alleged that the State violated Article 27 of the Agreement, specifically, § 21.7 of the Civil Service Time and Attendance Manual, when it deemed the officers "AWOL" for absences occurring on or about January 23, 2016, during a snowstorm for which Governor Cuomo declared a State of Emergency in the NYC area. This grievance was heard during expedited arbitration by Master Arbitrator Joel Douglas. Arbitrator Douglas denied the grievance on the basis that the law affords Lincoln Correctional Facility the discretion to determine if an absence due to extreme weather should be considered AWOL or charged to personal leave. The Arbitrator found that there was evidence in the record to support a finding that the facility made alternative plans and notified the snowbound officers, who are essential employees, of its decision and potential consequences faced by those officers who did not report for duty. As such, he concluded that the facility's decision to deem the officers AWOL for the absence was not "arbitrary and capricious," or an abuse of power, such as to invalidate its judgment.

Retirement

Downstate Correctional Facility: This is a disability retirement appeal. The member suffered a right leg amputation when a knee replacement became infected. The member was given a

reasonable accommodation with a perimeter patrol vehicle which was modified to accommodate his disability. The Retirement System found that he was not permanently disabled from performing his duties. The Systems appears to have overlooked the fact that the member was required to work mandatory overtime. There is also an issue as to act of an inmate causation. The first hearing was held on January 8, 2019, at which Dr. Scott Russinoff testified. The hearing has been continued of an additional medical witness and for the member's testimony.

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. Our Article 78 was filed on January 16, 2019, with a return date of February 15, 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 were filed on February 1, 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. On February 15, 2019, we received a Final Determination which held that the member was not injured by the act of an inmate.

Orleans Correction Facility: This a disability retirement appeal. The issue is whether the member is permanently disabled for performing the duties of a correction officer. The member testified on December 12, 2018. The matter has been continued for additional medical proof.

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. She has since been found fit for duty. However, the member was subsequently issued a suspension notice of discipline stemming from the same matter.

Green Haven Correctional Facility: The member was previously found unfit for duty following an Employee Health Services exam which occurred in May, 2018 based upon a request for light duty and subsequent return to full duty. The member filed her own appeal to this determination and she also submitted a subsequent return to work note, which led to a new exam and a return to duty on July 1, 2018. When she was contacted by DOCCS’ regarding her initial appeal to the unfitness determination, she contacted our office for representation. We reviewed the medical documentation in the EHS file and discussed the hearing process with the member. A hearing was scheduled for March 1, 2019. Following our review of the documents and the fact that the member did not have a physician who was willing to testify on her behalf, the member chose to withdraw her request for a hearing.

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 was scheduled for

February 15, 2019, before hearing officer Louis Patack. The member submitted another medical note and was seen by EHS on or about December 27, 2018. The member was found unfit for duty and has since withdrawn her request for a hearing

General

DOCCS Office of Special Investigations: At the instruction of the Board, we sent a letter to Thomas Knight, Assistant Deputy Chief, dated January 18, 2019, requesting, on behalf of NYSCOPBA, that the DOCCS Office of Special Investigations maintain and preserve the records that were ascertained by their office which were previously located and maintained in the office of the secretary of the Deputy Superintendent of Administration at Auburn Correctional Facility. This letter confirmed the conversation that NYSCOPBA Western Region Vice President Joe Miano and Bill Golderman had regarding the preservation of these records.

DNA Test of Member: We will be submitting a substantial memorandum to the NYSCOPBA Executive Board outlining three potential legal challenges to a recent order by DOCCS' OSI to a member to submit to a DNA test through a buccal swab.

NYSCOPBA Audit Report: On February 26, 2019, we prepared a response to NYSCOPBA auditors Whittemore, Dowen & Ricciardelli, LLP responding to NYSCOPBA's request to provide them with information regarding pending or unasserted claims against NYSCOPBA in connection with its financial audit.

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