CORRECTION OFFICERS' BENEVOLENT ASSOCIATION, INC.
"PATROLLING THE TOUGHEST PRECINCTS IN NEW YORK"

ELIAS HUSAMUDEEN
President

JOSEPH BRACCO
1st Vice President

ELIZABETH CASTRO
2nd Vice President

KAREN TYSON
3rd Vice President

MICHAEL MAIELLO
Treasurer

AMELIA WARNER
Financial Secretary

FREDERIC FUSCO
Legislative Chairman

KENYATTA JOHNSON
Corresponding Secretary

DANIEL PALMIERI
Recording Secretary

BENNY BOSCIO
Sergeant-At-Arms

ALBERT CRAIG
First City-Wide Trustee

ANGEL CASTRO
Manhattan Borough Trustee

PAULETTE BERNARD
Brooklyn Borough Trustee

TYSON JONES
Bronx Borough Trustee

MARK MACK
Queens Borough Trustee

BISHOP WILLIAM RAYMOND WHITAKER II
Chaplain

WILLIAM KWASNICKI
Retiree Consultant

KOEHLER & ISAACS, LLP
COBA Attorney

November 20, 2019

VIA EMAIL

New York City Board of Correction
One Centre Street
New York, NY 10007

Re: COBA's 1st submission in Response to BOC's Draft Restrictive Housing Rulemaking Request to Extend Rulemaking Period

To Interim Chair Sherman, Ms. Ovesey and Members of the Board:

I am the Director of Legal Affairs for the Correction Officers' Benevolent Association, Inc. ("COBA") whose 10,000 plus active members are continuing to bear the brunt of the myopic and lemming-like march into the abyss that this Board confuses with real jail reform.

This submission is the first of several from this union concerning the proposed rulemaking first announced on October 29, 2019 with public comment extended until January 3, 2020 and a public hearing inexplicably scheduled prior to the end of the written comment period on December 2, 2019.

COBA again – after repeated emails, conversations and one published letter to this Board– respectfully requests that the Board publicly announce that it will extend this process at least 6 months – until June, 2020 – so as to weigh the many issues at play. This is a process, like the prior one in 2014-15, that requires thoughtful and careful analysis prior to improvidently making any rules that may make things worse for all concerned. The BOC proposes a package of comprehensive rule changes that clearly took many months to put together; so why the need to cram down rule-making in two months? Is this rush by the Board fueled by purely political considerations? If so it is almost certain to spur litigation by either or both inmate advocates and the unionized workers. What is certain is that the unions and their membership have had no say in the complex process thus far prior to announcing a rushed process.

COBA MAIN OFFICES
75-01 31st Avenue, Lower Level, East Elmhurst, N.Y. 11370 • t (718) 545-COBA (2622) • f (718) 545-2668

www.cobanyc.org

These concerns include but are hardly limited to:

*- Historic highs of violence by inmates on staff and other inmates;[1]

*- Flawed self-serving mis-reporting of violence figures by the Department of Correction;[2]

*- COBA's recent victory in defeating the City's Motion to Dismiss in a State Supreme Court matter concerning the Department's failure to keep its workers safe;[3] and,

*- The complete failure or the Board of Correction to disclose to the public the identity and input from the "30 organizations and individuals" mentioned[4] in the BOC's Housing Revision package.

The published claims by the BOC that input was had from this union is disingenuous. Once again the Board's narrative begins on a false and sour note. In addition to being untrue, the BOC also ignores over 20 unions in the DOC's system. Nothing in the 128 pages posted the day before the October BOC meeting reflects anything that might be considered to protect the rights of workers to a safe workplace – let alone any non-existent input from the uniformed members of service so thoroughly vilified in and out of Board meetings and in the press.

Were COBA to have *had* any input, it would have included working correction professionals, and not only academics. Instead, the Board seemingly relied on cherry-picked information such as what was gleaned in the recent bizarre junket to visit the

---

[1] Correction Bd., Others Upbraid DOC Reply to Federal Monitor's Report, November 14, 2019, The Chief Leader last accessed November 19, 2019. https://thechiefleader.com/news/news_of_the_week/correction-bd-others-upbraid-doc-reply-to-federal-monitor-s/article_bc426c56-0746-11ea-8dc5-3b500e3fa4cc.html

[2] "Rikers Con Job", NY Daily News, September 10, 2018 last accessed November 19, 2019. https://www.nydailynews.com/new-york/ny-mckinsey-rikers-violence-data-20190910-3mwj7vmocba35cqhv4wto2sqpa-story.html

[3] See Decision of Judge Ruben Franco in Correction Officers v. City of New York, Bronx Supreme, 0024054/2016, a true and correct copy of which is annexed.

[4] Page 4, "(t)he proposed rules are the result of extensive fact-finding in 2017-2018, including discussions with 30 organizations and individuals . . . [and the] Correction Officers' Benevolent Association (COBA). A list of these individuals and organizations would be useful – for the sake of actual transparency – and are the subject of a FOIL request on the Board of Correction.

COBA MAIN OFFICES

75-01 31st Avenue, Lower Level, East Elmhurst, N.Y. 11370 • t (718) 545-COBA (2622) • f (718) 545-2668

www.cobanyc.org

prisons (not jails) in Norway—a country whose civil society in every way is the polar opposite of that here in New York City.[5]

The request here is simple: please announce a robust and realistic period for actual debate and discussion of the values and expected outcomes at play in current rule-making by the Board. The safety of real people – not volunteer board members and politicians- is at stake in the criminal justice system in New York City.

Respectfully Submitted,

/s/

Marc Alain Steier, Esq.
Director of Legal Affairs, COBA

Encl.

Cc: Elias Husamueen, President of COBA
NYC Board of Correction Members
DOC Correction Captain's Association
DOC Warden and Deputy Warden's Association
New York City Police Benevolent Association
New York City Corporation Counsel
DOC Commissioner Cynthia Brann
NYC Mayor's Office of Criminal Justice
Steve Martin, Esq., Nunez Monitor
DOC non- uniformed unions

[5] New York's Jails Are Failing. Is the Answer 3,600 Miles Away?, New York Times November 12, 2019, last accessed November 19, 2019. https://www.nytimes.com/2019/11/12/nyregion/nyc-rikers-norway.html

COBA MAIN OFFICES
75-01 31st Avenue, Lower Level, East Elmhurst, N.Y. 11370 • t (718) 545-COBA (2622) • f (718) 545-2668

www.cobanyc.org

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 26

---X

CORRECTION OFFICERS'

Index No. 0024054/2016
Hon. **RUBEN FRANCO,**
Justice Supreme Court

-against-

CITY OF NEW YORK

---X

The following papers numbered 1 to ___ read on this motion, (Seq. No. 001) for **DISMISSAL**, noticed on **January 28, 2019**.

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		

Respectfully Referred
Dated: ____________

MOTION IS DECIDED IN ACCORDANCE WITH MEMORANDUM DECISION FILED HEREWITH.

Dated: July 8, 2019 Hon. ______________________________

RUBEN FRANCO, J.S.C.

Rubén Franco

1. CHECK ONE.......................... ☐ CASE DISPOSED IN ITS ENTIRETY ☐ CASE STILL ACTIVE
2. MOTION IS.......................... ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE......... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE
☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX - IAS PART 26

CORRECTION OFFICERS' BENEVOLENT ASSOCIATION, INC., and NORMAN SEABROOK

Plaintiffs,

-against-

CITY OF NEW YORK,

Defendant.

Index No. 24054/2016E

MEMORANDUM DECISION/ORDER

Rubén Franco, J.

In this declaratory judgment action, defendant moves to dismiss the Complaint, pursuant to CPLR 3211 (a) (2) for lack of subject matter jurisdiction, and CPLR 3211 (a) (7), for failure to state a cause of action. Plaintiffs seek a declaration that defendant violated Labor Law 27-a by failing to furnish correction officers with a place of employment free from recognized hazards that are likely to cause death or serious physical harm to them. Plaintiffs request that defendant provide all correction officers, who are not part of the Emergency Service Unit (ESU), but are assigned to guard particularly violent inmates, the type of training and equipment that ESU correction officers receive, including spit-masks, mittens and enhanced restraints, and that until the training is provided, that ESU Corrections Officers guard the violent inmates. Plaintiffs also seek for defendant to promulgate and implement an appropriate Workplace Violence Prevention Program (WVPP).

The Department of Corrections (DOC) trains correction officers in various disciplines for 16 weeks or 640 hours at the inception of their employment. Only 40 hours of the training is

devoted to instruction in crisis intervention, verbal de-escalation, and escorting inmates, many of whom have problems with mental health, drugs, and violence. The ESU is an elite corps of correction officers created by DOC, who receive additional training in advanced defensive tactics and are provided with protective body equipment not available to all correction officers including helmets, chest-protectors, arm and shin guards, and stun shields, which serve to minimize the risk of injury from violent inmates. They are trained in relevant tactics for handling assaultive, and the most violent inmates. Less than 200 (.02%) of the approximately 9,000 correction officers are part of ESU. It is alleged that the ESU correction officers are not always available, and their unavailability leaves non-ESU correction officers who are inadequately trained with the responsibility of handling dangerous inmates, who may cause very serious injuries to the officers, other inmates, and staff. These incidents could be prevented with the proper training of non-ESU correction officers.

Policies, procedures, staffing and other controls, discussed in the implementing regulations of the WVPP, have not been instituted in order to evaluate the types of inmates that pose the greatest risk due to their viciousness and aggressiveness. Examples of behavior by violent inmates include serioust assaults, punching, kicking, slashing, stabbing, flinging of urine and feces, setting fires, and destroying property.

Defendant argues that the court lacks subject matter jurisdiction in that plaintiffs' request for relief is tantamount to asking the court to assume management of the DOC in contravention of the principle that the judiciary should not preempt municipalities in the management and operation of municipal agencies. Defendant also contends that plaintiffs' cause of action is not a cognizable claim because the New York State Public Employee Safety and Health Act (PESHA) does not

cover injuries sustained in the line of duty and WVPP does not provide for a private right of action. Defendants also posit that their discretionary decisions related to staffing and training of law enforcement professionals cannot be considered to constitute a recognized hazard under PESHA.

This court is called upon to determine whether, from the facts alleged, DOC has complied with PESHA and WVPP.

Whether a court has the power to entertain a case is a question of justiciability. In *Matter of New York State Inspection, Sec. & Law Enforcement Empls., Dist. Council 82, AFSCME, AFL-CIO v Cuomo* (64 NY2d at 238-239), the Court of Appeals noted that "Justiciability is the generic term of art which encompasses discrete, subsidiary concepts including, *inter alia*, political questions, ripeness and advisory opinions. At the heart of the justification for the doctrine of justiciability lies the jurisprudential canon that the power of the judicial branch may only be exercised in a manner consistent with the 'judicial function'" (*citing Matter of State Ind. Comm.*, 224 NY2d 13, 16, Cardozo, J.).

On a motion pursuant to CPLR 3211 (a) (7), a Complaint must be liberally construed, the factual allegations therein must be accepted as true, the plaintiff must be given the benefit of all favorable inferences therefrom, and the court must decide only whether the facts alleged fall under any recognized legal theory (*Miglino v. Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d 342 [2013]; *Lee v. Dow Jones & Co., Inc.*, 121 AD3d 548 [1st Dept 2014]). Defendant's basis for asserting that plaintiffs fail to state a cause of action is that PESHA does not cover injuries or hazards from risks unique to law enforcement work including injuries sustained in the line of duty.

Labor Law § 27-a (PESHA), provides for the safety and health standards of public employees. Paragraph (a) (3) states:

3. Duties. a. Every employer shall: (1) furnish to each of its employees, employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees and which will provide reasonable and adequate protection to the lives, safety or health of its employees; and (2) comply with the safety and health standards promulgated under this section. In applying this paragraph, fundamental distinctions between private and public employment shall be recognized.

b. Every employee shall comply with the safety and health standards and all rules, regulations and orders issued pursuant to this section which are applicable to his own actions and conduct.

c. The state shall promulgate a plan for the development and enforcement of occupational safety and health standards with respect to public employers and employees, in accordance with section eighteen (b) of the United States Occupational Safety and Health Act of 1970 (Public Law 91-596) which provides: '(b) Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 6 shall submit a State plan for the development of such standards and their enforcement.'

Labor Law § 27-b sets forth the duty of public employers to develop and implement programs to prevent workplace violence (WVPP). The purpose of the WVPP is "to ensure that the risk of workplace assaults and homicides is evaluated by affected public employers and their employees and that such employers design and implement workplace violence protection programs to prevent and minimize the hazard of workplace violence to public employees." Paragraph 3 of the WVPP states: "Every employer shall evaluate its workplace or workplaces to determine the presence of factors or situations in such workplace or workplaces that might place employees at risk of occupational assaults and homicides." Paragraph 5 (b) provides:

b. Every employer shall provide its employees with the following information and training on the risks of occupational assaults and homicides in their workplace or workplaces at the time of their initial assignment and annually thereafter:

(1) employees shall be informed of the requirements of this section, the risk factors in their workplace or workplaces, and the location and availability of the written workplace violence prevention program required by this section; and

(2) employee training shall include at least: (a) the measures employees can take to protect themselves from such risks, including specific procedures the employer has implemented to protect employees, such as appropriate work practices, emergency procedures, use of security alarms and other devices, and (b) the details of the written workplace violence prevention program developed by the employer.

In paragraph 6, Labor Law § 27-b provides a mechanism for risk evaluation and determination, including having an employee bring the matter to the attention of the supervisor. If the situation continues, the employee can notify the Industrial Commissioner, who may conduct an inspection.

PESHA and the WVPP complement each other (*see Matter of City of New York v Commissioner of Labor*, 100 AD3d 519 [1st Dept 2012]; *Matter of City of New York v Commissioner of Labor*, 44 Misc 3d 612 [Sup Ct, NY County 2014]). In *Balsamo v City of New York* (287 AD2d 22 [2nd Dept 2001]), the Court addressed a claim by a police officer to recover damages for personal injuries sustained as the result of a motor vehicle accident. The Court found that "a violation of Labor Law § 27-a may constitute a sufficient predicate for a claim pursuant to General Municipal Law § 205-e which is based on an allegation of a workplace safety violation" (*id.* at 28).

In contrast, in *Williams v City of New York* (2 NY3d 352 [2004]), the plaintiffs sought to recover damages for the death of two detectives shot and killed by a prisoner they were transporting after the prisoner removed a gun from a locker in the detective squad's locker room. The Court determined that the plaintiffs failed to establish a violation of Labor Law § 27-a because the provision that the defendants were alleged to have violated was not a specific workplace safety standard, but a general duty clause requiring employers to provide a place of employment free from recognized hazards. The Court asserted that PESHA did not cover the special risks faced by

police officers because of the nature of police work. The Court distinguished *Balsamo v City of New York* (287 AD2d 22) stating the "PESHA is designed to prevent the type of occupational injury that occurred when the officer was given an improperly equipped vehicle."

In addressing another police officer's claim for damages for injuries that were allegedly sustained while participating in a police training exercise at her precinct house, in *Singleton v City of New York* (13 Misc 3d 1173 [Sup Ct, Kings County 2006]) the court, using *Balsamo v City of New York* (287 AD2d 22) as precedent, found that the violation of section 27-a was properly construed as analogous to the unpadded computer console in *Balsamo*, and did not merely implicate policies utilized to manage the inherent dangers of police work. The court concluded that "having adequately pleaded a cognizable violation of section 27-a by the City, plaintiff's section 205-e claim is not subject to dismissal under CPLR 3211 (a) (7)" (*Singleton v City of New York,* 13 Misc 3d at 1177-1178). As in *Balsamo v City of New York* (287 AD2d 22) and *Singleton v City of New York* (13 Misc 3d 1173), whether defendant has an obligation to provide specific protective equipment and training is a claim that fits within a cognizable theory.

In essence, plaintiffs claim that volatile individuals reside in the jail system and correction officers are left, almost defenseless, to deal with them without the proper training and equipment, and that DOC is charged with the responsibility to create a plan to address this risk, and to mitigate injuries to correction officers. However, DOC has failed to address what is a small population of predatory inmates who cause the largest number and gravest types of injuries to correction officers, as well as others within the system. This systemic failure is due, in large part, to DOC's decision not to properly train and equip correction officers so that they can maintain order and security in the jail system, and protect themselves and others from these dangerous inmates, some of whom

are mentally ill. At issue is also whether DOC has failed in the responsibilities imposed by the WVPP because, it is alleged, that there are no safety or treatment plans for mentally ill or other inmates who pose inherent risks.

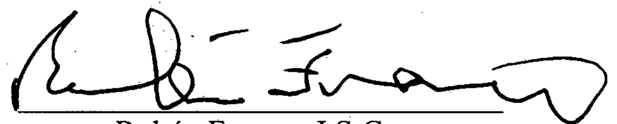
PESHA provides plaintiffs with a right of action because DOC has an obligation to provide a workplace free from recognized hazards likely to cause death or serious physical harm by providing reasonable and adequate protection (Labor Law § 27-a [3]). The court is charged with determining whether DOC is fulfilling its obligation to minimize avoidable risks of violence and is otherwise, addressing workers' safety consistent with State Law.

Defendant has not shown that DOC has implemented the controls mandated by the WVPP, or conducted risk assessments for incidents of violence, or diffused areas of concern by taking mitigating steps, such as considering the propensities of a part of the jail population, as well as properly training and equipping correction officers to address some of these problems. This court's interpretation of the WVPP is that the statute was implemented to ensure that agencies like DOC meet their statutory obligations, allowing for limited judicial review. In so doing, the court is not usurping DOC's role, it is determining whether DOC is in compliance with PESHA and the WVPP.

Accordingly, defendant's motion to dismiss is denied.

This constitutes the Decision and Order of the court.

Dated: July 8, 2019



Rubén Franco, J.S.C.

HON. RUBÉN FRANCO