# Public Sector Labor and Employment Law 2019 Update

**James D. Bilik, Esq.**
Arbitrator and Mediator

**Chris Trapp, Esq.**
Greco Trapp, PLLC

# PUBLIC SECTOR LABOR AND EMPLOYMENT LAW 2019 UPDATE

## October 26, 2019

**Chris G. Trapp, Esq.**
**Greco Trapp, PLLC**

**James D. Bilik, Esq.**
**Arbitrator and Mediator**

## I. LEGISLATION

With regard to legislative changes, the State has been extremely active since the start of the year passing multiple labor laws which will affect both private and public employers, in most instances.

**Agency Fee Amendments -** In the 2018 Budget Bill, in anticipation of the impending decision of the U.S. Supreme Court in *Janus v. AFSCME Council 31* that invalidated New York's agency fee provision (Taylor Law §208(3)), the Legislature enacted amendments to Taylor Law Sections 208 and 209-a(2):

- Public employers are required to: commence dues deduction for union members within 30 days after receipt of proof of a signed authorization card; remit dues to the union within 30 days after deduction occurs; accept proof of a union member's authorization via electronic record or electronic signature; continue deduction until the union member revokes membership in writing in accordance with the terms of the authorization card; reinstitute dues deduction if a separated employee returns to the unit within a year after separation; reinstitute dues deduction upon a union member's return from any leave of absence, paid or unpaid, voluntary or not; and notify the union within 30 days of a new employee's entrance into the unit, with name, address, job title, agency, and department, and permit union representative to meet with the new employee on work time within 30 days after notification.

- Unions are permitted to limit representation and services provided to non-members to the negotiation and enforcement of the terms of the collective bargaining agreement, while remaining free to provide extra-contractual representation and service to members, e.g., in statutory or regulatory proceedings not within the terms of the

contract. Non-members may also be denied union representation in employee evaluation or disciplinary processes arising under the contract, if the contract permits individual employees to proceed without the union and to be represented by their own advocates in such processes.

In the 2019 Budget Bill, additional revisions were made to the Taylor Law relating to *Janus*:

- A new CSL §215 was added, purporting to shield public employers and unions from liability under NY State law for their roles in deduction of agency fees from the salaries of non-members before the *Janus* decision was issued.

- Section 209-a was amended to make it an improper practice for a public employer to disclose employee home addresses, personal phone numbers (landline or cell), or personal email addresses unless otherwise required under the Taylor Law (or pursuant to subpoena or court order).

- Section 208 was amended to require employers to provide the union with names, addresses, job titles, employing agency/department and work location of all employees in the unit, unless the collective bargaining agreement specifies otherwise.

**Election Law Amendment** - In April, the State expanded the rules governing paid time off for employees to vote such that the time allowed off increased from two to three hours and changed the notice that employees must give to request the time from between two and ten days before an election, to just two days before the election. It also eliminated the presumption that an employee has sufficient time to vote without paid leave if the employee has four consecutive hours outside of work time to vote.

**2019 Sexual Harassment and Related Amendments** - Governor Cuomo signed legislation expanding claimant's rights under the Human Rights Law in August 2019:[1]

- Extends reach of the HRL to employers with fewer than 4 employees.

- Removes requirement that claimant show harassment was "severe and pervasive" in order to prevail.

[1] Effective dates of the changes vary.

- Removes defense that employee failed to file an internal complaint (failure shall not be determinative of liability).

- Protection of non-employees (e.g., contractors, vendors, consultants) from discrimination is extended beyond sex harassment to include all forms of unlawful discrimination.

- Punitive damages, previously limited to housing discrimination claims, are now available in all employment discrimination and harassment cases, with no stated limit on amount.

- Award of attorney's fees to any prevailing party, previously discretionary and only available in sex discrimination cases, is now required.

- The law is to be liberally construed for its remedial purposes regardless of how federal civil rights laws with similar language are construed; exemptions from liability to be construed narrowly.

- Statute of limitations for administrative complaints of sex harassment increased from one to three years; no change for other theories of liability.

- CPLR amended to extend existing prohibition against written contracts with mandatory arbitration of claims of sexual harassment, to claims involving all forms of unlawful discrimination.

- General Obligations Law and CPLR amended to prohibit nondisclosure agreements (unless it is the claimant's preference) not only in settlement of sex harassment claims but also in claims involving other forms of unlawful discrimination; voids any nondisclosure agreement that restricts the complainant from initiation/participation in any agency investigation, or from disclosing facts necessary to receive unemployment or other public benefits to which the complainant is entitled.

- Extends the Attorney General's authority to prosecute civil and criminal cases involving discrimination to all forms of unlawful discrimination (previously only age, race, creed color or national origin were listed).

**Domestic Violence Leave**

Recently, there were amendments to the victims of domestic violence which provides that effective November 18, 2019, employers will be required to provide reasonable accommodations to employees who are either victims themselves, or parents of children who

are victims of domestic violence. That law provides that employees are entitled to time off from work for the following reasons:

1. to seek medical attention for injuries caused by domestic violence including for a child unless the parent seeking the leave committed the act of violence;

2. to get services from a shelter, program, or rape crisis center that deals with these issues;

3. for psychological counselling similar to the first provision above;

4. to take action to increase safety including safety planning and temporary or permanent residency placement; or

5. to get legal services, appear in court, or assist in the prosecution of domestic violence.

For an employer to not give time off, the employer would have to show undue hardship which could be shown by the overall size of the business, number of employees, type of facilities, size of the budget and the type of business being operated. If granted leave, an employer can require an employee to use paid leave when available, but if it cannot, then unpaid leave is appropriate. Employees must give reasonable advance notice of a leave request, if feasible. If they cannot, then the employer can seek evidence of the need by seeking a police report, a copy of a court order, other evidence from a court or the prosecutor handling the case, or some documentation from a health care provider or counselor that the individual was in treatment or counseling as a result of the domestic violence.

**Discrimination based upon Traits**

New York also enacted amendments to the Human Rights Law to prohibit discrimination on traits historically associated with race. The focus was on hair texture and protective hairstyles such as braids, locks, and twists. This follows the interpretation of the New York City Human Rights Law that already was interpreted to prohibit discrimination based upon such

traits. It should be noted that although the amendment lists hair traits specifically, it is not so limited to simply hair. Instead, it is reasonable to conclude that it will be expanded to include anything that is closely associated with someone's racial, ethnic, or cultural identities.

**Equal Pay**

The State has also enacted a law intended to guarantee equal pay regardless of gender which states that an employer cannot pay two different people different amounts for similar work. The new bill provides that no employee within a protected class shall be paid less than an employee who is not in the same protected class for equal work for "substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions." Differentials are still permitted for non-discriminatory reasons such as merit, seniority and job-related purposes consistent with a business necessity, the change nevertheless constitutes an overhaul to the former equal pay provisions.

**Past Wage Information**

At the same time, the State passed legislation preventing employers from asking about a job candidate's past wage levels. This would apply not only to new job applicants, but also promotions. The prohibition applies to both written and oral requests for past wage history. Nothing prevents an individual, however, from volunteering that information and the employer being able to then confirm it.

**Labor Law section 215**

While Labor Law section 215 already prohibited employers from retaliating against an employee who raised a wage and hour complaint, the law has now been expanded to include

threatening to contact or contacting Federal immigration authorities or otherwise reporting or threatening to report the citizenship or suspected immigration status of not just the employee, but also the employee's family. This change will become effective as of the end of October of 2019. This is undoubtedly in reaction to the President's efforts through ICE to deport illegal aliens in New York and elsewhere.

**Stand Alone HRA**

In the area of health insurance, the Federal government issued new guidance under the Patient Protection and Affordable Care Act that reverses an earlier guidance letter. Beginning in 2020, an employer-sponsored and funded group health plan known as a health reimbursement arrangement might now be allowed on a stand-alone basis in certain circumstances for large employers. There are numerous limitations for these stand-alone plans and larger employers (fifty or more employees) are treated differently than smaller employers or employees not considered full-time for ACA purposes.

## II. PERB DECISIONS

### GOOD FAITH NEGOTIATIONS

*NYSCOPBA and NYS DOCCS*, 50 PERB ¶3031 (2017) -- Vacates, on procedural/administrative convenience grounds, decision of ALJ that employer violated the Act by refusing to provide information requested by the union (video involving alleged employee misconduct) prior to the demand for arbitration. The Board notes that the employer's obligation to provide information extends to disciplinary matters so long as the disciplinary process is based in the collective bargaining agreement, but that the employer's obligation is subject to considerations of reasonableness, burdensomeness, relevance and necessity. Where the employer raises an issue of confidentiality, it has a duty to negotiate regarding accommodation of such interest. The Board suggests in dicta that where the union asks for information in video form prior to demanding arbitration, the employer's obligation may be

satisfied by providing the union an opportunity to view video on the employer's premises, rather than providing a copy.

*Long Beach Firefighters and City of Long Beach*, 50 PERB ⁋3036 (2017) – Civil Service Law Section 71 permits employers to terminate an employee who has been disabled for more than one year due to occupational injury, and the law also permits any employee so terminated to re-apply for employment within a year after the disability ends. The City notified an employee who had been out for a year that he would be terminated, except that he could meet with the Fire Commissioner and city representatives if he disputes the termination. The Union demanded bargaining over this action and the City refused, asserting that this was not a procedure for separation from employment, and that the statute provides a post termination procedure. PERB, citing and refusing to revisit *Town of Cortlandt,* holds that the City's actions amounted to establishing a procedure for separation from employment, which triggers the duty to bargain.

*City of Cortland and Cortland PBA*, 51 PERB ⁋3014 (2018) – Resolving challenges to interest arbitration proposals, PERB holds that an employer's proposal eliminating the option for employees to take overtime pay rather than compensatory time for overtime work, is not prohibited as it does not violate the Fair Labor Standards Act. Two of the union's proposals are found to involve mandatory subjects: requiring payment at time and one half for work on "no time off" days and no new designation of such days without bargaining; and allowing employees to call in sick without providing the nature of the illness. Two union proposals deemed non-mandatory: making seniority the sole basis for work assignments; and allowing arbitrators to address the underlying disability claim in connection with disability leave under GML § 207-c (as opposed to allowing the arbitrator to review the employer's initial determination of eligibility, which would be a mandatory subject).

*PBA of NYS and NYS (Office of Parks, Recreation and Historic Preservation)*, 51 PERB ⁋3025 (2018) – Employer implemented a work schedule for Park Police that union had objected to; PERB finds that pre-implementation discussions with union constituted negotiations and that employer failed to engage therein. The ALJ did go too far in directing restoration of the schedule that existed before the implementation.

*Town of Blooming Grove and Blooming Grove PBA*, 51 PERB ⁋4526 (2018) – PERB holds that the union's proposal on minimum staffing, normally non-mandatory in nature, is converted to a mandatory subject per *City of Cohoes*, 31 PERB ⁋3020 because the contract includes a provision reserving to the police chief the right to determine staffing levels for tours of duty. The union's proposal to have wages earned pursuant to *Gen'l Munic. Law* §207-c treated as non-taxable on W-2 forms, is mandatory despite redundancy with federal law, as including it in the CBA creates a distinct remedy. Finally, the fact that an employer's proposal involves a duration in excess of two years does not make the proposal improper notwithstanding the arbitration panel's order being limited to two years.

*Putnam County Sheriff Deputies PBA and Putnam County, and Sheriff*, 52 PERB ¶4528 (2019) – The union argued that management breached the affirmative duty to support ratification of an MOA by the County Legislature, which failed to vote on the measure. The ALJ dismissed the Charge, finding that the County Executive supported the MOA and countered negative comments by other management personnel in communications with the Legislature. The two managers who criticized the MOA (the Deputy County Executive and the County Personnel Director) were not part of management's negotiating team so their actions did not violate the Act.

## UNILATERAL CHANGES IN TERMS & CONDITIONS OF EMPLOYMENT

*NYSCOPBA and NYS Office of Parks and Recreation*, 50 PERB ¶3024 (2017) – Employer's decision to cease permitting a forest ranger the use of an employer-owned vehicle for transportation to and from work, does not violate the Taylor Law. Such benefits are mandatorily negotiable, but there was no reasonable expectation of continuation and therefore no binding past practice under *Chenango Forks*, because after several years of allowing it, the employer had required the ranger to sign an acknowledgement of the employer's right to terminate the practice. Further, any challenge to the employer's action in requiring the ranger to sign the acknowledgement was time-barred, and knowledge of the change is imputed to the union because of the ranger's status as union steward.

*PEF and NYS Office of Medicaid Inspector General*, 50 PERB ¶3025 (2017) – Employer unilaterally changed policy of investigators having official placards allowing them to avoid parking meters and park their personal autos in otherwise restricted parking areas while either in the field, or at the office on days they would be in the field. Board upholds the employer's action in changing the policy so that placard would be given out only if no State vehicle was available and only for duration of the field assignment, as the policy involved a management prerogative and not an economic benefit, i.e., it only related to the manner and means of doing the job.

*United Fed. of Teachers and NYC Dep't of Education*, 50 PERB ¶3030 (2017) -- Board dismisses union's claim that unilateral imposition of new standards of practice for speech and language teachers violated the Act. While an increase in workload can be a mandatory subject of bargaining, the union did not establish that the change at issue lengthened the workday or increased the scheduled hours of work.

*Rochester Psychiatric Center (NYS OMH) and PEF*, 50 PERB ¶3032 (2017) – Employer unilaterally began requiring nurses calling in sick for 4 days or less, to provide medical documentation if one of the days is Christmas Eve or New Year's Eve. The prior policy has been to not require medical documentation for any absence of 4 days or less. PERB holds that this was a past practice that could not be changed without bargaining. The fact that civil service

regulations empower state employers to require proof of illness does not supersede the statutory duty to bargain over a term or condition of employment.

*Sullivan County PBA and Sullivan County & Sullivan Co. Sheriff*, 51 PERB ¶3008 (2018) – Union's IP Charge alleged unilateral termination of 19-year practice of permitting unit members to choose between compensatory time or time and one-half salary payment, for overtime work. PERB agrees with the employer that it has the right to limit employees to salary payments and end the practice of allowing employees to choose compensatory time: the collective bargaining agreement always provided for overtime compensation in the form of salary and contained no reference to comp time.

*CSEA, PEF et al. and NYS Dep't of Civil Service*, 51 PERB ¶3027 (2018) – PERB affirms ALJ's determination that the State's unilateral imposition of a schedule of fees to take promotional examinations involved an economic benefit and violated the Act notwithstanding language in *Civil Service Law* §50 (which discusses exams and fees).

*Schenectady Teachers Fed. and Schenectady CSD*, 52 PERB ¶4517 (2019) – ALJ holds that the employer violated the Act by unilaterally making a health insurance plan available to new hires after a 90-day waiting period, when the (expired) contract required a one-year waiting period. The employer's reliance on the Affordable Care Act, which limits waiting periods to 90 days, was rejected because that statute did not relieve the employer from the duty to negotiate over changes aimed at compliance with the ACA.

## PRACTICE AND PROCEDURE

*Javed and District Council 37*, 50 PERB ¶3028 (2017) – Board upholds the ALJ's denial of the charging party's motion to have his testimony taken by telephone because he was outside the country due to immigration issues. The Board notes that telephone testimony hampers the ability of the ALJ to determine credibility and the right of cross examination. The Board leaves open the possibility that *video* testimony, e.g., via Skype, may be permissible in some cases involving "genuine unavailability [of the witness] and compelling need," where an application is made sufficiently in advance of the hearing so that the necessary technology will be in place.

*Montgomery County Sheriff and Deputies PBA*, 50 PERB ¶3029 (2017) – The union violated the Taylor Law by submitting proposals to interest arbitration that were not "directly related to compensation", specifically: a proposal identifying which employees are eligible for assignment of overtime; and a clause involving continuation of all contractual benefits while an employee is out on leave for a line of duty injury. The latter proposal was improper because while it contained some compensation-related subjects, it was inextricably intertwined with other non-compensation related subjects.

*PBA, Village of Wappingers Falls and Village of Wappingers Falls*, 50 PERB ¶3041 (2017) – Employer's motion to file exceptions to Assistant Director's letter ruling is denied. The motion papers were not served on all parties within 10 working days after the ruling at issue.

Further, even if the motion had been timely, it would have been denied because there were no extraordinary circumstances shown: the employer's claim that to allow counsel to represent the charging party would be a violation of the Rules of Professional Conduct is not an issue PERB will entertain, citing *Bd. of Ed., City School Distr., City of Buffalo* (motion to preclude introduction of evidence allegedly obtained in violation of attorney ethics rules, denied).

*NYS Court Clerks Assoc. and Unified Court System*, 50 PERB ⁋3042 (2017) – Employer's motion to file interlocutory exceptions to ALJ's denial of pre-hearing motion to dismiss, is denied for failure to demonstrate extraordinary circumstances or severe prejudice. The IP charge alleged discrimination in demoting a probationary employee and returning her to her lower title after she opposed a supervisor's directive that she rewrite a performance evaluation of a subordinate who had just filed a grievance. None of the issues raised by the employer, e.g., that the charging party has a pending Article 78 proceeding alleging a violation of the Taylor Law, and that the IP charge implicates the employer's authority over matters of employee probation, justify an interlocutory review as these issues could be adequately addressed in post-hearing exceptions.

*Cicero PBA and Town of Cicero*, 51 PERB ⁋3009 (2018) – Union alleged Town's submission in interest arbitration was regressive because it contained no increases in meal allowance and shift differential. The Board affirms the ALJ's decision that the Town, at the final bargaining session before impasse was declared, had dropped its proposals for increases and that there was therefore no regression. PERB also upheld the ALJ's grant of the employer's motion, made after the hearing but before the ALJ's decision, to delete two proposals that the union had objected to at the hearing. The Board holds that a party is free to correct observed deficiencies in its petition or response, and that an ALJ is authorized to allow such corrections rather than such matters being exclusively the province of the Director of Conciliation. PERB notes that the motion involved issues of what can be subject to interest arbitration, not which job titles are included in the arbitration.

*United Fed. of Police Officers and County of Rockland*, 51 PERB ⁋3016 (2018) -- PERB holds that undercover investigators employed by the Rockland County District Attorney's office are not eligible for interest arbitration because although they may fit the definition of police officers, they are not "members of any organized police force or police department."

*City of Ithaca and Ithaca PBA*, 51 PERB ⁋3020 (2018) – Departing from prior rule, PERB holds that in the interest of finality, when the union responds to an employer petition for interest arbitration by invoking the right to maintenance of the status quo pursuant to the Triborough Amendment, PERB should go forward and process the petition rather than decline to do so as it had in the past. Such action by the union limits the eventual arbitration award to the status quo with respect to the period for which Triborough is invoked.

*DC 37 AFSCME and NYC Transit Authority*, 51 PERB ⁋3031 (2018) – PERB grants employer's motion for interlocutory exceptions from ALJ's interim determination that TA

hearing officers are employees under the Act: extraordinary circumstances exist as success on exceptions would end this unit clarification proceeding. On merits, PERB upholds decision that hearing officers are public employees, as they work every day for 7 hours, and despite signing contracts saying they are employees for payroll tax purposes only.

*PEF and NYS Dep't of Corrections*, 52 PERB ⁋3003 (2019) – PERB affirms, as modified, ALJ's dismissal of a charge alleging that shop steward was formally counseled and had approval to attend union convention revoked, because of steward's protected activity in a labor-management meeting. The ALJ who wrote the decision was not the same one who heard the testimony, but there was no need for a de novo hearing because the findings (that the union did not prove a link between the protected activity and the adverse action) were not credibility findings as between two witnesses, but rather findings based on weighing the probative value of the testimony. Close proximity of the events, and vague conclusory assertions by union witnesses, did not prove anti-union animus.

## REPRESENTATION

*City of Yonkers and Int'l Brotherhood of Teamsters*, 50 PERB ⁋3033 (2017) – The positions of Director of General Services and Budget Analyst are not exempt from inclusion in the (white collar administrative) bargaining unit. The Director is not managerial because his duties do not involve determination of goals and objectives and methods for accomplishing them. The Budget Analysts are not confidential because their involvement in collective bargaining consists only of costing out bargaining proposals, which does not constitute assistance to a managerial employee performing statutorily enumerated labor relations responsibilities.

*Village of Westhampton Dunes and Westhampton Dunes Police Association*, 50 PERB ⁋3035 (2017) – PERB rejects Village's application to have Constable Sergeants designated as managerial or confidential. The Sergeants handle scheduling and staffing, authorize overtime, review the work of the Constables and have authority to counsel them, make recommendations for how much to pay new hires, and have input in the hiring and employee discipline processes. PERB holds that the Sergeants' supervisory duties do not rise to the managerial level, and that their role in setting the pay rates for new hires should be seen as that of ensuring fairness to the existing employees, not of assisting the police chief in his performance of his collective bargaining duties.

*Commanding Officers Assoc. of Long Beach and City of Long Beach*, 51 PERB ⁋3005 (2018) – Commanding Officers' unit had fragmented from larger PBA unit but there was no new collective bargaining agreement in place. The Commanding Officers Association pursued arbitration of two alleged violations of the existing (PBA) contract: one involving overtime and the second involving discipline of a unit member. The union's IP charge challenged the employer's refusal to arbitrate which was based on arguments that a fragmented unit is not entitled to Triborough Law protections so the arbitration clause is not continued in these

circumstances. PERB holds that fragmented units are indeed covered by the Triborough Law, and that this protection extends to the arbitration clause as it would in any non-fragmentation situation. This protects the union's right to arbitrate the overtime issue but not the disciplinary grievance, as the City Charter prohibits bargaining over police discipline, and this prohibition does not give way to Taylor Law considerations.

*Law Enforcement Employees Benevolent Assoc. and CUNY; IBT Local 237, Intervenor*, 51 PERB ¶3012 (2018) – Board affirms ALJ's dismissal of petition to fragment 669 security officers from 2400-member blue collar unit. There are no compelling reasons to fragment this existing unit; fact that security officers have peace officer but not police officer status supports denial of petition.

*SEIU and Herkimer County Community College and Herkimer County*, 51 PERB ¶4003 (2018) – SEIU, the sole union in a representation election, received a majority of the valid ballots cast, but not a majority of the number of unit members eligible to vote. PERB rejects the employer's argument that the union should be required to receive the votes of a majority of the eligible voters when there is only one union in the election.

## INTERFERENCE AND DISCRIMINATION

*Churchville-Chili SRPs and Churchville-Chili Central School District*, 51 PERB ¶3003 (2018) – In conversation between provisional office employee and union president about the member's status, the president wondered why the employee was still in place and hadn't been "walked out" of the office yet, and stated that the member shouldn't trust the employer. The employee complained to management, who issued a counseling memo to the union president. PERB sustains the IP Charge, holding that the counseling memo amounted to interference in union operations: the president's statements were protected as a union official's advice on what rights the employee has. It is irrelevant that the employer's motive was good (i.e., maintaining civility among employees) or that a counseling memo is not considered disciplinary in other contexts.

*Amalgamated Transit Union and Niagara Frontier Transit Metro System*, 51 PERB ¶3004 (2018) – Employer held to have engaged in interference with union operations as well as with union members' rights to select their representative. Employer's representative told union representatives that they did not have to "listen to" the union president when resolving a disciplinary matter, and he showed the union representatives a provision in the union's international constitution purporting to prove the point. On another occasion, the employer's representative, after having the union president removed from a meeting, insisted on the other union representatives remaining despite the fact that the meeting involved negotiations, and suggested that the employer would be more forthcoming in contract negotiations without the union president's participation.

*Bagarozzi and Bd. of Educ., City School District, City of New York*, 51 PERB ⁋3032 (2018) (Cacavas, ALJ) – IP Charge by a tenured teacher claiming that she was retaliated against by her supervisor for her protected activity in filing contract grievances and making complaints about the employer to outside agencies. The alleged retaliation included adverse performance ratings, and being subjected to an investigation and disciplinary charges under Educ. Law §3020-a, which ended in a Hearing Officer's finding of guilt on an incident from two years prior, and imposition of a $2000 fine. The ALJ finds the employer's actions retaliatory and orders reimbursement to the Charging Party of the $2000 fine she paid pursuant to the decision in the disciplinary case. The remedy was based in part on the fact that the disciplinary charge arose from conduct occurring before the supervisor pushing the discipline started work at the school.

*Piller and NYS Office of Temporary and Disability Assistance*, 51 PERB ⁋3023 (2018) – PERB orders remand to ALJ who had dismissed an IP charge finding no improper motivation for employer's action directing union representative to not be on premises before or after assigned work hours. Employer argued that its action was motivated by avoiding overtime pay to the representative, and concerns about safety in the neighborhood at night. PERB holds that the ALJ had erroneously found that the representative was eligible for overtime, and had failed to make clear findings on the issues of safety or whether the ban on presence in the workplace after hours was applied uniformly.

*Teachers Assoc. of Pleasantville and Pleasantville Union Free Sch. Dist.*, 51 PERB ⁋3024 (2018) – During impasse, the employer violated §209-a(1)(a) and (c) of the Act by prohibiting teachers from wearing T-shirts bearing the union's logo and a slogan praising teachers in areas where there would be student or public contact. The employees' activity did not amount to a discussion of pending negotiations with the public on employer property, or enmeshing students into the labor dispute. However, the Superintendent's letter to unit members expressing the employer's position about the wearing of the shirts and about its bargaining proposals, did not violate the Act as the letter contained no threat of reprisals or benefits, and evidenced no intent to negotiate with employees individually.

*Oliver and State of New York (NY State Police)*, 51 PERB ⁋3037 (2018) – PERB affirms dismissal of employee's charge that the employer violated the Act by taking disciplinary action against the employee in alleged retaliation after the employee filed a charge of sexual harassment under Title VII and made an in-house EEO complaint. It is settled that such employee activity does not constitute protected activity under the Taylor Law.

*Elgalad and BOE, CSD, City of NY*, 52 PERB ⁋3001 (2019) – PERB affirms dismissal of IP charge that alleged that disciplinary charges against teacher (for engaging with a student involved in an investigation of the teacher's actions, and for unfavorable performance evaluations), were in retaliation for the many grievances filed by the teacher. The employer had legitimate nondiscriminatory reasons for the adverse actions.

## SUBCONTRACTING/TRANSFER OF UNIT WORK

*CSEA and Pine Valley CSD*, 51 PERB ¶3036 (2018) – PERB agrees with bus drivers' union that the school district violated the Act by using non-unit bus drivers to transport students to alternative education program at a BOCES. The BOCES had moved the program to a new location that could easily be handled by another school district's buses. However, Pine Valley drivers had handled this work for 20 years and PERB finds exclusivity was maintained despite the fact that student athletes who played on other districts' sports teams (because Pine Valley is so small) would often travel to and from games by the other district's buses: those students would be transported to and from the other district on whose teams they played by Pine Valley buses. Instances of other districts' buses transporting Pine Valley students to special events were found to be too isolated and/or remote in time (four years prior to the change at issue). PERB also rejects the employer's argument that the union had waived exclusivity by agreeing to management rights language on direction, deployment and utilization of the work force, finding that this clause was too vague to constitute a clear, intentional and unmistakable relinquishment of the union's bargaining rights. Finally, PERB holds that the IP charge was not barred by duty satisfaction: contract language concerning regular and alternative education bus runs does not support permitting subcontracting.

## III. COURT DECISIONS

### DISCIPLINE AND TERMINATION

In the First Department, in *Phillips v. New York Citywide Administrative Services*, 2019 Slip Op 04658 (6/11/19), dismissed the petitioner's action and upheld the termination decision. In that case, the agency sent the employee to an outside physician for a fit-for-duty examination. The employee challenged the decision arguing that the agency lacked the authority to delegate its duty to select a medical officer under Civil Service Law section 72(1) to an outside physician. The Court also noted that the employee failed to explain her work behavior which first lead to her being placed on leave.

In *Matter of BOE of the City Sch. Dist. on the City of New York v. Crooks*, 2019 NY Slip Op 04297 (5/30/19), the First Department affirmed the lower Court's modification of an order that vacated an arbitration award and penalty in a disciplinary action involving a tenured teacher which was subject to compulsory arbitration rather than voluntary arbitration the latter of which results in less strict scrutiny. The Court essentially chastised the arbitrator by concluding that the award was not simply arbitrary and capricious, but also irrational. The record indicated that the teacher threatened physical violence and placed at least one child in fear of his physical safety. What were also described as racist comments were also not something that would not affect the students as concluded by the arbitrator.

The First Department in *Patterson v. City of New York*, 2019 NY Slip Op 048809 (6/18/19) refused to overturn the termination decision of the City and the subsequent disqualification from employment. While the petitioner had submitted a resignation letter while disciplinary

charges were pending, the City could properly elect to ignore it and prosecute him on the original charges.

In another education case, the First Department *in Matter of Lamberti v. City of New York*, 2019 NY Slip Op 05090 (6/25/19) refused to reverse the termination decision of the probationary employee based upon the fact that the petitioner had received ineffective or developing ratings on more than one occasion which meant that there was no bad faith, and that the was not entitled to more notice than the sixty days under the statute prior to termination. The Court also noted that the petitioner had been supplied with support and even if there were any deviations from internal procedures, he was not denied any rights.

In an attendance case, the conclusion that termination was appropriate by the arbitrator did not shock the conscience of the First Department in *Matter of Blythe-Baugh v. City of New York*, 2019 NY Slip Op 05088 (6/25/19). It should be noted that the petitioner did not dispute the absences or tardiness evidence in the record and failed to seek medical accommodations until just before charges were filed.

The Third Department in *CSEA Local 1000 v. NYS Office of Children and Family Services*, Case No. 527717, July 18, 2019 affirmed the lower Court's dismissal of the petition seeking to overturn the termination of the employee. The employee had been in one competitive class for an extended period of time on a probationary basis and prior to the end of his probationary period and before he was permanently appointed, the employee was first promoted to another competitive position on a temporary basis and then appointed provisionally. By the time of his termination, the employee had worked for nearly two and a half years for the same employer. The employer first terminated him from the provisional position and told him that he was being returned to his prior position. At the same time, he was then told that he was going to be terminated from the former position as well. In challenging whether he was still a probationary employee, the petitioner claimed that all of his employment time should count and that the failure of the employer to advise him that it did not count, meant that he was no longer a probationary employee. The Court concluded that the responsibility to ask if the time as a provisional employee would count toward his first probationary period rested with the employee and his failure to do so did not trigger the employer's obligation to answer that request in writing. Therefore, the employer was free to not include the additional time in the probationary calculations.

In *Matter of Ethington v. County of Schoharie*, Case No. 526920 (June 20, 2019)[related Case No. 526701], the Third Department upheld the dismissal of the petitioner who had supplied false information to the labor attorney handling some underlying cases. The Court concluded that even though the attorney had been successful in the defense of the other cases, the fact that the petitioner had submitted false documents was enough under Civil Service Law section 24 to warrant dismissal.

In *Ansley v. Jamesville-Dewitt CSD*, TP 18-01530 (July 5, 2019), the Court modified the lower court's determination by effectively upholding the decision that the employee was guilty of the charges, but reversed as to the penalty of termination in light of the fact that the twenty year unblemished record of the bus driver who was working with children with special needs for five years, was shocking to the conscience of the Court.

The First Department affirmed the lower Court which upheld the dismissal of teacher in *Matter of Denicolo v. BOE of the City of New York*, et al, 2019 NY Slip Op 02962 (4/18/19). The Court reviewed the record and determined that the hearing officer's findings had a rational basis and were supported by the evidence. The Court also noted that it was constrained by controlling precedence such that the penalty did not shock their sense of fairness.

In *Matter of Bruno v. Greenville Fire District*, 2019 NY Slip Op 03043 (4/24/19), the Second Department affirmed the lower Court's dismissal of the Article 78 proceeding brought by a probationary firefighter who was terminated from his position. The Court recognized the limited scope of review as to whether the dismissal was in bad faith, for a constitutionally impermissible purpose, or in violations of statutory or decisional law. In this case, the employee failed to raise a material issue of fact on any of these standards.

In *Espinal v. County of Nassau*, 2019 NY Slip Op 03785 (5/15/19), the Second Department affirmed the ruling that reversed the determination of the Civil Service Commission which revoked the petitioner's eligibility and appointment and which terminated the employee based upon a prior criminal record. The Petitioner had originally disclosed certain criminal history to the Commission which thereafter sought additional information which was not supplied. Nevertheless, the Commission certified the employee as being eligible for employment. The employee claimed that the other convictions were out of state matters and he thought that the request was as a result of a different position which he had been seeking at the time, but from which he later withdrew his application. Five years later, he applied for a different position after his job was privatized. Now he disclosed the prior convictions which had not been disclosed previously. In response to that, the Commission revoked his eligibility certificate and terminated the employee. The Court found that the certificate could not be revoked more than three years later absent fraud, which was lacking in this case, especially since the Commission never alleged that any fraud occurred. Further citing article 23-A of the Correction Law, the Court found that none of the exceptions to hiring existed and that the employee could not have been charged with a failure to disclose or cooperate since he, in response to the 2016 application, had actually provided the information about his prior convictions.

The First Department in *Almanzar v. City of New York City Civ. Serv. Comm*., 2018 NY Slip Op 08062 (11/27/18) upheld the termination of two corrections officers involved with a physical confrontation with a prisoner on the issue of excessive force. The decision turned on the procedural posture of the case where the employees first sought an administrative appeal

and later sought an Article 78 proceeding. By following this process, the nature of the review by the Court changed and not in favor of the officers.

In *Nobile v. BOE of the City Sch. Dist. of the City of New York*, 2018 NY Slip Op 08065 (11/27/18), a former teacher sought to rescind a disciplinary settlement on the grounds that although he had signed the agreement along with his attorney and the Department's counsel, because the Superintendent had not yet signed it, he could change his mind. The Court was not impressed and he is still retired.

In upholding a 3020-a hearing officer's dismissal recommendation, the Second Department in *Johnson v. Riverhead CSD*, 2018 NY Slip Op 08021 (11/21/18), recognized a different standard for their review but still concluded that the determination of the hearing officer was neither arbitrary nor capricious.

In *Snowden v. Village of Monticello*, Decision No. 526490, November 29, 2018, the Third Department heard a case involving the termination of a Code Enforcement Officer under Section 75 of the Civil Service Law which was transferred to that Court. The decision turned on whether the charges were time-barred even though the allegations allegedly constituted a crime. The Court determined that the charges were not time-barred nor were they unsupported by substantial evidence.

The Second Department in *Matter of Buccieri v. County of Westchester*, 2018 NY Slip Op 07305 (2nd Dept. 2018) granted, in part, the petition of an employee who was suspended without pay for thirty (30) days after a recommendation of a hearing officer on the issue of misconduct and/or incompetence as part of a Section 75 hearing. Initially, the lower Court upheld the petition and remitted the matter to the employer on the basis that the Commissioner who rendered a final decision had actively participated in the events leading up to the hearing and, therefore, should have recused herself. Another individual then accepted the recommendation of the hearing officer with regard to the suspension and the petition should a further review under CPLR Article 78. The Appellate Court determined that nineteen (19) of the charges were supported by substantial evidence while three were not and thus ultimately held that the thirty (30) days penalty was not so disproportionate to the offenses to be shocking to one's sense of fairness.

The Seventh Circuit Court of Appeals recently decided in *Graham v. Arctic Zone Iceplex, LLC* that undocumented incidents may still allow an employer to fire an individual contrary to the typical understanding that if it is not written down, it does not count. The Court stated that "even minor grievances can accumulate into a record that justifies termination." In that case, the plaintiff argued that the problems set forth in the termination notice (e.g., bad attitude, failure to timely complete work, insubordination) were not legitimate reasons for termination because they were never recorded. The Court rejected the waiver argument that was proffered.

In another City of New York BOE case, the First Department affirmed the refusal to vacate the arbitration award terminating a teacher. The hearing officer determined that there was sufficient evidence on the issue of incompetency based upon six written reports of formal and informal observations of the petitioner's teaching over a period of two years. *Matter of Johnson v. BOE of the City of New York*, et al, 2019 NY Slip Op 02834 (4/16/19).

**DEFERENCE**

While not a per se labor case, the First Department decision in *GP v. NYSDHR*, 2019 Slip Op 04280 (5/30/19) reiterates the substantial deference position of courts as it applies to factual determinations of State agencies. The Court went further to refuse to substitute its judgment for that of the agency or to pass on credibility issues where conflicting evidence existed. The Court also concluded that the Commissioner was not required to follow the findings of the ALJ, but, instead, could reach an independent decision on both the facts and the ultimate conclusion.

While not a public sector matter, per se, the Fourth Department reaffirmed the long standing rules with regard to deference to administrative agency determinations with regard to them being upheld unless they were arbitrary and capricious or clearly irrational. Finding that the State Division of Human Rights was not obligated to have a hearing even when a question of fact existed, the Court yielded to "the expertise [of SDHR] in evaluating allegations of discrimination…which extends to [a] decision whether to conduct a hearing." The Court further found that there is no protection under the law based upon someone's status as a caregiver. *Matter of Floriano-Keetch v. NYSDHR*, 2019 NY Slip Op 06282 (8/22/19).

**RETIREMENT**

The Second Department affirmed the dismissal of an Article 78 proceeding with respect to retirement benefits based upon a failure to timely file the petition within four months of receiving the determination of the retirement system in *Matter of Strax v. City of New York*, 2019 NY Slip Op 04177 (5/29/19).

In *Matter of Tomassi v. City of Buffalo*, Decision No. 39, CA 18-01482 (6/7/19). The Court unanimously affirmed the denial of the petition filed by a former firefighter who was granted performance of duty disability retirement benefits and later a supplemental benefit until he reached age sixty-two. The employee argued that an amendment to the Retirement and Social Security Law section 384-d(i) raised the mandatory service retirement to age sixty-five and thus he was being denied equal protection of the law. A review of the legislative history led the Court to the conclusion that the intent of the law was not to provide benefits for someone who was already enrolled in the plan. The Court also concluded that the employee had failed to show any evidence as to how he had been treated differently than others similarly situated.

In *Matter of Halloran v. NYS ERS*, 2019 NY Slip Op 03336 (5/1/19), the Second Department reversed the grant of retirement benefits by the Court which reversed the decision of the System which had denied accidental retirement benefits to the sanitation worker who claimed an injury to his left shoulder. Examinations to his left shoulder shortly after the accident were negative and it was not until seventeen months later that an MRI revealed a rotator cuff tear to the same shoulder. The ERS determination was that there was no causal relationship between the accident and the injury. The Court recognized that the test was whether there existed some credible evident to support the agency's determination. The Court concluded that the employee did not establish that the disability was the "natural and proximate result of his line-of-duty accident." The Court concluded that there was a rational basis for the decision and that it was not arbitrary and capricious and so it refused to substitute its judgment for that of the agency even if its review would lead to a different result.

In *Matter of Hannon v. New York State Dept. of Human Rights*, 2019 NY Slip Op 02343 (3/27/19), the Second Department affirmed the lower Court's confirmation of the hearing officer's decision pursuant to section 74 of the Retirement and Social Security Law when it determined that the State and Local Retirement System properly denied disability retirement benefits to an employee who had submitted over two hundred pages of medical records to the System after the physician on the IME determined that the ailments were either well controlled where she could work or simply self-reported complaints which were not verifiable.

In an ERISA case dealing with an Education Law section 3813 notice requirement (similar to GML section 50-e), the Second Department affirmed the denial of the motion to file a late notice of claim on the grounds that there was no privity since the disability policy was between the employee and the insurance company, not the municipal employee. Therefore, since the claim would be patently meritless, no basis for the late notice existed. *Matter of Arroyo v. Central Islip UFSD*, 2019 NY Slip Op 04688 (6/12/19).

## STATUTE OF LIMITATIONS

The lower Court's decision dismissing the petition of the employee who was terminated as a New York City Correction Officer was affirmed by the Second Department in *Matter of Campos v. New York City Department of Corrections*, 2019 NY Slip Op 03966 (5/22/19). The employee was charged with having sexual relations with a minor and his defense was that the minor had claimed to be eighteen years of age. Given the choice of appealing his termination to the Civil Service Commission or the Court, after being told that an appeal to the Commission would be final and binding, the employee chose to appeal to the Commission which upheld the termination. Thereafter, the employee filed an Article 78 proceeding in Court. In addition to determining that there was no right to appeal the decision of the Commission, the Article 78 proceeding was also untimely since it was not filed within four months of the denial of the first appeal.

In *Matter of Salomon v. Town of Wallkill*, 2019 NY Slip Op 05671 (7/17/19), affirmed the lower court's dismissal of the petition on timeliness grounds. The Court rejected the continuing wrong doctrine which it said could be used only if it is "predicated on continuing lawful acts and not on the continuing effects of earlier unlawful conduct." In this case, the employer made a determination with regard to health insurance contribution levels and the employee tried to argue that with each paycheck, the act of the employer continued. Each paycheck was not a continuing wrong in itself. The Court also noted that the filing of a grievance did not toll the statute of limitations.

In another statute of limitations case, the First Department in *Matter of Stewart v. NYC Dept. of Education*, 2019 NY Slip Op 05069 (6/25/19) affirmed the refusal to reconsider the petitioner's application to be a cleaner. The case was filed more than four months after the agency's determination and the time line did not run from the date of the notice of claim or the date of the 50-h hearing.

In a CPLR section 217 timeliness case, the Third Department in *Matter or Karkauer v. NYSED*, Case No. 527364 (July 11, 2019), reiterated the Court of Appeals determination of what constitutes "final and binding" in terms of exhaustion of administrative remedies. The agency "must have reached a definitive position on the issues that inflicts actual, concrete injury and…the injury…may not be…significantly ameliorated by further administrative action or by steps available to the complaining party." The Court determined that although a second almost identical notice was sent one month after the first notice to the employee, the employee should have acted after he received the first notice.

In *Martin v. Dept. Educ. of City of New York*, 2018 NY Slip Op 09018 (12/27/28), the First Department dismissed the petition to vacate the arbitration award terminating the teacher's employment for failing to timely commence the Article 75 proceeding within ten days after receipt of the Hearing Officer's decision pursuant to Education Law section 3020-a. Petitioner failed to show any prejudice even though the hearing was not completed within 125 days and the arbitration award was not issued within thirty days of the last day of the hearing. On a substantive point, the Court also upheld the findings of the Hearing Officer even in light of the thirty year career of the petitioner.

In *Peckham v. Island Park UFSD*, 2018 NY Slip Op 08318 (12/5/18), the Second Department reversed the lower Court and dismissed the employment discrimination claim for age and sexual orientation. The Court concluded that the action was time barred and there was no tolling available to resurrect the matter.

*In re Singh v. City of New York*, 2018 NY Slip Op 07253 (1st Dept. 2018) is a case where the Appellate Division upheld the denial of the petitioner's application to file a late notice of claim with respect to a firefighter's exam. The court concluded that they should not delve into the facts and the petitioner failed to set forth any facts which would show any liability on the part of the City employee.

## ARBITRATION

*Livermore-Johnson v. NYS Dep't of Corrections and Comm. Supervision*, 155 A.D.3d 1391 (3d Dep't 2017) – Employer's cross-motion to vacate arbitration award granted. The award violates public policy: the employee, a Supervising Offender Rehabilitation Coordinator, accessed confidential information on the employer's computer system regarding parole officer's surveillance of the employee's husband, a convicted rapist and registered sex offender, and shared some information with her husband. Arbitrator's award dismissing charge because the specific allegations regarding the number of times the employee shared information were not proven, is overturned due to public policy, reflected in *Public Officers Law* §74(3)(c), against disclosure of confidential information or use for personal interest.

The Second Department in *Matter of Ross v. NYC Metropolitan Transit Authority,* 2019 NY Slip Op 05548 (7/10/19) reversed the lower court and reinstated the arbitration award which terminated the employee, a bus driver. The Appellate Court took the position that the lower Court applied the wrong standard and while the penalty was harsh, it did not violate any strong public policy or "clearly exceed an enumerated limitation on the arbitrator's power."

In another City of New York BOE case, the First Department affirmed the refusal to vacate the arbitration award terminating a teacher. The hearing officer determined that there was sufficient evidence on the issue of incompetency based upon six written reports of formal and informal observations of the petitioner's teaching over a period of two years. *Matter of Johnson v. BOE of the City of New York*, et al, 2019 NY Slip Op 02834 (4/16/19).

The Second Department decided *Matter of City of Yonkers v. Yonkers Fire Fighters, Local 628*, 2018 NY Slip Op 08294 (12/5/18) reversed the lower Court which granted a permanent stay of arbitration. The Appellate Division concluded that there was no statutory, constitutional or public policy reason to stay the arbitration and there was sufficient general language in the contract to determine that the issue was arbitrable.

In two related cases involving the same parties, the Third Department stayed arbitrations at the request of the employer in *City of Plattsburgh v. Plattsburgh Permanent Firemen's Association*, Case Nos. 527791 and 527793 (July 3, 2019). The issue in the first case was whether the contractual language was a job security clause or a safety clause with regard to minimum staffing levels. Although it was mixed, the fact that it was considered a job security clause was fatal and against public policy thereby rendering the arbitration demand unenforceable. Trying to argue that it was a violation of the CBA language dealing with filing vacancies did not prove to be more fruitful for the union.

In a case where a stay was not granted, the Third Department in *Matter of Hudson City Sch. Dist. v. CSEA, Local 1000*, Case No. 528149 (July 11, 2019) determined that the issue of prescription drug coverage with regard to retirees was a matter for an arbitrator and that the argument that the clause within the CBA referring to staff and employees could not have meant former employees was something for the arbitrator to decide.

Similarly, the Fourth Department in Matter of *Jefferson County v. Jefferson County CSEA*, 2019 Slip Op. 06298 (8/22/19) also rejected the request to stay the arbitration between the parties citing the two step process a court must use to determine when a public sector grievance is subject to arbitration. Since the parties did not raise the issue whether there was a statutory, constitutional, or public policy prohibition against arbitration, the sole focus was whether the CBA contained language where the parties agreed to take the matter to arbitration. Not surprisingly, with a broad definition of what constitutes a grievance, the case was allowed to proceed administratively. The Court also rejected the arguments that there was no agreement to arbitrate because of the existence of a separate MOA on the subject and further that CPLR section 7502(b) was inapplicable because of the question of whether the new CBA affected the continued viability of the prior MOA.

In a case once again proving that overturning an arbitration decision is not a concept preferred by the Courts, the Third Department in *Capital District Transportation Authority v. Amalgamated Transit Union*, Case No. 527824 (June 20, 2019) ruled that vacature exists only if the award violates a strong public policy, is irrational or the award "clearly exceeds a specifically enumerated limitation on the arbitrator's power." Finding none, the Court concluded that since the contract was "reasonably susceptible to different conclusions" the arbitrator's finding that a forty year past practice existed would not be disturbed.

In a not very surprising move, the Fourth Department *in Matter of Arbitration between the Professional, Clerical, Technical Employees Assoc. v. Buffalo City Sch. Dist*., CA 18-02028 (July 5, 2019), refused to vacate an arbitration award and, instead, confirmed same in a termination case with a security guard who the employer said did not have the proper registration card. The Court rejected the violation of public policy argument which was advanced and determined that there was nothing in General Business Law section 89-g that prevented the matter from going to arbitration. On the issue of whether the arbitrator exceeded his authority, the Court stated that "by submitting to arbitration, however, respondent ran the risk that the arbitrator would find the dispute covered by the CBA, as he did, notwithstanding respondent's position…". It would have been interesting to see how the Court would have reacted to a request to stay under these circumstances.

Keeping with its consistent desire to have labor cases heard outside of the judicial system, the Fourth Department in *Matter of Bender*, 2019 NY Slip Op 06297 (8/22/19) reversed the partial vacature of an arbitration award reinstating same and further confirming the determination of the arbitrator. In that case, an assistant principal was directed to leave a school function after showing up under the influence of alcohol. Rather than go through disciplinary proceedings, the parties agreed to a Last Chance Agreement because the employee was generally popular as a teacher and an administrator. The employee later violated the agreement by virtue of having employee alcohol bottles in his desk at school and he was arrested for DWI by the local police. Rather than just terminating him under the agreement, the District conducted a hearing where the hearing officer sustained the charges and concluded

that termination was the appropriate penalty. The lower court felt that since the district had not followed the terms of the LCA and initiated disciplinary proceedings, any charges related to the LCA should be dismissed. The Court also found that termination shocked its conscience and was "shockingly disproportionate" because the DWI did not happen on school grounds. In reversing the lower Court, the Appellate Division determined that the election of remedies doctrine was inapplicable under these circumstances and that the terms of the LCA would stand and could be pursued through a hearing. The Court also reiterated the basis for vacating a hearing officers findings under Article 75 concluding that any judicial review would be limited.

**DISCRIMINATION**

The Second Department in *Reilly v. First Niagara Bank, N.A*. 2019 NY Slip Op 04974 (6/19/19) affirmed the dismissal of the sex based employment discrimination and hostile work environment claim of the petitioner. In this case, the plaintiff failed to allege that an adverse employment action occurred under circumstances giving rise to an inference of discrimination. The court also used the now modified "severe and pervasive" standard with regard to the hostile workplace to decide that there was insufficient evidence to permit the complaint to stand. The Court also took the position that plaintiff failed to sufficiently allege that the employer encouraged, condoned, or approved of the actions.

The Second Department in *Sanderson-Burgess v. City of New York*, 2019 NY Slip Op 05173 (6/26/19) affirmed the dismissal of several causes of action in the same sex and retaliation employment discrimination claim filed with regard to the actions of one civil employee in the police department against another civil employee. The Court recognized its obligation to analyze the case under both the McDonnell Douglas framework as well as the mixed motive framework of the more recent cases. Even with these standards, the Court concluded that the plaintiff could not follow any "evidentiary route" that would allow a jury to find in favor of the plaintiff. The Court also noted that once the NYPD became aware of the situation, it took "prompt remedial action." Thus, the harassment and aiding and abetting claims were dismissed.

The Fourth Department in *Matter of Christian Central Academy v. NYS DHR*, Case No. 372 (5/3/19) upheld the determination of the Division which determined that the employer had engaged in discrimination on the basis of familial status in their hiring policies. The court concluded that there was sufficient basis for the penalty and the judgment interest that was imposed.

The First Department also affirmed the granting of a motion to dismiss the employment discrimination claim in *Marino v. City of New York*, 2018 NY Slip Op 09027 (12/27/28), as time barred rejecting the continuous violation doctrine. The Court further found that the City could not be held liable for the alleged acts of the corporate pension fund which was independent and distinct from the City.

In *Matter of Ufland v. NYS DHR*, Case No. 1162 (12/21/18), the Fourth Department affirmed the dismissal of the petition which sought to annul the determination of the DHR, after an investigation, that there was no probable cause to believe that the County Department of Social Services has discriminated against petitioner based upon her disability. In this case, the petitioner's employment was terminated a year prior to her administrative complaint. In addition to being considered untimely, the Court concluded that the DHR had conducted a proper investigation and had given the petitioner a full and fair opportunity to be heard. The Court also rejected the petitioner's attempt to use the Unemployment hearing decision as evidence of the discrimination and the argument that a hearing by DHR was required.

On April 18th of this year in *Natofsky v. City of New York* (17-2757-cv), the Second Circuit Court of Appeals decided that under the ADA, a plaintiff must prove "that discrimination was the but-for cause of any adverse employment action." This changes the standard and brings it in line with ADEA and Title VII claims. Previously, under the "mixed motive" standard, the plaintiff was required to show that that person's disability was a motivating factor in the employer's adverse employment action, even if other permitted motivations existed. Now a plaintiff must show that but-for his or her disability, the adverse employment action would not have been taken. This effectively raises the burden on plaintiffs to prove these types of cases.

**GENERAL MUNICIPAL LAW SECTION 207**

In a 207-c case, the Second Department confirmed the determination and dismissed the petitioner's application for benefits in *Redmond v. Town of Haverstraw,* 2019 NY Slip Op 05670 (7/17/19). In this case, while the hearing officer recommended that benefits be granted, the respondents issued a final determination denying the application. On appeal, the Court opined that their review was "limited to a consideration of whether the determination was supported by substantial evidence upon the whole record." The Court noted that while the hearing officer's recommendation is to be afforded weight, the final decision rested with the administrative authority and since there was conflicting medical opinions, the "Courts are not free to reject the choice made" as long as the evidence was rational and fact-based.

In *Matter of Fortuna v. City of White Plains*, 2019 NY Slip Op 02092 (3/20/19), the Second Department affirmed the hearing officer's determination denying benefits under GML section 207-a for on the job injuries sustained as a firefighter. Petitioner retired and then eight months later attempted to retroactively apply a new CBA provision to convert sick leave benefits into salary benefits and to supplement his disability retirement benefits. The City granted a partial conversion of the sick leave benefits, but denied to supplement the retirement benefits. The Court concluded that the hearing officer's determination was supported by substantial evidence.

**APPR**

A third school related First Department decision in *Damesek v. City of New York*, et al, 2019 NY Slip Op 03301 (4/30/19) dismissed the petition of an administrator challenging his

APPR rating. The Court concluded that there were sufficient facts to justify the unsatisfactory rating.

In *Matter of Addoo v. NYC Board of Education*, 2019 NY Slip Op 04887 (6/18/19), the First Department upheld the lower court's refusal to annul the APPR rating for the employee. The teacher tried to argue that her employment was discontinued, but in reality, the Court noted that she resigned and that there was a rational basis for the rating.

**DISABILITY**

In a decision that shows the importance of video surveillance in spite of medical examinations and testimony to the contrary, the Third Department in *Swiech v. City of Lackawnna*, Case No. 527159, July 3, 2019, refused to reverse the disqualification from future wage replacement benefits on the basis that the claimant violated Workers' Compensation Law section 114-a when there was video evidence showing him doing activities that he had previously testified that he could not do or that his physicians had stated were not possible based upon their examinations. It should be further noted that extreme adherence to the rules governing the forms for a full Board review is critical because if you do not fill out the forms properly or completely, the Board can deny the request for a full Board review.

The Third Department in *Matter of Cavallo v. DiNapoli*, Decision 526613 (12/20/18), upheld the denial of petitioner's applications for accidental disability benefits as a result of an injury he sustained exiting a vehicle while responding to a fire call. While the Retirement System conceded that he was permanently disabled, they concluded that the incident was not an accident. In light of the medical testimony, the issue of whether the performance of duty disability retirement benefits should have been denied was remitted for further proceedings while the application for accidental disability retirement benefits was properly denied on the basis that it did not fit the definition of an accident which was sudden. The Court concluded that a misstep by a firefighter was not out-of-the-ordinary or unexpected.

In *Bufearon v. City of Rochester*, Decision 526688 (12/27/18), the Third department upheld the ruling that the claimant did not sustain a causally-related cervical spine injury that was never mentioned as part of the initial proceedings. Since there was a lack of credible medical testimony relating the injury to the accident, the Board properly decided the credibility issue against the claimant.

In a Worker Compensation case discussing the retroactive application of Worker Compensation Law section 15(3)(w) as it applied to whether an individual had to demonstrate attachment to the labor market in order to receive permanent partial disability benefits, the Third Department in *Matter of Pryer v. Incorporated Village of Hempstead*, 2019 NY Slip Op 06561 (9/12/19) concluded that not all cases will result in retroactive application. In this case, the determination on whether the claimant was in the labor market by the Board preceded the amendment and so retroactive application was not appropriate.

In *Arroyo v. Central Islip UFSD*, 2019 NY Slip Op 04669 (6/12/19), the Second Department affirmed the motion to dismiss the complaint of the security guard injured while employed by the school. Petitioner received long term disability benefits for three years and then was told by the insurance company that he was no longer entitled to benefits because he was no longer totally disabled. The petitioner attempted to argue that while the plan was not technically subject to ERISA since it was a governmental plan, the District had nevertheless subjected itself to the statutory scheme governing appeals. That argument was summarily rejected. The Court concluded that the District was not a party to the Summary Plan Description and had nothing to do with its content or development. The claim was fully controlled by the insurance company without any involvement by the employer. The Court also noted that the claim failed for filing and service a notice of claim under Education Law section 3813 which was a condition precedent. A related appeal between the same parties decided the same day under Slip Op 04688 dealt with the issue of filing a late notice of claim. The Court also rejected that attempt.

The Second Department in *Shortt v. City of New York*, 2019 NY Slip Op 04745 (6/12/19), reversed the lower Court's grant of a CPLR 3211(a)(7) motion dismissing the complaint against the teacher's employer after the school district alleged that the plaintiff had failed to exhaust her administrative remedies under the CBA. The teacher was injured as a result of a malfunctioning elevator and initially sought "line of duty injury" paid medial leave. The Department of Education denied the request without setting forth a reason and instead of appealing that decision, the teacher sued the District. The Court concluded that the negligence claim was not governed by the CBA and thus could be continued. The Court also rejected the collateral estoppel argument raised by the employer who tried to rely on the DOE determination on the basis that the defendant had failed to demonstrate that the issue decided by the DOE was the same being sought by the plaintiff. While not specifically mentioned, it would seem that the failure of the DOE to elaborate further on the initial decision proved fatal to the defense.

The Third Department refused to overturn the Workers' Compensation Board after it rejected the claims for mental injury on behalf of a County Sheriff. *Karam v. Rensselaer County Sheriff's Dept.*, Decision No. 525286/525911, December 6, 2018.

The Second Department also affirmed the lower Court's granting of a petition directing that the firefighter's surviving spouse receive accidental death benefits from the date of the first application in *Carlock v. Board of Trustees of the New York Fire Department Pension Fund*, 2018 NY Slip Op 07119 (2nd Dept. 2018).

**CIVIL RIGHTS LAW**

On December 11th in *NYCLU v. New York City Police Department*, 2018 Slip Op. 8423, the Court of Appeals addressed Civil Rights Law section 50-a with respect to police officer personnel records stemming from a disciplinary proceeding. The NYCLU sought disclosure of

the records under FOIL arguing that compliance under the Civil Rights Law was unnecessary where the officer's identifying information had already been redacted. In this case, upon the administrative appeal, the NYPD provided seven hundred pages of redacted Disposition of Charges forms, but not the final opinions. The Court carefully reviewed the statute and the procedures which should be used and determined, in part, that the records sought by the NYCLU were not records which were "relevant and material to any pending litigation." The Court went on to recognize the policy arguments proffered by the NYCLU, but it declined to "second-guess the Legislature's determination, or to disregard-or rewrite-its statutory text." The Court then discussed FOIL and its relationship to the case at length. Judges Rivera in a rather lengthy opinion, and Wilson dissented. Rich advised the Committee that our Section is joining with the Labor & Employment Law Section in opposing NYSBA's support for legislative repeal of CRL §50-a.

In a recent Civil Rights Law section 50-a case, the First Department affirmed the decision of Supreme Court on the issue of whether body camera footage was a personnel record albeit on different grounds. In *Matter of Patrolmen's Benevolent Assn. vs De Blasio*, et al, 2019 NY Slip Op 03265 (4/30/19), the Court held that while the statute does not provide for a private right of action, it did not prohibit a review for injunctive relief. The Court nevertheless dismissed the petition and determined that body-worn-camera footage was not a personnel record because the footage is used for other objectives beyond personnel evaluations, as argued by the petitioners, and is for transparency, accountability and public trust building. The Court distinguished this release of information from *NYCLU v. New York City Police Dept*., __ N.Y.3d __, 2018 Slip Op 8423 (2018) which sought the records related to a disciplinary proceeding.

**MISCELLANEOUS OR WE GOT TIRED DOING NEW HEADINGS**

In *Stewart v. MTA Bus Company*, Case No. 527915 (August 1, 2019), the Third Department affirmed the determination of the Unemployment Board on the issue of the claimant's right to benefits even though an arbitrator, while not issuing a termination order, did determine that the claimant was guilty of misconduct. The Court concluded that the Board was entitled to make its own determination on the facts and to decide if the actions of the employee rose to the level of a disqualifying basis for benefits. Collateral estoppel was used only on the factual findings, not the end result.

The same Board of Education did not fare any better in *Matter of Buffalo Council of Supervisors, et al v. Board of Education*, et al, CA 18-02195 (July 31, 2019) when the same Court reversed the lower Court's dismissal of the petition. The Court concluded that there was no defect when the attorney rather than the petitioner verified the petition and that the proceeding was not barred by res judicata and collateral estoppel as a result of a prior arbitration between the same parties with regard to the discipline of the employee. The Court also concluded that the petitioner was not required to exhaust any administrative remedies under the CBA because the petitioner alleged violations of the Education Law not the

agreement. The fact that the petitioner also filed a grievance was "of no moment" because the Court felt that the issues presented and remedies sought were different. The Court also refused to grant deference to the Commissioner of Education on the Education Law question which it felt needed no particular education law expertise to decide.

In *Matter of Fields v. City of Buffalo*, CA 18-02225 (July 31, 2019), the Fourth Department determined that the police officer's challenge of the refusal to provide a defense and indemnification was untimely since it was made more than four months after the City had advised the employee that it was not going to provide a defense and indemnification. The fact that the plaintiff in the underlying action amended the complaint to add additional parties did not toll the statute of limitations as to this defendant police officer with the Court thereby refusing to extend the *Perez* holding.

The Third Department on May 16, 2019 decided *Matter of Lynn v. State of New York and PERB*, Decision 526445, which discussed whether the Court was going to issue a decision pursuant to the request of PERB. In this case, the petitioner filed an Article 78 proceeding seeking to have the Court direct PERB to issue a determination on two improper practice charges. Supreme Court granted the petition and directed PERB to issue determinations within sixty days of the date of service of the order. PERB then appealed and obtained an automatic stay. During the pendency of the appeal, PERB issued a determination on the charges, but continued the appeal on the issue on whether the petitioner had failed to exhaust his administrative remedies. The Court simply determined that the matter was moot because the relief originally requested by the petitioner had been granted with the issuance of the IP decisions.

The Third Department in *Jones v. Town of Mayfield*, Decision 527043 (5/16/19) concluded that health insurance was not the equivalent of salary payments under Town Law section 27 as it pertained to Town justices' salaries being equal. The petitioner declined health insurance coverage which the other justice took and then argued that she should get additional salary to make up the difference between the two justices' entire benefit package.

In a retaliation and defamation case, the Third Department in *Carter v. Village of Ocean Beach, et al*, Decision 527565 (5/9/19) affirmed the partial grant of summary judgment to the defendants. The plaintiffs alleged that they were not hired back as seasonal, part-time officers in retaliation to their complaints of misconduct by other officers and improper policing practices. The Federal Court case was dismissed after which a State Court action was brought under Civil Service Law section 75-b. The Court concluded that the officers had failed to communicate the concerns to another government official who could have addressed them and instead raised the issues only to the individual about whom they were complaining. The plaintiffs had failed to make the "notification efforts which are a procedural prerequisite to invoke" the statutory protections. On the issue of defamation, there was no proof that the governmental agency had either known of the matters or approved them as being within the scope of the other officers' positions with the police department.

In an interesting whistleblower retaliation case, the Third Department in *Lilley v. Green CSD*, Decision 527253 (1/3/19) reversed the lower Court's dismissal of the case on the grounds that Civil Service Law section 75-b can allow a case to proceed as to whether the disciplinary action may be retaliatory even if the employee is guilty of the alleged infraction if, while the employee may have had an "interest", was that interest something which was under his authority to act upon. The Appellate Court also found that the trial court failed to make a separate determination on whether the employer's action was pre-textual.

The Fourth Department decided *Timkey v. City of Lockport,* Case No. 1114 (12/21/18) which affirmed a lower Court's grant of summary judgment for the plaintiff on the issue of the defendant's obligation to provide health insurance benefits to the plaintiff who was previously employed by the City. Eight years after the plaintiff left the employ of the defendant, plaintiff requested that the City provide him with medical benefits under the relevant CBAs in the City. While the Court recognized that the general rule that contractual rights do not survive beyond the termination of the CBA, rights which would have vested at that time can survive. In this case, the employee had worked for the City for more than twenty years which allowed him to become eligible for the benefit upon reaching retirement age.

The Third Department decided *Endicott Police Benevolent Assoc. v. Bertoni*, Decision 526197 (3rd Dept. October 25, 2018) which involved an appeal of a dismissal of an Article 78 proceeding to review a determination of the municipality setting minimum qualifications for civil service exams for the positions of Chief and Assistant Chief of Police for the Village of Endicott. The PBA sent a letter to the Department requesting that promotional examinations be conducted rather than open competitive examinations and that the minimum qualifications for experience be revised. The Department did not respond and held the open competitive examinations. The PBA unsuccessfully argued that competitive civil service exams should be used only when it is impracticable to fill a position through promotional exams. The Court took the position that it was up to the local civil service commission to determine the types of examinations which would be given. On the issue of changing the minimum qualifications, the Court concluded that the respondent had met the minimal burden of providing a fair explanation for at least one of the requirements for Chief of Police. The same was not true, however, with regard to the change for the Assistant Chief since the record did not set forth any explanation for that change.

A procedural change of a case from an Article 78 proceeding to a declaratory action by the Second Department in *Matter of Williams v. Town of Carmel*, 2019 NY Slip Op 06160 (8/21/19) changed little substantively. Either way, the matter was dismissed and the retiree petitioner was not entitled to payment for unused sick time pursuant to an earlier memorandum of agreement. In rendering its decision, the Court noted that an Article 78 proceeding was not the "proper vehicle to resolve contractual rights" although commencing an action in an improper form does "not necessarily warrant dismissal." In giving weight to the plain language of the agreement, the Court concluded that by use of the phrase "upon effective

ratification" meant that the clause applied only to those individuals who retired after the effective date of the agreement.

In an interesting change of pace, the union in *Matter of Yonkers Firefighters, Local 628 v. City of Yonkers*, 2019 NY Slip Op 06402 (8/28/19), decided that in addition to challenging the dismissal of their petition they would seek to get the judge pulled from the case. When recusal was refused, they sought a review by the Second Department which examined the rules regarding recusal and determined that there were no facts which would warrant either a mandatory or discretionary recusal in this case.

That stemmed from the related case decided the same day which sought to overturn the vacature of an arbitration decision by Supreme Court set forth in *Matter of Yonkers Firefighters, Local 628 v. City of Yonkers*, 2019 NY Slip Op 06391 (8/28/19). The arbitrator ruled that the City had improperly terminated a firefighter and that was overturned by Supreme Court and affirmed by the Appellate Division.

## SCHOOLS ARE MUNCIPAL CORPORATIONS TOO

The Third Department on March 28, 2019 decided *BOE of Minisink Valley CSD v. Elia*, Decision 526754, which upheld the determination of the Commissioner on the issue of whether the elementary teacher should have been credited for her long-term substitute work when an elementary position opened up that resulted in the PEL being canvassed. The Court provided great deference to the Commissioner's decision and concluded that "any and all service within the system must be counted, not just within the specific tenure area" under Education Law section 3013 as opposed to Education Law section 3012. The Court went further to recognize the "negative policy outcome of deterring teachers from accepting long-term substitute work if it falls outside of their preferred tenure area."

A school Superintendent filed breach of contract and tortious interference claims against the district which were dismissed on motion of the district in *Mehrhof v. Monroe-Woodbury CSD*, 2019 NY Slip Op 00110 (1/9/19). The Second Department concluded that not only did the documentary evidence submitted by the defendant totally refute the allegations in the complaint, but that the plaintiff had also failed to set forth sufficient facts to show that there existed a specific business relationship with an identified third party with which the defendants had interfered.

*Buffalo Teachers Federation v. Elia*, 162 A.D.3d 1169 (3d Dep't 2018), *lv. to app. den.*, 32 N.Y.3d 915 (2019) -- Certain public schools that are "underperforming" under Federal and New York State school accountability standards can be placed under receivership per Education Law §211-f. In Buffalo, the district Superintendent, as receiver over 5 schools in the district, sought modifications of the collective bargaining agreement with the teachers' union regarding issues including length of the school day and year, and teacher transfer rights. The statute provides that if the receiver and union do not agree on changes, the Commissioner of Education resolves the issues in accord with standard collective bargaining principles. After the Commissioner

approved all of the Superintendent's proposed changes that had not been agreed to by the union, the union filed an Article 78 petition. Supreme Court dismissed the union's claims. The Appellate Division affirmed in part, holding (1) that the Commissioner properly refused to determine whether the district bargained in good faith, a matter left to PERB; (2) that the receivership statute does not violate the Contract Clause of the U.S. Constitution; and (3) that the Commissioner's determination was not affected by bias. The Court agreed with the union that the Commissioner's jurisdiction extends to a proposal by the union during bargaining to reduce class size in the affected schools and that it was error for the Commissioner to refuse to consider the union's proposal merely because class size was not among the topics on which the Superintendent had sought changes. The case was remitted to the Commissioner to resolve the class size issue.

**FOIL**

In a related FOIL decision, the Second Department in *Matter of Outhouse v. Cortlandt Community Volunteer Ambulance Corps, Inc.*, 2019 NY Slip Op 02881 (4/17/19) found that an EMT who had made requests for records pertaining to the rejection of her application for reinstatement was not entitle to the documents under FOIL because the company was not an agency required to comply under the terms of the Public Officers Law. The Court considered whether they were required to disclose its annual budget, maintain offices in a public building, was subject to a governmental entity authority with regard to hiring and firing personnel, had a board of primarily governmental officials, was created exclusively by the government, or it described itself as an agent of the government. Based upon these criteria, the Court concluded on a factual basis that the defendant was not a governmental agency subject to FOIL.

## IV. PENDING LITIGATION (*JANUS*-RELATED)

*Pelligrino v. New York State United Teachers, United Teachers of Northport, Northport UFSD, et al.*, EDNY 2:18-CV-03439 – Anticipating the Supreme Court's decision in *Janus*, this class action, filed a month before *Janus*, against the school district as representative of all school districts in the state, the local teacher's union as representative of all teacher locals, and NYSUT, seeks recovery of past agency fees paid by agency feepayers and past union dues paid by union members who would not have joined but for the agency fee law. It also seeks to invalidate NY State laws (see above) limiting the rights of union members to quit the union according to the language in the authorization cards they signed, and requiring public employers to turn over to the union the names and home addresses of employees newly hired, newly returned from leave, reemployed or promoted or transferred into the unit. Defendants' motions to dismiss are pending.

*Seidemann v. Professional Staff Congress, Faculty Assoc. of Suffolk Community College, et al.*, SDNY 1:18-cv-09778 (filed October 24, 2018). The suit seeks recovery of agency fees that

had been paid to the union pre-*Janus*, based on the First Amendment and the torts of conversion and unjust enrichment. Defendants' motions to dismiss are pending.