NYSUT'S OFFICE OF GENERAL COUNSEL:

A BRIEF INTRO

TARRYTOWN SUMMER LEADERSHIP CONFERENCE

August 17, 2022

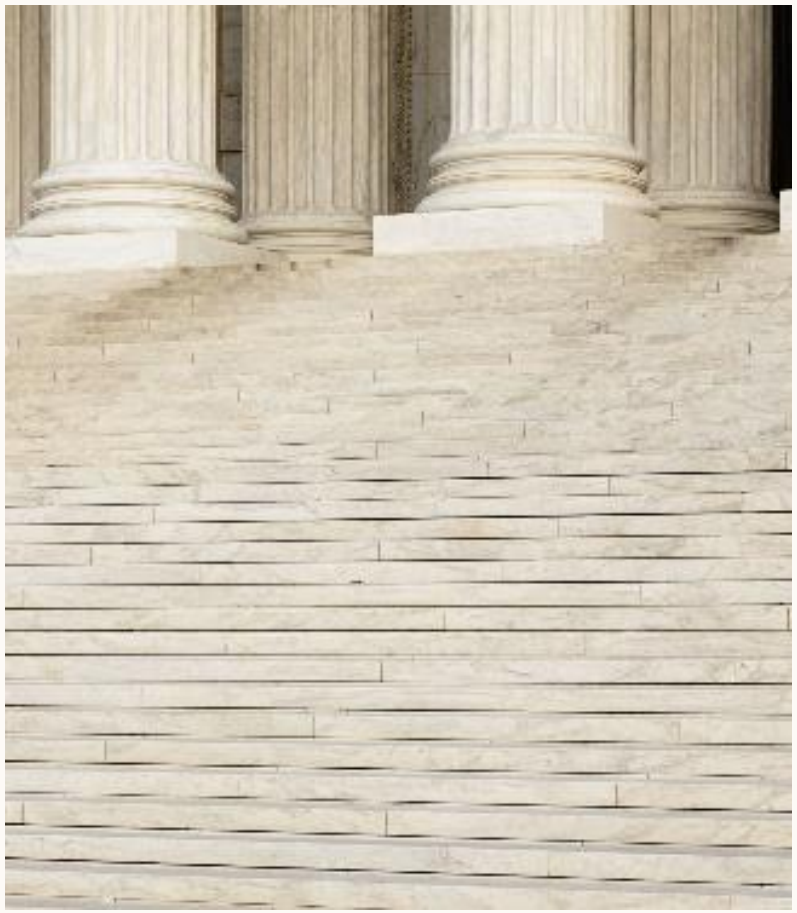
NYSUT OGC

- OGC has offices in 3 locations: Albany/Latham (Headquarters), New York City, and Buffalo (Western NY)
- OGC represents NYSUT in all matters, and it represents individual local affiliates or members in particular matters on a case-by-case basis.
- OGC appears in state and federal court at the trial and appellate levels and before a wide variety of administrative agencies and arbitration panels.

MISSION STATEMENT

- The mission of the Office of General Counsel is to provide NYSUT, its locals and their members:
  - Zealous, effective and ethical legal representation, guidance and counsel;
  - Active legal support on issues affecting labor, education, healthcare, and the public interest.
  - NYSUT's Office of General Counsel is committed to the highest professional standards in discharging its mission.

WHO WE ARE



- OGC has 5 attorney managers, over 30 staff attorneys, 2 office managers, Legal Assistants, Administrative Assistants and student law clerks as support.

- The attorney managers are:
  - Robert T. Reilly, General Counsel
  - Lena M. Ackerman, Assistant General Counsel
  - Michael Travinski, Associate General Counsel
  - Jennifer Coffey, Associate General Counsel
  - Jennifer Hogan, Associate General Counsel

NYSUT BOARD POLICY REGARDING LEGAL REPRESENTATION

- Board and RA policy specifically address dismissal hearings and license revocation hearings.
- Accordingly, OGC provides representation to tenured teachers, permanent non-probationary civil service employees, and public and private sector employees with just cause arbitration where the imposed or proposed penalty is dismissal from employment.
- Similarly, OGC provides representation in license revocation or suspension hearings before the Commissioner of Education, but only where there was no prior representation in a dismissal hearing that resulted in a decision upholding dismissal or a settlement whereby the employee resigned or retired.

WHAT DO WE DO?

TYPES OF LITIGATION OGC HANDLES

- Education Law: tenure, seniority, layoff, recall
- Civil Service Law enforcement
- Discipline cases (Ed Law 3020-a, Sec 75, just cause arbitrations)
- Part 83 and other licensing cases
- PERB/NLRB/Organizing & Strike cases
- Variety of legal opinions ranging from evaluating violations of federal & state laws, regulations & policies

- DFR (Duty of Fair Representation) cases
- CBA enforcement (defend arbitration awards and the process)
- Retiree health insurance and other retiree issues
- Constitutional and related issues: speech, privacy, association, due process, school funding
- Various other union or employment related cases and questions (subpoenas, agency fee litigation, etc.)

WHAT WE DON'T DO

GENERAL EXCLUSIONS FROM REPRESENTATION

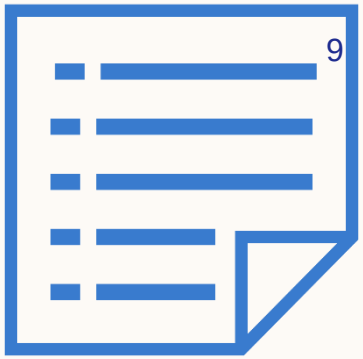
- Workers' compensation
- Unemployment insurance appeals
- Immigration
- Personal and family matters (divorce, estate planning, real estate, etc.)
  - Pre-paid legal services plans, available through other entities (e.g., NYSUT Member Benefits)
- Certain civil cases
  - (e.g., affirmative claims of defamation, other intentional torts, negligence, etc.; although we may defend against such claims)
- Criminal cases

OUR INTAKE PROCESS

Legal intakes should be first addressed to your Labor Relations Specialist, who may discuss them with their Regional Staff Director before submitting them to OGC.

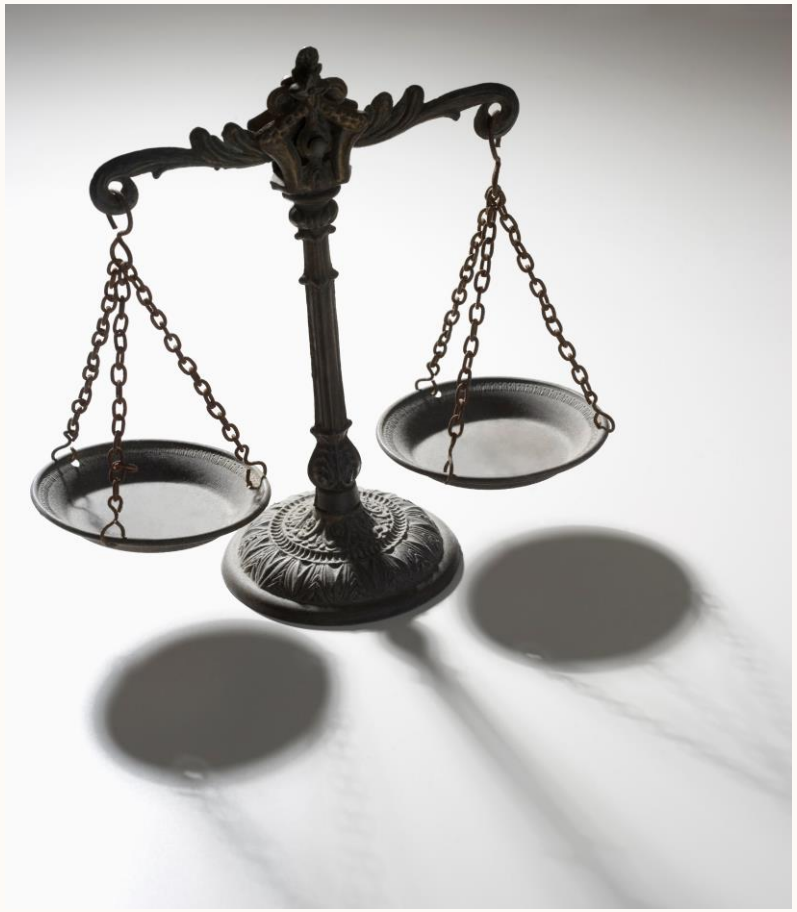
Legal intakes are handled regionally.
The NYSUT Regional Office will submit the legal intake to the assigned attorney manager for that region.

INTAKES



- With respect to regions:
  - Lena M. Ackerman handles legal intakes from Long Island & Westchester/Rockland
  - Jennifer Hogan from NYC & Westchester/Rockland
  - Jennifer Coffey from all other regions
  - Mike Travinski from NYSUT departments.
- However, based on factors such as expertise and urgency we may assign matters to attorneys from areas outside of their region.
- Improvements in technology at NYSUT have made this much easier.

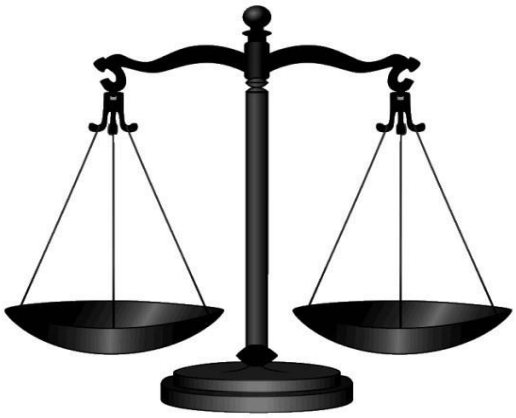
THANK YOU



Questions?

Comments?

Summer 2022
NYSUT Office of General Counsel
Legal Update



Robert T. Reilly, General Counsel

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Jennifer A. Hogan, Associate General Counsel

Michael S. Travinski, Associate General Counsel

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INTRODUCTION

This is a compendium of relatively recent cases and other legal matters intended to provide you with a general update of recent cases, decisions and legal matters that may be of interest to you. This compendium provides a brief overview of some of the matters OGC is either handling or monitoring. Please note that this document was last updated on August 12, 2022.

I. CONSTITUTIONAL ISSUES

A. Tuition Payments to Religious Schools

In June, the United States Supreme Court held in *David Carson, as Parent and Next Friend of O.C., et al., v. A. Pender Makin*, 142 S.Ct. 1987 (2022) that by conditioning tuition assistance payments to private schools by requiring the school to be "nonsectarian," the State of Maine violated the Free Exercise Clause of the First Amendment to the United States Constitution. Plainly stated: "[t]he State pays the tuition for certain students at private schools – so long as they are not religious. That is discrimination against religion."

In rural Maine, due to their large geography and small populations, many school districts do not operate their own secondary schools. Under Maine law, in such districts parents can send their children to the private secondary school of their choice and the district must provide tuition assistance payments to pay for or defray the cost of tuition. The dispute before the Court in *Carson v. Makin* began as a challenge to the system that Maine uses to provide a free public education to school-aged children. In some of the state's rural and sparsely populated areas, school districts opt not to run their own secondary schools. Instead, they choose one of two options: sending students to other public or private schools that the district designates or paying tuition at the public or private school that each student selects. But in the latter case, state law allows government funds to be used only at schools that are nonsectarian – that is, schools that do not provide religious instruction.

In this case, Chief Justice John Roberts explained, Maine pays tuition for some students to attend private schools, as "long as the schools are not religious." "That," Roberts stressed, "is discrimination against religion." It does not matter, Roberts continued, that the Maine program was intended to provide students with the equivalent of a free public education, which is secular. The focus of the program, Roberts reasoned, is providing a benefit – tuition to attend a public or private school – rather than providing the equivalent of the education that students would receive in public schools. Indeed, Roberts observed, private schools that are eligible for the tuition benefit are not required to use the same curriculum as public schools, or even to use certified teachers. He suggested that the state's argument was circular: "Saying that Maine offers a benefit limited to private secular education is just another way of saying that Maine does not extend tuition assistance payments to parents who choose to educate their children at religious schools."

Roberts also dismissed any suggestion that the ruling would require the state to fund religious education. Maine has other options to eliminate its need to fund private schools, Roberts noted: It could, for example, create more public schools or improve transportation to public

schools. But having chosen to provide public funding for private schools, Roberts concluded, "it cannot disqualify some private schools solely because they are religious."

Further, the Court stated that its holdings do not draw a distinction between a limitation on a benefit based on a school's religious "status" and a limitation based on the school's religious "use" of the benefit. According to the Court, while the state need not fund "vocational religious degrees," it could not deny a benefit based on the anticipated religious use of the benefit. For example, provided the student was not taking the courses in pursuit of a vocational religious degree, state money could be used to pay for courses in theology. However, while the Court found that Maine violated the Free Exercise Clause, it found the Establishment Clause of the First Amendment was not offended. In the Court's words, "a neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause."

Broadly speaking, if a state provides a benefit that is generally available to private schools, particularly one directed to the private schools by parental choice, under the holding in *Carson*, the state cannot deny that benefit to schools based either on the school's religious status or on the anticipated religious use of the benefit.

Justice Stephen Breyer filed an 18-page dissent that Justice Elena Kagan joined and Sotomayor joined in part. Breyer emphasized that the First Amendment's free exercise and establishment clauses were intended to strike a balance on the interaction between government and religion, with the ultimate goal of "avoiding religious strife" in a country that now has over 100 different religions. Maine's program is intended to foster precisely this kind of balance, Breyer argued, and the state has the right to opt not to fund religious schools.

Breyer noted that the Supreme Court has not previously ruled that "a State must (not may) use state funds to pay for religious education as part of a tuition program designed to ensure the provision of free statewide public education." But Tuesday's decision, Breyer suggested, creates the prospect that states may now be required to providing funds for religious schools simply by operating public schools or by giving vouchers for use at charter schools.

Sotomayor echoed Breyer's warnings in her five-page dissent. In a short time, she observed, the Supreme Court has "shift[ed] from a rule that permits States to decline to fund religious organizations to one that requires States in many circumstances to subsidize religious indoctrination with taxpayer dollars." As a result, she continued, "any State that values its historic antiestablishment interests more than this Court does will have to curtail the support it offers to its citizens. With growing concern for where this Court will lead us next," she wrote, "I respectfully dissent."

B. School Prayer

In *Kennedy v. Bremerton School District*, 142 S.Ct. 2407 (June 27, 2022), the U.S. Supreme Court held that a school district violated the First Amendment's Free Exercise Clause and Free Speech Clause - but could not rely on the Establishment Clause - when it prevented a high school football coach from praying on the 50-yard line after games. The Supreme Court

found that the Constitution neither mandates nor permits the government to suppress such religious expression.

The Court made it plain: it will not tolerate government "hostility" towards religion. The Court majority in this case makes no mention of the "separation of church and state," but instead relies on "historical practices and understandings," ones that "faithfully reflect the understanding of the Founding Fathers." According to the Court, a Free Exercise violation may be established by showing that a government entity has burdened someone's sincere religious practice with a policy that is not "neutral" or "generally applicable." A policy is not "neutral" if it is specifically directed at a religious practice, such as prayer. It is not "generally applicable" if it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way."

Here, the Court found that, after the game, the football coach could make a phone call, socialize with friends in the stands, or "engage in any manner of secular activities," but could not pray on the 50-yard line. This was "singling out private religious speech for special disfavor": a violation not only of the Free Exercise Clause but also the Free Speech Clause since religious speech, in the Court's words, is "doubly protected."

C. Gun Rights

In June, the U.S. Supreme Court struck down a New York handgun-licensing law that required New Yorkers who want to carry a handgun in public to show a special need to defend themselves. *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S.Ct. 2111 (2022). The 6-3 ruling, written by Justice Clarence Thomas, is the Court's first significant decision on gun rights in over a decade. In a far-reaching ruling, the Court made clear that the Second Amendment's guarantee of the right "to keep and bear arms" protects a broad right to carry a handgun outside the home for self-defense.

Going forward, Thomas explained, courts should uphold gun restrictions only if there is a tradition of such regulation in U.S. history. Continuing the modern Court's developing precedent on the Second Amendment right to bear arms, Justice Thomas' majority opinion confirmed that laws like New York's are subject to a rigid historical analysis of whether they would be understood to limit a person's right to bear arms as that right was understood by the framers of the Constitution at the time the Second Amendment was written in 1791. The majority equated the right to publicly bear arms for self-defense with the right to free speech, reaffirming that the right to bear arms is not to be considered a "second-class right." After a lengthy review of the history of American laws regarding public carry of firearms, the majority found New York's licensing requirement overly burdensome on their expansive vision of the right enshrined in the Second Amendment. The Court held that New York's proper-cause requirement for obtaining an unrestricted license to carry a concealed firearm violates the Fourteenth Amendment in that it prevents law-abiding citizens with ordinary self-defense needs from exercising their Second Amendment right to keep and bear arms.

II. EDUCATION LAW

A. Discipline and Licensing Matters

In addition to representing tenured teachers in Education Law § 3020-a disciplinary proceedings, OGC also represents pedagogues in proceedings before the New York State Education Department ("NYSED") concerning their professional licensing. In one such matter, OGC provided representation to a NYSUT member whose application for a speech-language pathologist license was under consideration by the NYSED. NYSED's Office of Professional Discipline reviewed the application further because of two prior criminal offenses, both misdemeanor traffic offenses occurring outside of New York State. As a result, NYSED afforded the applicant a hearing in order for the applicant to demonstrate that they have the requisite moral character to fulfill the licensing requirements pursuant to Education Law § 8206(6).

The applicant testified at length during the proceeding concerning their prior substance abuse which stemmed from their attempts to manage a diagnosed panic disorder and generalized anxiety disorder. After their second arrest, they sought more positive ways to manage their disorder, including attending professional therapy, meditating, and engaging in exercise. The applicant also testified that they no longer take non-prescribed medication and have achieved multiple professional milestones, including being recommended for tenure with their school district. Multiple witnesses testified on behalf of the applicant concerning their moral character. Further, the applicant themself attested to their commitment to helping students and becoming a "new person" since their criminal convictions.

After a full investigatory hearing, the hearing panel determined that the applicant had the requisite moral character for licensure as a speech language pathologist in New York. The hearing panel noted that New York strongly supports anti-discriminatory rehabilitation and re-integration into society. The panel determined that neither conviction will have any bearing on the applicant's fitness or ability to perform the duties and responsibilities of a speech-language pathologist. The panel further determined that there is no direct relationship between the previous criminal offenses and the application for the professional license, nor would the issuance of the license involve an unreasonable risk to property or the safety or welfare of specific individuals or the general public. The panel unanimously determined that the applicant's prior criminal history is not necessarily dispositive to their character at present, and that the applicant is presently a credible witness and meets the "good moral character" requirement for licensure as a speech-language pathologist in the State of New York.

In *Matter of Simpson v. Poughkeepsie City School District*, 206 A.D.3d 741 (2d Dep't 2022), the Appellate Division, Second Department vacated a hearing officer's decision terminating a principal's employment pursuant to Education Law § 3020-a. The principal was originally charged with participating in a scheme to intentionally inflate her school's graduation rates. While the hearing officer in the section 3020-a hearing found insufficient evidence that she had acted intentionally regarding the alleged actions, the hearing officer still sustained all charges against her and imposed a penalty of termination. A New York Supreme Court judge denied the principal's petition to vacate the hearing officer's decision, but the Appellate Division reversed that decision and granted her petition, vacating her termination.

The Appellate Division noted that under CPLR Article 75, an arbitration award may be vacated on the basis of arbitrator misconduct, bias, excess of power, or procedural defects. In compulsory arbitration proceedings, as is required under Education Law § 3020-a(5), a hearing officer's determination is subject to close judicial scrutiny under CPLR §7511(b) and must have evidentiary support and cannot be arbitrary and capricious. Additionally, Article 75 review requires that the decision be rational and have a plausible basis. Here, the Court found that the hearing officer's determination of guilt was arbitrary and capricious and without evidentiary support. This was because the hearing officer found that the petitioner was guilty of all charges despite finding that there was insufficient evidence to show that the principal acted intentionally.

B. Jarema Credit

Jarema credit allows a teacher to shorten their probationary period based on substitute teaching service rendered before a probationary teaching appointment begins. In *Sisson v. Johnson City School District, et. al*, (Sup. Ct., Broome Cty., Feb. 10, 2021), Petitioner, a music teacher, commenced an Article 78 proceeding against the Johnson City School District ("District") challenging her termination and denial of tenure by alleging that she obtained tenure by estoppel. The District hired Petitioner as a substitute teacher for the 2015-2016 school year. The District then hired Petitioner as a music teacher in September 2016. Petitioner worked for the 2016-2017, 2017-2018, 2018-2019 and 2019-2020 school years. However, Petitioner's teaching certificate lapsed on August 31, 2017, and was not reinstated until December 15, 2017.

In granting the petition, the Court found that because the Petitioner's probationary period was four years, her one-year term as a "regular substitute" provided one year of Jarema credit which reduced Petitioner's probationary period to three years. The Court rejected the District's argument that Education Law § 2509(1)(a)(ii) requires service increments of exactly two years in order to receive Jarema credit (citing *Matter of Robins v. Blaney*, 59 NY2d 393 [1983]). The Court noted that the Commissioner of Education has long interpreted § 2509 to allow substitute service credit for periods of less than two years so long as the service was rendered before the start of the probationary period. *See Matter of Robins*, 59 NY2d at 398-399.

Ultimately, the Petitioner obtained tenure by estoppel when the District continued to accept her service as a teacher and failed to provide any notice regarding the future of her employment status by the expiration of the probationary period. On appeal, the Appellate Division, Third Department affirmed the decision, relying on the *Matter of Robins* and finding that Jarema credit could also be earned in periods of less than two years. *See Sisson v. Johnson City Cent. Sch. Dist.*, 206 A.D.3d 1116 (3d Dep't 2022).

III. DUTY OF FAIR REPRESENTATION AND DISCRIMINATION CLAIMS AGAINST UNIONS

The Taylor Law, Article 14 of the New York Civil Service Law, as amended in April 2018, requires a union to fairly represent members of the bargaining unit represented by the union. This means that the union, with respect to any member of the bargaining unit, cannot act in a manner that is arbitrary, discriminatory, or in bad faith. The duty of fair representation to nonmembers

now only extends to negotiation or enforcement of the terms of the collective bargaining agreement. Further, the amendments to the Taylor Law permit a union to withhold certain services from nonmembers based solely on their membership status, which was previously forbidden. Both PERB and the courts can hear and determine duty of fair representation claims.

It is also important to note that Section 209-a(2) of the Civil Service Law, incorporating section 202 of the Civil Service Law, provides that it is an improper employee organization practice for a local union to deliberately "interfere with, restrain or coerce" public employees in the exercise of their right to "form, join or participate in, or to refrain from forming, joining or participating in, any employee organization of their own choosing."

The Office of General Counsel defends local unions and leaders against these charges at PERB and in other forums. It is important for the Office of General Counsel to be notified of any such charges or claims immediately.

In *Felton v. Monroe Comm. Coll. and Monroe Comm. Coll. Faculty Ass'n*, No. 6:20-CV-06156 (EAW), 2022 WL 71694 (WDNY 2022), the United States District Court for the Western District of New York granted the motion made by the Monroe Community College Faculty Association ("FA") and two of its individual officials to dismiss a lawsuit against them ("collectively, "FA Defendants") by FA member Thomas Felton. The lawsuit alleged that Mr. Felton was discriminated against on the basis of race in violation of both federal and state law, and that the FA Defendants failed to fairly represent him.

The court ruled that his federal law allegations had to be dismissed because no charge was filed with the United States Equal Employment Opportunity Commission ("EEOC") before the lawsuit was filed, as required by law. On the state law claims, which did not require an EEOC filing, the court dismissed them because the complaint failed to allege facts that constituted discriminatory conduct by the FA Defendants. This dismissal was "without prejudice," which means that Mr. Felton could try to rewrite his allegations and file them again.

The court also ruled that it did not have jurisdiction to hear disputes regarding a union's duty of fair representation owed to public employees and dismissed that claim without prejudice (meaning it cannot be refiled in federal court). However, it should be noted that Mr. Felton has already filed a DFR claim against the FA with PERB, which is awaiting decision by an administrative law judge.

IV. IMPROPER EMPLOYER PRACTICES

It is a violation of the Taylor Law for an employer to unilaterally implement a change to a term or condition of employment without bargaining with the union. In 2012, the Board of Education of the City School District of the City of New York ("District") unilaterally implemented a policy that "flagged" employees' negative work history in its "Galaxy" computer system. This new procedure made information regarding an employee's disciplinary history with the District immediately available to a principal who indicated an intent to hire that employee in their school.

Upon learning of this new "flagging" policy, the United Federation of Teachers filed an improper practice charge ("charge") before the Public Employment Relations Board ("PERB"), asserting that the District unilaterally implemented the policy in violation of the Taylor Law without bargaining with the UFT. Ultimately, PERB sustained the charge, finding that the District unilaterally implemented the flagging policy without bargaining with the UFT, in violation of the Taylor Law. *Matter of United Federation of Teachers, Local 2, Aft, AFL-CIO, Charging Party, and Board of Education of the City School District of the City of New York, Respondent.*, 55 PERB ¶ 3013 (2022).

PERB reasoned that the flagging policy impacted terms and conditions of employment by changing the procedures applicable to employee transfers within the District. Prior to the implementation of the flagging system, it was up to the discretion of the "intending" principal to seek out the personnel file. Now, the negative aspects of an employee's personnel file automatically populated for the principal to review. Therefore, both the automatic nature of providing the information and providing solely the negative portions of the employee's personnel file, changed the prior procedure applicable to effectuating transfers within the District. Because this unilateral change to procedure affected the terms and conditions of employment, they were mandatorily subject to bargaining.

V. RETIREE HEALTHCARE ISSUES

In *Donohue v. Hochul*, 32 F.4th 200 (2d Cir. 2022), plaintiff, Civil Service Employees Association, Inc., Local 100, AFSCME, AFL-CIO ("CSEA"), represents various workers employed by New York State. CSEA's members and former members could obtain health insurance through the New York State Health Insurance Plan ("NYSHIP") and, from its inception in the 1950s until approximately 1983, the State paid 100% of the costs for employees and retirees and 75% of costs for dependents.

In 1983, the State's contribution changed pursuant to a memorandum of understanding ("MOU"), whereby the contribution rate for employees decreased to 90%. While the legislature codified this negotiated contribution rate and made it applicable to those who retired after 1983, those who retired prior to January 1, 1983 were not impacted.

From 1985 to 2011, a series of new collective bargaining agreements ("CBA") were enacted between plaintiff CSEA and the State and they continued to contain the 90%/75% provisions. The 2007-2011 CBA, again, contained the 90%/75% provision, but did not expressly state the duration of the State's promise to contribute at this rate, specifically whether it continued for lifetime of the retirees.

In 2011, the State and CSEA agreed to a successor agreement, which reduced the State's contributions for NYSHIP premiums based on salary grade. Amendments to the Civil Service Law and its accompanying regulations provided that, for retirees who retired on or after January 1, 1983, and employees retiring before January 1, 2012, the State would contribute 88% toward the premium cost for individuals and 73% for dependents.

CSEA and certain retirees sued the State and other State officials in federal court, alleging that the State breached the CBAs in effect as of the retirees' respective retirement dates, among other things. Other unions, including United University Professions (UUP), filed related actions. We represent UUP in their action against the State in *Kreh, et al. v. Cuomo, et al.*

The United States District Court for the Northern District of New York, as relevant here, granted the State's motions for summary judgment in all of the actions and denied CSEA's motion for summary judgment. The Second Circuit reserved decision on 11 appeals, including UUP's appeal, and referred, or certified, the following two questions of New York State law to the New York Court of Appeals in CSEA's case:

1) Does New York State law create a vested right for fixed State contributions for the lifetimes of retirees, regardless of the duration of the CBA?

2) If they do not, do they create a sufficient ambiguity such to permit the consideration of evidence outside the CBA to determine if there is a vested right?

The Court of Appeals subsequently accepted the Second Circuit's order and designated CSEA's case as the "lead" case. However, UUP sought permission from the Court of Appeals to proceed as "amicus," thus allowing UUP's arguments to be heard in connection with the arguments presented by CSEA and the State.

In its decision, the Court of the Appeals held that CSEA's CBA did not expressly provide for a vested right to fixed premiums for the remainder of their retirees' lifetimes and declined to adopt any inferences that would either support a finding of vested rights or, at the very least, create an ambiguity concerning that issue, thus allowing outside evidence to be used to supplement the terms of the CBA. The court found that the State's contract law principles could not support a finding that anything outside of the "four corners" of the CBA could be used to support the assertion that retirees' were entitled to fixed premiums.

Following the New York Court of Appeals decision as to CSEA's case, the Second Circuit affirmed the Northern District's denial of CSEA's motion for summary judgment. Employing the same rationale, the Second Circuit held that UUP's breach of contract and contractual impairment claims fail absent provisions guaranteeing a vested right to lifetime fixed insurance premiums, and thus the State could change the terms of plaintiffs' premium rates. Because the CBA was silent regarding such a right and there was no ambiguity in the relevant provisions, external evidence could not be considered that might infer such a right.

CONCLUSION

Questions about the cases and other legal matters covered in this compendium may be discussed with the attorney assigned to the presentation or may be directed to Robert T. Reilly, NYSUT General Counsel, NYSUT Office of General Counsel, 800 Troy-Schenectady Road, Latham, New York 12110, (518) 213-6000.