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NYSCOPBA LAWYER's OPINION

FROM: Richard E. Casagrande

RE: Issue of whether Workers' Compensation leave counts against an employee's leave entitlement under the Family and Medical Leave Act

DATE: March 6, 2000

This memo is in response to Gary's question about whether Workers' Compensation leave counts against an employee's Family and Medical Leave Act (FMLA) leave entitlement. Unfortunately, based upon our research, the State can count Workers' Compensation leave against the required 12-week annual FMLA leave.

The FMLA only establishes minimum requirements for unpaid leave time. Therefore, if the State grants employees more leave time than required by the FMLA, the employees are not entitled to FMLA leave in addition to what the State provides. Put differently, because the State grants an employee more leave time than is given to an employee under the FMLA, the employee is essentially selecting the State granted leave rights over, or instead of, the FMLA leave rights.

The FMLA states: "[t]he Act provides that a serious health condition may result from injury to the employee 'on or off' the job. If the employer designates the leave as FMLA leave in accordance with 29 C.F.R. § 825.208, the employee's FMLA 12-week leave entitlement may run concurrently with a worker's compensation absence when the injury is one that meets the criteria for a serious health condition." (See, 29 C.F.R. §825.207(d)(2)) For example, if an employee is placed on workers compensation for 15 weeks, as long as the State properly designated that leave as FMLA leave, the employee does not get an additional 12 week FMLA leave after those 15 weeks expire. During those 15 weeks spent on workers' compensation, the FMLA leave is used up -- not added to the 15 weeks already spent on workers' compensation. This interpretation and policy prevents the employer from having to provide more leave time than is statutorily required under the FMLA.

In 1999, a New York federal District Court confirmed that the FMLA only sets minimum standards of leave entitlement: ". . .relevant collective bargaining agreements or employee benefit policies may provide for other, non-FMLA leave that the employee could take instead of, in addition to or concurrently with FMLA leave. Where the employer provides for paid medical or vacation leave in circumstances that would also qualify for FMLA leave, the Department of Labor regulations allow for the employee to elect, or for the employer to require. . .that the non-FMLA leave and the FMLA leave be taken concurrently." (See, *Donnellan v. New York City Transit Authority*, 1999 WL 527901 (S.D.N.Y. 1999).

The U.S. Department of Labor has also addressed this issue, specifically stating: "FMLA leave and workers' compensation leave can run together, provided the reason for the absence is due to a qualifying serious illness or injury and the employer properly notifies the employee in writing that the leave will be counted as FMLA leave." (Compliance Guide to the Family and Medical Leave Act, US Department of Labor Employment Standards Administration Wage and Hour Division, WH Publication 1421 (December 1996).

In conclusion, it is our opinion that the State can count an employee's workers' compensation leave against the required FMLA leave, so long as it notifies the employee that it is doing so. Or, in other words, workers' compensation leave can run concurrently with FMLA leave.

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Prison guard pleads guilty to misconduct in sex case with inmate

ALBION, N.Y. (AP) A prison guard pleaded guilty to misconduct after he was accused of having sex with an inmate.

Robert Kozak, 47, of Alden was arrested April 13 and charged with third-degree rape and official misconduct. The case involved a woman at the Albion Correctional Facility 30 miles west of Rochester.

Kozak has resigned. He was suspended without pay pending the outcome of the case, a state Department of Corrections spokesman said.

District Attorney Joseph Cardone said Kozak was allowed to plead guilty to official misconduct, with a rape charge dismissed. He immediately signed a letter of resignation after the plea Wednesday, Cardone said.

Kozak faces up to a year in jail. He'll be sentenced in July.

Kozak is the second Albion guard to lose his job in the last year following allegations sex with inmates. Another guard was convicted of sexual abuse in September.

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CSEA pact wins; PEF adopts new strategy

Albany -- Top state worker union backs deal while the Public Employees Federation agrees to blackout

The Civil Service Employees Association on Friday announced overwhelming approval of a four-year contract with the state. Meanwhile, New York's second largest union, the Public Employees Federation, has agreed to a cease-fire in its war of words with the Pataki administration over lagging negotiations.

CSEA, the largest state employee union with about 77,000 members in four bargaining units, said the turnout for contract ratification was "unprecedented," with more than 46,000 members casting ballots. The contract passed 44,245 to 2,478.

"This is one of the largest turnouts for anything in CSEA," said union President Danny Donohue. "Twenty-to-one I'll take any day."

CSEA members have been working without a new contract since April 1, 1999. The contract, negotiated with the Pataki administration in March, came after months of public complaints from the union, including a massive demonstration outside the Capitol in January as the governor delivered his State of the State address.

The pact calls for two years of 3 percent pay hikes and two years of 3.5 percent increases, along with a \$500 signing bonus. The first increase is retroactive to October 1999, while the other increases come at the start of the state's normal fiscal year, April 1.

Also agreed to was a plan to seek legislative approval to eliminate the 3 percent pension contributions now paid by members of tiers 3 and 4 of the state retirement system. If approved, it would apply to people with at least 10 years in the system, which Donohue now said covers about three-fourths of the union and will reach 80 percent by next year.

Tier 1 and 2 members would get an extra month of service credit toward their pensions for each year of service, up to two years.

Still without a contract are the bulk of Public Employees Federation members, who have spent recent months increasing their criticism of the administration. But, responding to a request from Pataki's negotiators, PEF President Roger Benson has agreed to a blackout on public comment or protest through

May 12 to call the administration on its complaint the the rhetoric was interfering with the bargaining process.

Benson, who earlier complained publicly about the state's request for a moratorium on public discussion of the talks, acceded "in order to remove obstructions the state has claimed are preventing the successful completion of their negotiations," said Denyce Duncan-Lacy, a PEF spokesman.

PEF, which represents about 54,000 workers, earlier said it would accept a pact similar to CSEA's or one approved by the Metropolitan Transportation Authority.

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EXECUTIVE BOARD MEETING - FEBRUARY 11, 2000

New York State Correctional Officers & Police Benevolent Association, Inc.
194 Washington Avenue - Albany, NY 12210
(518) 427-1551 nyscopba@nyscopba.org

EXECUTIVE BOARD MEETING

FEBRUARY 11, 2000

The meeting began at 12:15PM and was held in Conference Room #1 at NYSCOPBA Headquarters located at 1 94 Washington Avenue, Albany, New York.

Present were:

Brian Shanagher - President
Bill West - Executive Vice President
Robert Cronin - Treasurer
David J. Stanson - Recording Secretary
Phil Bijeau - Vice President
Anthony Farda - Vice President
Grant Mann - Vice President
Diane Davis - Vice President
Ray Sordoni - Vice President

Excused Absence: Andrew Deieso - Vice President
Edwin Mercado - Vice President

William Golderman, Esq. - Hinman, Straub, Pigors & Manning, P.C.

At this time the minutes from the January 28, 2000 meeting were read. Bill West made a motion to accept the minutes. Bob Cronin seconded the motion. Motion unanimously passed.

Treasurer's Report

Bob Cronin distributed the report, reminding the Board members that the report given at the first meeting of each month will encompass the income and expenditures of the previous month. Bob reviewed the report in detail.

President's Report

Brian Shanagher reported that the Legislative Committee met on Thursday, February 11, 2000. He presented and reviewed the Legislative Report.

The Department of Correctional services is working to change the smoking policy. The Department's proposed changes are unacceptable.

Rick Harcrow's situation was explained and discussed at this time. Andrew Deieso and Edwin Mercado were conferenced by telephone for this debate. Brian stated the facts of the situation:

Rick Harcrow is presently suspended from his Union position, with pay, until the Executive Board reviews the situation and reaches an agreement.

First incident, November 1 999: Brian was advised by a member that Rick Harcrow had approached one or more individuals at the November Executive Assembly meeting, advocating the removal of two Executive Board members, Bob Cronin and Dave Stanson. Brian Shanagher confronted Rick Harcrow with this information. After first denying this action, Rick admitted the deed. Brian informed Rick that this action could be grounds for dismissal and that he needed to meet with Bob Cronin and Dave Stanson to smooth things over. A meeting transpired, Rick Harcrow apologized, and both Bob and Dave agreed that if no such action ever occurred in the future, the situation would be considered over. Rick agreed this would not happen again.

Second incident, January 2000: At a January 31, 2000 meeting in Brian Shanagher's office, Bill West, Bob Cronin, Rick Harcrow and Brian Shanagher were present. Rick stated again that Bob Cronin and Dave Stanson were through. At this time, Brian suspended Rick from NYSCOPBA's employment, with pay, on February 3, 2000 until the situation could be resolved. At this time it was agreed between Bill West, Bob Cronin, Dave Stanson and Brian Shanagher that Rick Harcrow could write a letter admitting to his actions with the understanding that they were never to be repeated in any way, shape or form, or a permanent termination from NYSCOPBA would occur. Rick agreed to this condition and wrote a letter, however, admitted no guilt of wrongdoing. Brian then wrote a letter presenting the facts as he knew them to be. Both he and Rick were to sign this letter. Brian contacted Rick on February 11, 2000 regarding the letter Brian wrote. Rick refused to sign this letter, in no uncertain terms, and said NYSCOPBA would have to fire him.

Because the letter Rick Harcrow sent to Brian Shanagher admitted no wrongdoing, a motion was made by Phil Bijeau to terminate Rick Harcrow from NYSCOPBA's employment. Dave Stanson seconded the motion.

A lengthy discussion followed. Anthony Farda suggested that Rick be present at the next Executive Board meeting to address the members. This would be in two weeks. Brian informed the Board that his offer to accept the original requested letter is now withdrawn. Anthony Farda made a subsidiary motion to postpone the vote on the original motion for two weeks and have Rick Harcrow appear and address the Board members at the next Executive Board Meeting. Grant Mann seconded the motion. A tie vote of 5 yes and 5 no was broken by Brian Shanagher's yes vote. Rick will address the next meeting of the Executive Board. Yes votes: Diane Davis, Anthony Farda, Grant Mann, Edwin Mercado, Ray Sordoni and Brian Shanagher. No votes: Phil Bijeau, Bob Cronin, Andrew Deieso, Dave Stanson and Bill West. Rick Harcrow will remain suspended with pay until a final decision is made.

At this time Brian Shanagher distributed and read aloud, a Sexual Harassment Policy. Everyone working in the NYSCOPBA office and Satellite Office will be required to attend a meeting on the subject. Bill West made a motion to accept the Sexual Harassment Policy as read by Brian Shanagher. Ray Sordoni seconded the motion. The motion was unanimously carried.

Old Business

Anthony Farda inquired about NYSCOPBA's open position for a Health & Safety Officer. He has a memo of interest from a member, John Pappas. Grant Mann stated that he previously suggested Byron Ball, another member, for the position. Bill West stated that the position is still open and there is now a policy in place whereby members are advised of open positions and should submit resumes. It is hoped that an expert in the field of Health & Safety will fill this position.

New Business

Bill West reported that the Judicial and Ethics Committee met and made Policy and Procedure. A copy was distributed to each member present. He further stated this document would be brought before the Executive Assembly on Tuesday, February 15, 2000. Bill West asked everyone to review the material and submit any suggestions or comments to him.

Denny Fitzpatrick, Director of Public Relations, addressed the Executive Board at this time and explained two proposals in which NYSCOPBA was requested to partake:

1. Become a Corporate sponsor for Missing and Exploited Children. This sponsorship would be at a cost of \$10,000, equaling approximately \$.50 per member.
2. Become an official sponsor of the Special Olympics. The cost of this endeavor is less than \$.90 per member, per year.

The money to participate in both of these causes would come out of the Public Relations budget. No additional monies are being solicited. Following Denny Fitzpatrick's explanation, Grant Mann made a motion for NYSCOPBA's support of both of these causes. Anthony Farda seconded the motion. A unanimous yes vote passed this motion.

Bill West reported on the grievance meeting held earlier this morning. In addition, the Grievance Department may be looking to hire a new secretary in the very near future. Steve Heroux is extremely overwhelmed and additional assistance is needed.

A motion to adjourn the meeting was made by Bill West and seconded by Anthony Farda.

Meeting adjourned at 3:30pm.

Minutes Recorded by:

David J. Stanson
Recording Secretary

Doris Rafferty
Executive Secretary

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EXECUTIVE BOARD MEETING - FEBRUARY 18. 2000

New York State Correctional Officers & Police Benevolent Association, Inc.
194 Washington Avenue - Albany, NY 12210
(518) 427-1551 www.nyscopba.org

The meeting began at 11:00AM and was held in Conference Room #1 at NYSCOPBA Headquarters located at 1 94 Washington Avenue, Albany, New York.

Present were:

Brian Shanagher - President
Bill West - Executive Vice President
Robert Cronin - Treasurer
David J. Stanson - Recording Secretary
Phil Bijeau - Vice President
Andy Deieso - Vice President
Anthony Farda - Vice President
Grant Mann - Vice President
Edwin Mercado - Vice President
Diane Davis - Vice President
Ray Sordoni - Vice President
William Golderman, Esq. - Hinman, Straub, Pigors & Manning, P.C.

President Shanagher again discussed the actions of NYSCOPBA employee Liaison Officer Rick Harcrow.

Anthony Farda raised a question as to whether or not this situation should be referred to the Judicial & Ethics Committee. There was much discussion on this issue.

Anthony Farda requested Attorney Bill Golderman give a legal opinion on this subject.

Bill Golderman explained that the Judicial & Ethics Committee parameters do not address this matter. He also explained that the Executive Board is the correct body to make employee decisions.

At this time a motion was made by Anthony Farda and seconded by Grant Mann to refer the termination of Rick Harcrow to the Judicial & Ethics Committee. A vote was taken. There were 7 no votes by Bill West, Bob Cronin, Dave Stanson, Diane Davis, Ray Sordoni, Phil Bijeau and Andrew Deieso, and 3 yes votes by Anthony Farda, Edwin Mercado and Grant Mann.

Motion denied.

Rick Harcrow then entered the room and spoke to the Executive Board. He apologized for his actions taken against Dave Stanson and Bob Cronin and told the Board that he will accept their decision.

After Rick Harcrow left the room, Executive Vice President Bill West told the Board he will vote against the motion to terminate Rick Harcrow.

Dave Stanson then stated, "Even though we do not have the votes to terminate, let us vote for the record".

Phil Bijeau made the motion to terminate Rick Harcrow. The motion was seconded by Dave Stanson. A vote was then taken. There were 4 yes votes by Bob Cronin, Dave Stanson, Phil Bijeau and Andrew Deieso, and 6 no votes by Bill West, Edwin Mercado, Ray Sordoni, Diane Davis, Anthony Farda and Grant Mann. Motion denied.

A motion was made by Bob Cronin to adjourn. The motion was seconded by Bill West. Motion passed.

The meeting was adjourned at 3:00PM.

Minutes Recorded by:

David J. Stanson
Recording Secretary

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Attica survivors will reject money

ALBANY, N.Y. (AP) Some relatives of guards killed in the 1971 Attica prison riot plan to refuse their share of a \$550,000 compensation payment from New York state.

The payment plan was crafted by state leaders this year after Attica inmates won approval of a \$12 million settlement from New York with about \$4 million of that going to legal fees.

The payment of \$50,000 to each of the 11 families of slain prison workers was meant to provide a degree of balance. A number of families said they were not told immediately following the riot that by signing death benefit checks, they were forfeiting their right to sue state officials.

A group of surviving relatives have complained the payment to guards' relatives is too small and fails to address larger issues surrounding the tragedy. As state lawmakers prepared Thursday to vote on the budget that would authorize the payment, two surviving relatives said they were among a group that would refuse the money.

"It's too little too late," said Ann Valone, whose husband Carl was taken hostage and killed at Attica. "That's not justice."

Valone and other survivors believe the state needs to do more to address the tragedy that claimed the lives of 32 inmates and 11 prison employees, most of whom died during the violent retaking of Attica by state troopers on Sept. 13, 1971.

A group of survivors calling themselves Forgotten Victims of Attica want New York state to open sealed records related to the case; apologize for the state's retaking of the prison; provide counseling for survivors and injured guards; support a yearly ceremony outside the prison and to also provide money for the surviving guards taken hostage.

"The money is not the issue with me or with our entire family," said Valone's daughter, Maryann Valone.

Mark Cunningham, whose father Edward was a prison guard shot to death in the retaking, also said his family would refuse the money. He said 10 families voted at a survivors' meeting in April not to accept the payment. Members of two of those families reached for comment Thursday said they were not sure if

they would take the money.

State Sen. Dale Volker, a Buffalo-area Republican who spearheaded the compensation plan, has said \$550,000 is the most money Assembly Democrats would agree to pay. Volker aide Joe Maltese did not rule out the Legislature taking up the families' other requests later.

A group of families is planning to lobby at the state Capitol later this month.

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NY State's prisons honored for TB fight

ALBANY - The National Academy of Sciences has recognized the state prison system for its significant reduction of tuberculosis among staff and inmates.

A federally funded report states:

Cases of TB dropped from 225 per 100,000 inmates in 1991 to 40 in 1998.

Cases of drug-resistant TB dropped from 39 in 1991 to one in 1998.

The staff TB rate dropped from 1.7 percent in 1993 to 0.03 in 1998.

The rate of tuberculosis among inmates dropped from 2.4 to 1.2 percent in the same period.

The state Department of Correctional Services' program includes aggressive screening and treatment of prisoners and staff. TB is a bacterial infection that spreads through the air when an infected person coughs, spits or sneezes, and which usually affects the lungs

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Important News for Us Retirees

Attn: NYS Retirees

There is a new Retiree COLA Bill now pending in the legislature, it is backed by all the unions, and I hear it has a good chance of passing. Everyone needs to write their state legislators now. The bill would provide A COLA to retirees based on the CPI, plus those retired a specified number of years would automatically get a raise for inflation.

The Bill numbers are S5703A Senator Leibell & A8516A Assemblyman-- Vitaliano. Leibell & Vitaliano are the sponsors in the senate & assembly. Retirees should write to their home district legislators. Also the unions are having a lobby day & rally for the bill on May 9th in Albany. Pass this on to all retirees you know to get on it. Time for us to fight for our raise now !

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Contract-less guards go public with video

By MICHAEL GORMLEY

The Associated Press

ALBANY, N.Y. (AP) -- Stark black-and-white images of life and death inside state prisons show the fear, threats and abuse to which corrections officers are subjected daily. The echoing clank of steel locks on steel doors punctuates the brief glimpse inside state prisons provided by a new union-sponsored video about to go public.

The union representing corrections officers who guard the state's 70,000 worst felons is going over the governor's head to take the videos to the public, which can't see the important and dangerous jobs done behind the walls.

The union-produced video is "Inside the Walls: The Toughest Beat in New York State Law Enforcement." The public relations tool was shown to state senators Tuesday before it makes the rounds of civic groups and community service clubs statewide.

The union representing the state's more than 24,000 corrections officers has been working without a contract since April 1, 1999. Their base pay with uniform compensation and other benefits make the starting pay at least \$40,000**, state officials said.

The New York State Correctional Officers & Police Benevolent Association wants to have certain concessions for its officers which are routinely granted to police bargaining units in New York. They include a 30-day limit on suspensions resulting from allegations of wrongdoing lodged by inmates or others. The union is also seeking continued health care and other benefits to family members.

"In the best of times this is the most stressful job in state government," said Sen. Michael Nozzolio, chairman of the Senate's crime victims, crime and corrections committee. His Auburn-based district in the Finger Lakes district has five prisons.

"The governor has said repeatedly that he has the utmost respect for the job these people do and it's one of the toughest in state government," said Mary Hines, spokeswoman for the Office of Employee Relations. Negotiations are in mediation and both sides continue to talk, she said.

The video includes interviews with men and women officers. They relay stories of inmates accumulating arsenals of hand-hewn knives fashioned from plexiglass that can't be detected by metal detectors, razors, small bits of steel, even eyeglass frames. They talk of fear when a half-dozen officers must supervise up to 700 prisoners. And they also spoke of the continued fear of "dousing," despite a recent state law that has toughened penalties for the throwing of excrement and urine at officers.

Worse, the officers said they have trouble relating too much about their jobs because friends and relatives can only listen to so much about the harsh life inside, if officers feel they can open up at all.

The narrator concluded of one officer: "He's in prison."

**My Notes: The Starting pay stated is in error, just out of the academy is approx. \$26,000.

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CSEA reaches tentative pact for 4,600 court employees

ALBANY - The Civil Service Employees Association has reached a tentative contract agreement for 4,600 employees of the state's unified court system, the union announced Monday.

Matching a deal already ratified by CSEA's members in the executive branch of state government, the proposed contract calls for an across-the-board raise of 3 percent retroactive to Oct. 1, 1999; another 3 percent raise retroactive to April 1, 2000; and two 3.5 percent raises April 1 of 2001 and 2002.

The agreement also makes changes in the salary schedule, increasing the value of each "step" based on years of service and raising longevity bonuses, according to the union's announcement.

The announcement said the deal would increase uniform and equipment allowances, raise the employer contribution to the CSEA Employee Benefit Fund, maintain health coverage and make various improvements in sick leave benefits.

CSEA spokesman Stephen Madarasz said he wasn't sure whether the court workers' settlement calls for the same pension improvements that were negotiated for the executive branch employees. Under that agreement, which needs approval from the Legislature, workers with 10 years' experience could stop paying 3 percent of their income into the pension fund.

Madarasz said the union wants the Legislature to make the same change for all state employees.

"The expectation is we're going to pursue it for everybody," Madarasz said.

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NY Officers' families assail payout for Attica riot

By GENE WARNER
News Staff Reporter
5/6/00

They call themselves the Forgotten Victims of Attica and they're blasting the state's \$550,000 "payoff" to the families of 11 corrections officers and civilian employees killed in the 1971 prison riot.

The new state budget approved Friday includes \$50,000 for each of those families in the wake of the \$12 million court-approved settlement with inmates' families.

Not good enough, the corrections officers' families have replied, apparently in unison.

"My father is a man in a box," said Maryann Valone, daughter of slain corrections officer Carl Valone. "He calls from his grave for justice and he's been denied his for almost 29 years."

"In 1968, when my husband, John, graduated from college, he told me he wanted to leave his mark on the world," added Anne D'Arcangelo Driscoll, widow of slain officer John D'Arcangelo. "But he had no intention of leaving his blood on the walls of Attica. I trusted New York to keep its word and take care of us, but instead I received a scar that will never fade."

More than 40 widows, family members, surviving hostages and injured corrections employees recently

formed the Forgotten Victims of Attica to educate the public about what happened in September 1971 and how the families have been treated since then.

The group is asking the state to issue a formal apology, open sealed state records about the retaking of the prison, support an annual ceremony honoring the 11 guards and civilian employees killed in the riot, provide counseling for these families, and compensate each family somewhere around \$1 million.

Families have complained that by signing death-benefit checks after the riots, they forfeited their right to sue the state. One widow who didn't sign those checks was awarded \$1.06 million in 1985.

State Sen. Dale M. Volker, R-Depew, who helped navigate the \$550,000 compensation plan through the State Legislature, told group members last month that that amount was the most the Assembly would support this year.

"Sen. Volker says no money will heal the scars," said Joe Maltese, his communications director. "This is a symbolic gesture to give these families some form of closure."

The issue's not closed for Valone, who didn't try to hide her anger Friday.

The \$50,000 offered to her family wouldn't even cover one year of her father's life, which was sacrificed by the state's storming of the Attica prison, she said.

Valone said she and her family want nothing to do with this money.

"They think they can buy us off and silence us with this amount of chump change," she said. "My father died at the age of 44. He had the best years of his life in front of him."

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NY State pension fund grows to \$127 billion

By ANNY KUO, Associated Press Writer

ALBANY, N.Y. (AP) -- A volatile year on Wall Street did little harm to the New York's government worker pension fund, which has grown to a record \$127 billion.

State Comptroller H. Carl McCall said Monday stock market fluctuations had "some impact" on the state Common Retirement Fund but added that with well-diversified investments, "there really is no cause for concern."

"I continue to believe in the market in terms of its long-term viability," said McCall, the sole administrator of the New York State and Local Retirement Systems. "The underlying principles of our market are very good and overall the long-term prospect of the market is good."

Nevertheless, McCall said he has decided to reduce the percentage of the fund invested in domestic stocks from about 50 percent to 45 percent over two to three years. That would be done by investing the interest income in other ventures such as real estate and international investments.

He added that he doesn't plan to sell the state's nearly 17 million shares of Microsoft Corp., which is facing the threat of a breakup. McCall said while the software giant's future is uncertain, its "attractive

products" would ensure that it would continue to perform well.

McCall said the performance of the state pension fund has helped state and local taxpayers save \$1.2 billion since 1996 as bills to government employers have decreased to zero for their share of the pension costs.

"Because the pension fund has done so well, and it has provided significant benefits for employers, it's time we do something for retirees," he said.

The comptroller called for automatic cost-of-living adjustments for retirees, a move that Gov. George Pataki indicated last week he would support. Current and retired public employees have planned a pro-COLA rally today in Albany, and McCall said he intends to join them. Organizers said they expected as many as 10,000 people at the event.

McCall also said with high earnings from the state's investments, a complete elimination of pension contributions from all public employees is possible. Pension contributions by current employees in Tier III and Tier IV of the Common Retirement Fund made up about \$600 million of the fund's \$6.9 billion income last year.

The Common Retirement Fund was about \$115 billion last year and has grown from \$56 billion in 1993, McCall said.

The fund had a five-year average rate of return of 17.7 percent, with a one-year rate of return of 17.8 percent for the state fiscal year that ended March 31.

McCall pointed out that the rate of return for fixed income -- investment in bonds -- dropped to 1.3 percent. The five-year average rate of return of fixed income was 8 percent. The comptroller said the decline was due to the Federal Reserve raising interest rates several times in the past year. When interest rates go up, the value of bonds go down, he said. About 27 percent of the pension fund is invested in bonds.

That decline was offset by an increase in returns from international equities, which makes up about 10.5 percent of the fund.

More than 800,000 current and former employees of state and local governments around the state have money in the State and Local Retirement System.

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NY Pension fund of state to shift investing plan

McCall to cut funds in U.S. stock markets

By WILLIAM F. HAMMOND Jr.
Gazette Reporter

ALBANY - After months of unprecedented volatility on Wall Street, the pension fund for state and local employees will scale back its investment in U.S. stock markets, Comptroller H. Carl McCall said Monday.

McCall, who manages the \$127 billion fund on behalf of 900,000 workers and retirees, said he does not plan to sell off the fund's current holdings in stocks - General Electric, Microsoft and Exxon Mobil are a few examples - which currently make up about half of its portfolio. For the time being, however, the fund will concentrate future investments in overseas stocks, real estate and venture capital, he said.

"We're not taking money out" of the New York Stock Exchange and the Nasdaq, he said. "But we will be putting the bulk of our income into other asset classes."

The share of the portfolio consisting of American stocks will gradually decline from 50 percent to 45 percent, which is about what it was when McCall took office in 1993, said spokesman Jeffrey Gordon.

"We are reducing our exposure somewhat in the domestic equity market, but we'll still be pretty heavily invested," Gordon said.

As of the end of trading on Monday, the Dow Jones industrial average was down 6.6 percent since the start of this calendar year, and the Nasdaq composite was down 7.6 percent.

Despite the gyrations early this year, the pension fund realized a return of almost 17.8 percent during the fiscal year that ended March 31, McCall said.

"Although we've had this tremendous volatility in the stock market, there is really no cause for alarm," he said. "We are long-term investors. We are patient investors. . . ."

"The growth . . . should be very reassuring to the million New York state employees and retirees who depend on the fund," McCall said. "The message we want to send to them is the fund is in good shape and doing very well."

In fact, McCall said the fund easily can afford to be much more generous with members of the retirement system.

McCall, a Democrat who is considering a run for governor in 2002, restated his support for giving retirees an automatic cost-of-living adjustment every year - the subject of a major rally today organized by the AFL-CIO. McCall also endorsed the idea of allowing employees with 10 years of service to stop contributing 3 percent of their paychecks into the fund - a change that Gov. George Pataki recently agreed to with the Civil Service Employees Association.

Both proposals require approval from the Legislature.

The fund has realized an average annual return of almost 18 percent for the past five years, largely because of a booming stock market. But McCall said the fund could afford the benefit changes even if the market goes into a slump.

"It would have to be a very deep downturn and sustained over a long period of time" before the fund would need any money from government employers, he said. "And I don't contemplate that."

Last year, the fund paid out \$4 billion, mostly in benefits to retirees. But it received income, not including its gains in the market, of \$6.9 billion - only \$600 million of which was employee contributions. The rest was investment income such as interest and dividends.

"I don't like to use `excess,' " McCall said in describing the fund's financial health. "But we've got depth."

Last week, a governor's task force on the pension system reported that the fund managed by McCall has 106 percent of the money it needs to pay off all of its obligations to current retirees and employees. That calculation was based on an actuarial estimate of the fund's assets at \$81 billion, less than two-thirds the current market value.

Acknowledging the possibility that Wall Street is headed for a bear market, McCall said he still considers stocks to be good investments.

"The underlying principles of our economy are very good," he said. "That means the long-term prospects for the market are very good. . . . Over a long period of time, that is the best place to have the bulk of your assets."

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COLA concept picks up steam

Albany -- Workers and retirees plan to demonstrate today for regular adjustments in pension payments, and it appears idea has high-level support

Thousands of workers and retirees are expected to descend on Albany today to push for regular cost-of-living increases for retired public employees as the state's top three leaders appear to have embraced the idea.

The high-level support makes it likely a permanent cost-of-living adjustment, long a major objective of public worker unions, will be enacted this spring.

Both Assembly Speaker Sheldon Silver and Senate Majority Leader Joseph Bruno are scheduled to address what organizers say could be 5,000 to 10,000 employees in a noon rally to demand a cost-of-living adjustment, or COLA. Last week, Gov. George Pataki, backed by a task force report, supported the COLA as well.

And on Monday, state Comptroller H. Carl McCall, the sole trustee of the state retirement system that covers some 290,000 state and local retirees and has another 593,000 working members, said the nearly \$127 billion fund can easily handle a COLA provision for years to come.

The stock market has largely fueled the fund's roughly 18 percent annual gains over the last five years. But McCall said that even if the bull market were to turn bearish it would take a long period of major losses for the COLA to be a problem.

"It would have to be a very deep downturn sustained over a long period of time," McCall said. "This is something retirees need, deserve. It's something we can now afford."

The exact terms of a COLA have yet to be ironed out, but Pataki, a Republican, and McCall, a Democrat, appear generally in agreement on such basic elements as that it is affordable, automatic and permanent.

A bill pending in the Assembly, sponsored by John J. McEneny, D-Albany, would allow retirees to receive a maximum 3 percent annual raise whenever the retirement system enjoys a combined return on investments of more than 10 percent over a five-year period. When the fund's return hits 12 percent, earnings would be put aside for years in which investment performance doesn't reach the 10 percent

threshold.

Pataki's Task Force on Public Employee Pension Systems also urged that any program recognize that people who retired years ago, when public salaries were much lower, have seen the value of their benefits wither the most from inflation.

According to the AFL-CIO, which is organizing today's rally at the Capitol, 60 percent of retirees in the system receive state pensions of less than \$10,000 a year. While 39 other states have some kind of built-in system for regular increases, New York does it only on an ad-hoc basis. The most recent were in 1995 and 1998.

With more than 60 percent of its investments in the domestic and international stock market, the fund has been riding Wall Street's bull market for several years and earning so much money that it stopped requiring local governments to contribute. This year, the state negotiated contracts eliminating contributions for many of its employees. McCall said that while the pension system took in about \$6.3 billion in interest, it paid out \$4 billion.

One potential snag in the proposal is whether New York City, which has five independent pension systems, will go along with the COLA idea. While its approval isn't needed for the state systems, officials say they would want all public employees to enjoy equal benefits.

While the state systems have enough -- if not more than enough -- money to pay for current and future retirees, the governor's task force analysis indicates that the city's systems do not appear to be as well-funded.

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Winner faces primary challenge

By CHARLIE COON
Star-Gazette

Sidney S. Graubard of Horseheads, a 20-year Chemung County legislator, stunned the local political establishment Friday by announcing he will run in September for fellow Republican George Winner's state Assembly seat.

Winner has never faced an opponent in the primary since winning the Republican primary in 1978 over Graubard and James Graner. Winner has also faced few Democratic or third-party candidates in the November general election while ascending to the No. 2 Republican post in the Assembly.

Graubard, who represents the 5th District, said he did not have any criticisms of Winner's performance in Albany.

"I'm running for the office as opposed to against anybody," Graubard said. "A lot of county legislators become assemblymen. It's the next step up.

"My message is quite simple. I feel with the knowledge and experience I've gained, I can be an effective assemblyman and represent a larger constituency than I represent now. I can be a strong voice for the Southern Tier."

Both Winner, of Elmira, and Chemung County Republican Party Chairwoman Donna Draxler, of Pine City, said they were surprised by Graubard's announcement.

Draxler said it was highly unusual for a Republican candidate like Graubard not to notify her that he was running for office.

"My first question is, 'Why?'" Draxler said. "Is he totally dissatisfied? I don't have any answers, really. I thought he'd at least let me know why he wants to run."

"I called Sid this morning after I received his announcement and wished him well," Winner said. "I told him I was disappointed after all my long-standing efforts on behalf of the party to have a primary challenger, but this is a democracy and he certainly is entitled to run."

The 66-year-old Graubard retired in 1990 after a 33-year career in the state Department of Correctional Services.

He said his desire to be an assemblyman is a natural extension of a career in politics that began in the 1960s when he helped organize the Conservative Party in his native New York City. Graubard said his great uncle, Moritz Graubard, served in the Assembly in the early 1900s.

Graubard said he felt he could do a good job as an assemblyman because he is comfortable dealing with people from all walks of life. Too many politicians, he said, are thin-skinned.

"Mine is thick, Graubard said. "Maybe that's why I'm fairly successful. I like people to be up front."

Keith Osborne, chairman of the county's Democratic Party, said Democrats will not field a candidate this year to run against Winner.

"We'd probably have to start organizing the campaign a year in advance," Osborne said. "The (Democrats) who want to run don't have the qualifications or support. The ones we feel are viable candidates are not interested in politics or are satisfied in their current jobs"

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Inmate from Upstate Correctional Facility dies after fight with cellmate

MALONE, N.Y. (AP) -- A fight over a fluorescent reading light in a maximum-security prison cell Friday ended in the death of a 42-year-old inmate, officials said.

The name of the deceased inmate, pronounced dead at Albany Medical Center at 2:30 p.m., was being withheld Saturday pending notification of family members in Panama. He was serving an indeterminate sentence of 18 years-to-life for a conviction in Brooklyn for second-degree murder and drug sale charges.

According to a news release from the state Department of Correctional Services, a correction officer making rounds at Upstate Correctional Facility discovered two cellmates fighting at 3:10 a.m. Friday.

After inmate Donnell Brunson, 34, was removed from the cell, five officers and two nurses transported the injured cellmate by gurney to the facility's infirmary. He was brought to Alice Hyde Hospital in

Malone, then transported to Albany Medical Center.

Brunson was placed in restraints without incident and transferred to the disciplinary housing unit at Clinton Correctional Facility in Dannemora, officials said.

State Police and Department of Correctional Services investigators say the fight appears to be over Brunson's turning on an inmate-controlled fluorescent light that his cellmate wanted left off. No weapons were found in the cell, and it is suspected Brunson assaulted his cellmate using his fists and feet. The cellmate sustained head injuries when Brunson allegedly grabbed him by the hair and rapidly beat his head against the cell wall.

Possible additional criminal counts as well as administrative charges against Donnell are pending investigation, officials said.

Correction officials said the incident was the first potential inmate-on-inmate homicide at the 1,500-bed facility since it opened about a year ago. The last inmate homicide was in 1998, at the Wyoming Correctional Facility in Attica.

"It is a fact of prison life that violence will occur among inmates who choose to misbehave, but our policies at Upstate keep those attacks to a minimum, despite this incident," Department of Correctional Services Commissioner Glenn S. Goord said.

Inmates are sent to Upstate for an average of four months to serve disciplinary sentences imposed for misbehavior at other prisons.

Upstate double cells 1,200 inmates around the clock, with out-of-cell time limited to medical, family and legal visits plus one to three hours of outdoor exercise time daily, depending on inmate conduct. The remaining 300 inmates are classified non-disciplinary, and are let out of their cells daily for various work assignments.

DOCS officials say that Upstate and other disciplinary housing units allow the state to remove more disruptive inmates from other prisons.

Both inmates had earned "Level 3" status that restored most of their property and privileges and meant their release back to other facilities was approaching.

Brunson was serving a nine-year determinate sentence for an Oneida County robbery conviction with a conditional release date of July 8, 2003 and a maximum sentence expiring October 22, 2004. He was being housed at n Wyoming Correctional Facility in Attica when he received a 295-day disciplinary sentence for drug use. His cellmate was serving a 21-month disciplinary sentence for creating a disturbance, disorderly conduct and fighting with other inmates at Mid-State correctional facility.

The state began double-celling inmates in 1995 in response to a growing overcrowding problem. The state's prison guard union argued at the time that double celling would increase the odds of inmates becoming more violent toward each other and toward corrections officers and would raise the chances of diseases spreading.

DOCs officials say statistics show a drop in inmate-to-inmate assaults in recent years -- from 27 incidents per 1,000 inmates in 1987 to 14 per 1,000 inmates in 1999. Inmate-on-staff assaults during the same period went from 14 to 10 such incidents per 1,000 inmates.

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Figures of CSEA disputed

Analysis shows pay would increase by 17.2%, not 22%

ALBANY - In the run-up to their contract ratification vote last month, officials at the Civil Service Employees Association repeatedly declared that the four-year deal would mean 22 percent more money for most of their members in state government.

CSEA workers apparently liked what they heard, because 95 percent voted to approve the contract.

But that 22 percent figure was based on questionable arithmetic by union officials, which exaggerated how much the contract is really worth.

In fact, the contract itself raises pay just 13.6 percent across the board. Even including a separate proposal to eliminate pension contributions for most CSEA members - which is not legally part of the contract - the total increase in before-tax income would amount to no more than 17.2 percent, according to an analysis by The Daily Gazette.

CSEA officials defended their figure, insisting that it accurately reflects the cumulative impact of the pay raises and pension changes over the four-year life of the contract.

"It was a 20-1 ratification, and the members are happy with what was explained to them on it," said Stephen Madarasz, a CSEA spokesman. "They're satisfied with the results."

But others familiar with the contract agreed the 22 percent figure - which was mentioned by CSEA President Danny Donohue at news conferences, published on the union's Web site and printed in the union newsletter - was misleading.

"I looked at it, and I said, 'I don't know where [Donohue] got that figure,'" said Mary Hines, a spokeswoman for the Governor's Office of Employees Relations. "When I added it up, that's not what I got."

"There's no 22 percent increase in anybody's pay," said Allen Mead, part of a dissident CSEA faction that unsuccessfully challenged the Donohue administration in union elections this year. "That's an exaggeration."

But Mead said he doubted the union's "creative" arithmetic made much difference in the lopsided ratification vote.

"I don't think they duped people," Mead said. "I think most every state worker knows exactly how much more they're going to see in their paycheck."

Madarasz said the union based its calculation on the two biggest components of its agreements with the Pataki administration, which were the result of more than a year of negotiations:

Across-the-board raises of 3 percent retroactive to Oct. 1, 1999; 3 percent as of April 1, 2000; 3.5 percent in April 2001 and 3.5 percent in April 2002. The union counted this as 13 percent over the life of the

contract, although it adds up to 13.6 percent with compounding.

Changes in the retirement system, which allow people in Tier 3 and 4 (hired after 1976) to stop contributing 3 percent of their pay to the pension fund after 10 years of service. The longer-term employees in Tier 1 and 2, who currently pay nothing into the fund, would receive enhanced pension pay-outs. These changes, if approved by the Legislature, would take effect during the second year of the contract.

According to Madarasz, the union counted this as 3 percent for each of the last three years of the contract, or 9 percent. Then it added the 9 percent to the 13 percent across-the-board raises to come up with 22 percent.

"For our members who have 10 years in the system, between the pension piece and the salary piece, they'll be able to put 22 percent more in their pocket over the life of the contract," as Donohue put it after the contract was ratified. "And that's 75 percent to 80 percent of our members."

But there are several problems with how the union valued the pension change.

First of all, the change is not legally part of the contract that rank-and-file members ratified. By state law, the governor is not allowed to "negotiate" changes in the retirement system. Instead, Gov. George Pataki agreed to join the union in supporting the necessary legislation.

Despite this, CSEA included the pension changes in a summary of the contract under a column marked "Article 7, compensation."

If CSEA members had turned down the contract, Pataki might well have withdrawn his support for improving their pensions. But their vote to approve the contract does not guarantee the change will become law.

"Probably a lot of the members who voted for [the contract] were thinking they were voting to eliminate the employee contribution, and it may or may not even materialize," said Pat Ellis, who lost the three-way race against Donohue for the union presidency.

So far, Pataki has not introduced the proposed legislation. Key lawmakers have said the proposal is likely to become law, but only if it applies to all public employees - not just CSEA members.

A second problem with the union's estimate is that the proposed change wouldn't start until Oct. 1 of this year, meaning it will be in effect for only 2½ years of the contract, not three.

Finally, it's hard to justify counting the change more than once. The value to a CSEA worker of not paying 3 percent into the pension fund would increase a bit each year as the worker's salary increases. But this does not come close to 9 percent.

For the sake of comparison, the Gazette calculated how a CSEA worker receiving the average salary - \$27,600 - would be affected by the proposed salary and pension changes. The analysis does not include the effect of health benefits, increasing seniority, promotions or longevity bonuses.

Before the new raises and pension changes take effect, that average CSEA worker receives a before-tax income of \$27,600 minus 3 percent, or \$26,772.

After receiving the four years of raises and no longer paying into the pension fund, that average worker's

before-tax income would rise to \$31,367 - a 17.2 percent increase.

Looking at it another way, if the proposed salary and pension changes never went into effect, the average worker would continue collecting \$26,772 for four years, or a total of \$107,088.

With the salary and pension changes (and a \$500 signing bonus payable this year), that average worker stands to receive \$118,189, or 10.4 percent more during the four-year period.

Some observers said union officials were eager to make this deal look as attractive as possible after members overwhelmingly defeated a proposed contract last year.

"When people are overly enthusiastic, and relieved to finally have a contract, sometimes t's aren't crossed and i's aren't dotted," said Assemblyman Jack McEneny, D-Albany. "I don't think they did it deliberately."

McEneny added that the state Capitol in Albany "is one of the few places in the world where math is not an exact science."

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NY Bill would prohibit shackling of inmate moms on way to delivery room

ALBANY, N.Y. (AP) Women inmates in New York should not be shackled as they are being transported from prison to hospital delivery room, a new bill advocates.

The legislation, which appears to have the sponsorship to guarantee its passage, should be looked upon as an affirmation of basic rights to women who are at their most vulnerable point in the criminal justice system, said the measure's prime sponsor, Assemblyman Nick Perry, D-Brooklyn.

Amnesty International is among the groups advocating for changes in state or local laws to prohibit shackling of women prisoners both during labor and delivery.

In a 1999 report to the U.N. Human Rights Commission, U.N. investigator Radhika Coomaraswamy found the use of leg irons and shackles common in prisons throughout the United States. She cited one case Perry said it was not in New York where a woman was shackled during delivery and Coomaraswamy expressly criticized the practice of shackling women in labor who were being taken to hospitals and after their babies were born.

"It is a human dignity issue," Perry said.

Currently, female state inmates who are expecting babies are housed in two prisons, the maximum-security Bedford Hills and the medium-security Taconic, situated alongside each other in Westchester County.

Taconic inmates are prohibited from being shackled or having to wear leg irons past the third trimester of their pregnancies. Hand and leg restraints can be used on inmates being taken to local hospitals from Bedford Hills for delivery, with the approval of both prison and medical personnel. Waist shackles are prohibited on those women in any case.

New York City is under court order not to shackle inmates during delivery, but there is no court directive against pre-delivery shackling.

"This is a good thing," Mishi Faruqee of the state Correctional Association's Women in Prison Project said of the proposed state law. "We have actually been advocating for a long time for a policy like this."

It is clear that women who are going into labor are not an escape risk, she said.

"The policy is there are supposed to be security and medical considerations (about shackling), but usually the security considerations override the medical considerations," Faruqee said.

Perry said state and local corrections officials have adequate personnel to make sure a woman about to give birth are properly guarded without the use of shackles.

"The issue of security I think is very muted in this case and I don't believe this is a political issue," he said. "I think it's a human issue and I believe we put humanity before politics most of the time."

State Sen. Nancy Lorraine Hoffmann, R-Onondaga, is sponsoring the bill in her Republican-controlled chamber. She said she expected it would move through committee this week and to get onto the floor for a vote within two or three weeks.

"It is a very narrowly drawn provision that applies to women in labor," she said. "Obviously, a woman in labor does not pose much of a security risk for flight on her way to the hospital to deliver a baby."

State Department of Correctional Services officials do not comment on pending legislation. Officials could not say how many inmates give birth each year in New York, but about 10 percent of the women entering the prison system are found to be pregnant.

The maternity ward at Bedford Hills has a capacity of 32 babies while Taconic's can accommodate 23. Babies can stay for up to a year with their mothers in the prison maternity wards.
