

Pro Se

Vol. 22, No. 3 June 2012

Published by Prisoners' Legal Services of New York

Prisoner Wins Summary Judgment in Civil Rights Case Where Hearing Officer and Director of Inmate Discipline Ignored “Some Evidence”

The United States District Court for the Western District of New York granted summary judgment in favor of the prisoner-plaintiff in a civil rights case arising from a Tier III hearing that was reversed after the inmate had spent nearly 12 months in the SHU. Molano v. Bezio, 2012 WL 1252630 (W.D.N.Y. April 13, 2012). The court found that the evidence against the inmate at his Tier III hearing failed to measure up to the “some evidence” standard, as established by the United States Supreme Court and explained by the U.S. Court of Appeals for the Second Circuit. The court also found that the defendants - the hearing officer and then-Director of Special Housing/Inmate Disciplinary Programs - did not have qualified immunity from liability.

The case was set in motion by a slashing at Five Points Correctional Facility in January 2008. The plaintiff was charged in a misbehavior report with attacking the victim, which he denied at his Tier III hearing. Another inmate’s testimony **corroborated** (backed up) the plaintiff’s. In addition, a correction officer testified that the victim said immediately after the attack that he did not know who had done it. On the other hand, the sergeant who wrote the report stated that the victim had identified the plaintiff in a photo array,

and another sergeant testified that he had observed the victim make this identification. Because the sergeant who wrote the report stated that he had interviewed the plaintiff about the slashing, the plaintiff requested a copy of the surveillance video from the holding pen where that interview allegedly took place. The hearing officer denied this request. The victim refused to testify at the hearing. The refusal form noted his reason as: “this inmate was the one who assaulted me.”

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A Message from the Executive Director
Karen L. Murtagh

WE WANT TO HEAR FROM THE WOMEN!

There are over 200,000 women in prisons and jails in the United States and over one million women are under criminal justice supervision. While the male prison population in the United States has grown by over 400% in the past three decades, the female prison population has grown by over 800%. Women now account for over 7% of the population in state and federal prisons. Women of color are significantly over-represented in the criminal justice system: Black women represent 30% of the U.S. prison population and Hispanic women represent 16%, although they respectively represent 13% and 11% of the U.S. female population. Two-thirds of women in prison are there for non-violent crimes, many for drug crimes. As of March 1, 2012 there were 2,309 women incarcerated in New York State's prisons and 51 of those women were being held in solitary confinement.

Prior to their incarceration, many women were already facing significant obstacles. In May 2007, the Sentencing Project issued a report entitled "*Women in the Criminal Justice System.*" The report found the following: More than half of the female prison population report that they were subjected to some form of sexual or physical abuse before coming to prison; almost 75% of women in state prisons have had a mental health problem; 25% of the female state prison population has been diagnosed with mental illness; almost half of the females incarcerated in state prisons have not completed high school and less than a third of these women are enrolled in a vocational program while in prison; over 60% of female state prisoners have a history of drug dependence but only 1 in 5 receive treatment for substance abuse; 50% of all women in state prisons did not have a job the month prior to being incarcerated; and over 66% of women in prison are mothers of minor children.

The issues women prisoners face are critical life issues – what NYS Chief Judge Jonathan Lippman refers to as "essentials of life issues." These include access to adequate medical and mental health care, education, vocational training, treatment and programming, as well as access to affordable and adequate housing and viable employment opportunities upon release. Equally disturbing, if not more so, is the fact that many of New York State female prisoners are housed hundreds of miles from their families and are thus prevented from having regular contact with their children. A mother's failure to maintain contact with her children can result in the horrific and irreversible decision by a court to terminate her parental rights.

While female prisoners face many unique and complex issues, PLS hears from only a fraction of New York State's female prison population. In an effort to reach the female prison population and to provide some guidance on the essentials of life issues that many women prisoners face daily, *Pro Se* is embarking on a pilot project. This month we will be sending to all women incarcerated in New York State prisons the first issue of a newsletter entitled *Essentials of Life: A Newsletter Dedicated to Helping Women Face the Challenges of Prison*. Our goal is to address these legal issues from the perspective of women prisoners. To help us with this project, we are asking our female readers to let us know the issues you would be interested in reading about. We also welcome your suggestions and ideas for making this project a success. Although we may not be able to address every issue you write to us about, we will do our best. We look forward to hearing from you and to the success of *Essentials of Life*.

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The hearing officer found the plaintiff guilty and penalized him with 36 months in the SHU. The plaintiff submitted an administrative appeal, which included a sworn statement from the victim saying he was positive that the plaintiff was not the person who had attacked him. The Director of Special Housing/Inmate Disciplinary Programs let the guilty determination stand, but reduced the SHU penalty to 24 months. The plaintiff filed a request for reconsideration, which was denied. After he filed an Article 78 action, however, the Commissioner administratively reversed the guilty determination. The plaintiff then filed the federal civil rights claim, alleging that the hearing officer and the Director of Special Housing/Inmate Disciplinary Programs violated his right to due process under the Fourteenth Amendment to the U.S. Constitution, which led to his confinement in the SHU for nearly 12 months.

Before dealing with the plaintiff's claim about the "some evidence" standard, the court disposed of two other due process claims the plaintiff made. First, the court ruled that it was not a denial of due process for the hearing officer to refuse to produce surveillance video of the interview by the sergeant who wrote the misbehavior report. The court stated that there was no proof that the video in question existed at the time the plaintiff requested it. Furthermore, the court noted that the plaintiff had offered no proof that the video would have contained relevant, **non-cumulative** (not repetitive) evidence, or that the video had the potential to change the outcome of the hearing. Second, the court dismissed the plaintiff's claim of ineffective assistance in preparation for his hearing. The court stated that the hearing officer cannot be held liable for ineffective assistance unless he was personally involved in the constitutional violation. Because the plaintiff failed to raise the issue of ineffective assistance at the hearing or in his appeal, the court found that the hearing officer was not personally involved in the alleged constitutional violation.

The plaintiff did find success, however, on his lack of evidence claim. Citing the U.S. Supreme Court cases Superintendent v. Hill, 472 U.S. 445 (1985) and Wolff v. McDonnell, 418 U.S. 539 (1974), the court stated that due process requires a

guilty finding at a prison disciplinary hearing to be based on "some evidence." The Second Circuit has held that the "some evidence" requirement implies that the evidence must be reliable. The chief evidence against the plaintiff was the testimony by the two sergeants that the victim picked him out of a photo array and wrote on the refusal form that he was the assailant. The court noted, however, that the sergeant who wrote the misbehavior report was the only officer to sign the Photo Display Record, indicating that he had been the only officer present for the identification procedure. But at the hearing he admitted that he had not been present. The other sergeant, whose name was not on the Photo Display Record, testified that he was the only officer present at the identification. When the hearing officer tried to verify the contents of the refusal form with the victim, the victim admitted to signing it but denied writing that the plaintiff was the one who had assaulted him. The court also noted that the misbehavior report was made up entirely of hearsay and double-hearsay statements from other officers, none of whom signed the report or wrote their own firsthand reports.

In light of these deficiencies, and the victim's later sworn statement that the plaintiff was not the person who assaulted him, the court found that the evidence upon which the plaintiff had been found guilty was insufficient to satisfy even the lenient "some reliable evidence" standard for due process. The court went on to comment on the similarity between this case and Luna v. Picco, 356 F.3d 481 (2d Cir. 2004), which "clearly and unambiguously" held that an accuser's statement, uncorroborated and without a credibility examination, is not "some evidence" sufficient to pass constitutional muster. Therefore, the hearing officer's guilty determination violated the plaintiff's Fourteenth Amendment due process rights.

Turning to the claim against the Director of Special Housing/Inmate Disciplinary Programs, the court noted that personal involvement in an alleged constitutional violation cannot be based solely on an official's supervision of an employee who violates a plaintiff's rights. But liability can be found if the official proactively participated in reviewing the administrative appeals, as opposed to just rubber-stamping the results. In this case the plaintiff

submitted documents to the court demonstrating that in his appeal to the director, he identified the due process violations he believed had occurred in the disciplinary process, as well as the **exculpatory** (tending to support innocence) statement from the victim. Because the defendants did not address the director's personal involvement in any of their submissions to the court, the court decided that the director was fully aware of the deficiencies of the hearing when he denied the plaintiff's appeal and request for reconsideration. Therefore the court found the director personally involved and liable as a matter of law.

Finally, the court addressed the question of qualified immunity, which can shield government officials from liability for civil damages when their performance of discretionary duties does not violate clearly established statutory or constitutional rights that a reasonable person would know of. The court found that this case was so similar to the Luna case, which involved the same hearing officer, that the Second Circuit's holding in Luna clearly applied, and the "some evidence" requirement was clearly established. Thus neither the hearing officer nor the director was shielded by qualified immunity. The court granted summary judgment to the plaintiff on his claim that the hearing officer and the Director of Special Housing/Inmate Disciplinary Programs violated his Fourteenth Amendment right to due process when they, respectively, found him guilty and failed to reverse the hearing. The court then directed the parties to confer on the subject of damages, which would be the subject of a trial if they could not reach agreement.

NEWS AND BRIEFS

Reassessing Solitary Confinement

Over the last several decades, the United States has witnessed an explosion in the use of solitary confinement for federal, state, and local prisoners and detainees. As *Pro Se* went to press, on June 19, 2012, U.S. Senator Dick Durbin (D-IL), the

Senate's Assistant Majority Leader, was scheduled to chair a hearing on the human rights, fiscal, and public safety consequences of solitary confinement in U.S. prisons, jails, and detention centers. This will be the first-ever Congressional hearing on solitary confinement. The goal of the hearing is to explore the psychological and psychiatric impact on inmates during and after their imprisonment, the higher costs of running solitary housing units, the human rights issues surrounding the use of isolation, and successful state reforms in this area.

The hearing is open to the public. Prisoners' rights advocates and experts, including Prisoners' Legal Services, The Prisoners' Rights Project of the Legal Aid Society, The New York Civil Liberties Union, and Dr. Stuart Grassian submitted written testimony to be included in the hearing record.

DOCCS Creates Incentive Program For Prisoners in Ad Seg

For some time, we at PLS have been concerned about the conditions of confinement for prisoners in long term administrative segregation. Over the course of the last year, representatives from PLS met with DOCCS administrators about the hardship that SHU conditions impose on prisoners in long term administrative segregation. Fortunately, we were able to find some common ground, and DOCCS initiated a pilot incentive program for prisoners who have been confined to administrative segregation for a year or more. This program allows prisoners who have been in administrative segregation for at least a year and who are subject to 60 day Central Office reviews pursuant to §301.4(d)(3) of Department Directive 4933 to be eligible to receive one or more of the following incentives:

The opportunity to watch television for up to 2 hours per session at intervals to be determined (for example, once a week or once a month) while in a RESTART chair or in a therapeutic cubicle;

The opportunity to buy designated food items from the Commissary to be eaten

while the prisoner is in a RESTART chair or a therapeutic cubicle;

An additional hour of exercise on a daily, weekly or other basis;

An additional visit per week, month or as otherwise determined;

One personal pair of sneakers, shorts and/or sweatpants; or

One phone call on a monitored “call home” program telephone not to exceed 30 minutes, to be permitted once per week, per month or as otherwise determined.

The three member facility Ad Seg review committee, after soliciting input from staff assigned to the prisoners’ housing unit, shall either recommend one or more incentives or state that no incentive is currently recommended.

The granting of an incentive is a privilege and no prisoner has a right to receive or to continue to receive an incentive. Incentives can be revoked at any time for any reason. Factors to be considered in determining whether to recommend an incentive include the prisoner’s current custodial adjustment; the reason for administrative segregation and other security concerns; overall adjustment to confinement status (such as attitude, cell standards and self hygiene); and the physical configuration of the housing unit.

Prison Law Writing Contest

The Yale Law Journal (Journal) welcomes submissions for its first Prison Law Writing Contest (Contest). If you are or recently have been in jail or prison, you are invited to write a short essay about your experiences with the law. The three top submissions will win cash prizes, and the editors of the *Law Journal* hope to publish the best work.

Background

The *Journal* is one of the world’s most respected and widely read scholarly publications

about the law. Its authors and readers include law professors and students, practicing attorneys, and judges. The Contest offers people in prison the chance to share their stories with people who shape the law and to explain how the law affects their lives. Where permitted by state law, the authors of the winning essays will receive prizes: \$250 for first place, \$100 for second place, and \$50 for third place.

Topics

Please write an essay addressing **one** of the following questions:

1. What does fair treatment look like in prison?
2. How does your institution deal with inmates who are violent or disruptive? Are people sent to solitary confinement? Is the disciplinary system fair, and does it help to maintain order?
3. Tell us about a notable or surprising experience you’ve had with another person in the legal system - whether a judge, a lawyer, a guard, or anyone else. What did you learn from it?
4. The goals of criminal punishment include retribution (giving people what they deserve), deterrence (discouraging future crimes) and rehabilitation (improving behavior). What purpose, if any, has your time in prison served? Should one of these purposes be emphasized more?
5. Have you ever filed a grievance with jail or prison authorities to complain about conditions? Tell us about it, and explain how the grievance process works. Are grievances effective? How do prison authorities respond to them? How do you feel about federal law’s requirement that prisoners file grievances before suing about prison conditions in court?
6. If you have been released from prison, what challenges did you face in reentering society?
7. How, if at all, do you maintain relationships with your family while in prison? Describe the prison rules that govern how much contact you

can have with your family. How has being in prison affected your family relationships?

Please do **not** discuss your innocence or guilt or ask for legal assistance with your case. Submissions are **not** confidential. Whatever you write will not be protected by attorney-client privilege. If you have an attorney, please speak with your attorney before submitting your work.

Rules

You may submit an essay if you have been an inmate in a prison or jail at any point from January 1, 2010, through September 30, 2012. The *Journal* welcomes essays of about 1000-5000 words, or roughly 4-20 pages. Please type your submission if possible. If you must write by hand, please be sure your writing is readable. Feel free to work together with others, but your essay should be in your own voice.

Essays must be received by **October 1, 2012**. Email your submission to YLJprisonlaw@gmail.com if possible. If you do not have email access, please mail your work to: The Yale Law Journal, ATTN: Prison Law, P.O. Box 208215, New Haven, CT 06520-8215. Please include your name and the name of the institution where you are or were imprisoned, and tell us the best way to reach you now.

DOCCS Adopts New Rules For Visitation and Suspension of Visiting Privileges

In March of this year, DOCCS adopted significant changes to its rules covering entrance to a correctional facility, visitation, and discipline. The new rules go into effect on October 1, 2012. According to DOCCS, they are now available in facility law libraries. The purpose of these changes is to clamp down on the introduction of contraband and to curb improper physical contact in the visiting rooms, thereby improving safety in facilities and enhancing the benefits of visitation for those who use it in a positive way. The most important rule changes for prisoners and their visitors are the following:

Identification: The previous version of the rules allowed visitors to present a photo ID or a signature card (such as a Social Security card) as proof of identity. The new rules require a photo ID, whether issued by a government entity or an employer. In addition, as part of a pilot program, DOCCS *may* photograph a visitor at the time of the visit and keep the picture on file.

Strip Searches: Previously, if the superintendent or his designee approved a strip search of a visitor, and the visitor refused, the rules stated that the visit *may* be denied and a non-contact visit *may* be allowed at the discretion of the superintendent. The new rules state that if a strip search is authorized and the visitor refuses, the visit *will* be denied.

Ion Scan: Previously, visiting guidelines informed visitors that they may be subject to an ion scan—a non-invasive procedure that is used to detect substances such as narcotics and explosives—without further details. The new rules also state that visitors may be subject to an ion scan and lay out a procedure for how to handle positive tests. If a test is positive, a second test of the same area is done. If the second test is also positive, DOCCS will deny the visitor entry into any facility for two days. The same two-day bar will apply to any visitor who refuses the ion scan.

Penalties for Visit-Related Misconduct: Under the old rules, DOCCS had a set of escalating penalties to be imposed on visitors and/or prisoners for first, second, and third offenses of various types. Under the new rules, DOCCS sets only the penalty for the initial offense and the maximum penalty for each type of misconduct. Superintendents will have discretion to penalize violators within each range. The maximum penalties for most types of misconduct remain the same, but some were raised, with different provisions for prisoner and visitor. For example, Unacceptable Physical Conduct (such as masturbation or intercourse) used to carry a maximum one-year suspension of visitation for both prisoner and visitor. Under the new rules, the maximum penalty for a visitor is indefinite suspension of visitation, which may be lifted upon request after one year; if kept in place, the suspension may be reviewed annually. For a prisoner, the new maximum for Unacceptable

Physical Conduct is also indefinite suspension of visiting privileges, but the new rules allow for suspension of all visits, not just those with the person involved, if other visitors “were subjected to exposure.” However, the superintendent must review a prisoner’s indefinite suspension of all visits after one year and annually thereafter.

Visitation Suspension Through the Disciplinary Process: Perhaps most significant for prisoners, the new rules allow a hearing officer to impose suspension of visiting privileges for certain disciplinary infractions not related to visitation. Previously, suspension of a prisoner’s visiting privileges could only be imposed for visit-related misconduct. As of October 1, a hearing officer may impose suspension of visiting privileges after a guilty determination for:

“the violation of any rule under rule series 100 assault and fighting; 101 sex offenses; 108 escape and abscondence; 113 contraband where such contraband consists of any weapon, narcotic, controlled substance or marijuana and/or paraphernalia, alcoholic beverage or intoxicant, electronic device, or money; 114 smuggling; or 115 searches and frisks, including any attempt or conspiracy to violate any such rule; or a disposition under rule 1.00 for a criminal conviction relating to such conduct.”

The maximum visitation suspensions for these disciplinary charges will be the same as those for visit-related misconduct, with a few exceptions. A first-offense maximum of six months and repeat-offense maximum of one year will apply to the following rule violations: 113.24 (prohibiting the use of narcotics, controlled substances, or marijuana, e.g., positive urinalysis); 113.25 (prohibiting making, possessing, selling or exchanging any narcotic, narcotic paraphernalia, controlled substance or marijuana); and 180.14 (requiring an inmate to comply with instructions by staff regarding urinalysis testing). When a hearing officer suspends all visiting privileges for two years or more, the superintendent will conduct an immediate discretionary review. When a hearing

officer imposes an indefinite suspension of all visiting privileges, the Director of Special Housing/Inmate Disciplinary Programs will review it within six months of the hearing, whether or not the prisoner appeals it.

STATE COURT DECISIONS

Disciplinary

Absence of Reason For Witness’s Refusal to Testify Leads to Reversal

In Matter of Moye v. Fischer, 940 N.Y.S.2d 356 (3rd Dep’t 2012), the court reviewed a lower court decision which dismissed the petition. The incident that gave rise to this litigation began when an officer accused the petitioner of punching the officer in the face. At the hearing, the petitioner stated that he had received inadequate employee assistance because his employee assistant had not interviewed his witnesses, who, he was told, had refused to testify at the hearing. Petitioner was not given witness refusal forms. The employee assistant did not testify regarding the circumstances of the witnesses’ refusals to testify. Following a Tier III hearing, the petitioner was found guilty of assault on staff, refusing a direct order and engaging in violent conduct. The determination was confirmed on appeal and the petitioner filed an Article 78 challenge.

Finding that the petitioner’s right to call witnesses had been violated, the court reversed the lower court’s dismissal of the petition and entered judgment in the petitioner’s favor. In reaching this result, the court noted that, “an inmate has a constitutional right to call witnesses at a prison disciplinary hearing and, if the request for a particular witness is denied, the inmate must be provided with a statement of the reason for the denial.” The principle applies, the court wrote, where a requested witness has refused to testify.

“Notably,” the court continued, “a deprivation of the inmate’s right to present witnesses will be found when there has been no inquiry at all into the reason for the witness’s refusal, without regard to whether the inmate previously had agreed to testify.”

Here, the court found, while it was unclear whether any of the requested inmate witnesses had ever agreed to testify, the assistant had interviewed all of the witnesses, reported that they would not testify and prepared a memorandum to that effect for the Hearing Officer. “Significantly,” the court wrote, “there is nothing in the record to explain the reasons for the inmates’ refusals to testify.” Because no witness refusal forms had been submitted and the employee assistant did not testify about the circumstances of the refusal, the court concluded that the hearing officer’s failure to determine the reason for the witnesses’ refusals to testify violated the petitioner’s right to call witnesses. Citing to the Third Department’s decision in Matter of Jamison v. Fischer, 913 N.Y.S.2d 350 (3rd Dep’t 2010), the court ordered that the hearing be reversed and all references to the matter be expunged from petitioner’s institutional records.

Hearing Officer’s Handwriting Comparison Was a Sufficient Basis For His Conclusion

In Matter of Lumpkin v. Fisher, 940 N.Y.S.2d 344 (3rd Dep’t 2012), the inmate-petitioner challenged a Tier III hearing determination finding him guilty of two charges of possession of gambling paraphernalia. One charge related to betting slips which were found in petitioner’s cell during a cell search. The petitioner said that the items listed on the slips were actually items that he had loaned to other inmates. The second charge resulted from confidential information that led to the recovery of a gambling sheet and betting slips from the recreation area. Based on a comparison between an admitted sample of the petitioner’s handwriting and the handwriting on the documents found in the recreation area, the hearing officer concluded that petitioner’s handwriting was on the recovered documents.

The Court ruled that the hearing officer’s conclusion that it was petitioner’s handwriting on the items recovered from the rec area was the result of an independent assessment of the handwriting samples, and that, along with the similarities – similarities which the hearing officer noted on the record – between the handwriting on the documents and the samples of petitioner’s handwriting, was a sufficient basis upon which the hearing officer properly concluded that petitioner had written the recovered documents. The court also ruled that the detailed misbehavior reports, along with, among other things, the confidential proof and hearing testimony of the author of the second misbehavior report provided substantial evidence to support the determination of guilt as to the gambling charges.

Miscellaneous

Court Reverses Rikers Island Disciplinary Hearing

An inmate at Rikers Island was charged with violating the jail’s rule against assaulting correction officers. He was found guilty and sentenced to 90 days of isolated confinement and restitution in the amount of \$100.00. The inmate challenged the hearing in an Article 78 proceeding. The Supreme Court, Bronx County, affirmed the determination of guilt. When the inmate appealed to the First Department of the Appellate Division, the court reached a different result. In Matter of Mitchell v. NYC Dept. of Correction, 942 N.Y.S.2d 499 (1st Dep’t 2012), the Appellate Division ruled that because the hearing officer failed to provide the petitioner with a written statement summarizing the testimony of the inmate’s three witnesses and failed to state her reason for not crediting the testimony of petitioner and his witnesses, she had violated the New York City Department of Correction’s rules on conducting hearings. Having failed to afford the petitioner the rights to which he is entitled, the court

ordered the hearing reversed and the expungement of all references to the charges from the petitioner's institutional records.

The petitioner in this action was represented by the Special Litigation Unit of the Criminal Defense Division of The Legal Aid Society.

Practice Note: Prisoners in state prison should note that the rules governing prison disciplinary hearings in the NYC jails are different from the rules governing such hearings in state prison. For instance there is no requirement that the hearing officer summarize the testimony of the witnesses at a state prison disciplinary hearing.

Court Reverses Denial of Grievance

The conflict resolved in Matter of Bush v. Fischer, 939 N.Y.S.2d 672 (3rd Dep't 2012), began when the petitioner filed a grievance seeking reversal of a decision that he was ineligible to participate in a food service training program because he had refused to enroll in a required program and had already completed his vocational requirement. Petitioner appealed the denial, arguing that he was no longer refusing to enroll in the required program and that the refusal to participate should be removed from his file. After receiving a decision from the Central Office Review Committee, petitioner filed an Article 78 proceeding arguing that the Department's denial of his grievance was arbitrary and capricious.

The factual basis for the petitioner's claim was that while it was true that he had refused the required program, he had **subsequently** (later) notified his correction counselor that he would participate in the program and was on the waiting list to be enrolled in the program at the time that he applied for the food service worker training program. Petitioner cited the policies and procedures in effect during the month when his request to participate in the program was made. These policies stated that an inmate would continue to be considered as a refusal until he contacted his counselor to ask for a second chance to participate. Several months after petitioner advised his counselor that he would participate in the required

program and had been placed on the waiting list, the policy changed. According to the new policy, an inmate is considered to be a refusal until he actually commences the required program.

In reviewing this matter, the court found that the policy in effect at the time that the petitioner notified corrections staff of his willingness to take the required program was the controlling policy. Because DOCCS is required to comply with its own regulations, the court wrote, when petitioner requested to participate in the program, the refusal should have been removed from his record. The court found that the fact that four months after the

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petitioner withdrew his refusal, the policy was changed was of significance; the refusal should have been removed from petitioner's file prior to the enactment of the new policy. Thus, to the extent that the Central Office Review Committee denied petitioner's request to remove the program refusal from his record, the court found the determination to be arbitrary and capricious. The court ordered that the respondent remove all references to the refusal to take a required program from petitioner's record.

Court Orders Drug Conviction Sealed

In the Matter of K., 942 N.Y.S.2d 772 (Sup.Ct. N.Y. Co. 2012), the defendant moved for an order sealing his 2002 felony drug conviction, by plea, for criminal possession of a controlled substance in the third degree. Criminal Procedure Law §160.58(1) provides that a defendant who has completed his sentence and has successfully completed a judicial diversion program "or another judicially sanctioned drug treatment program of similar duration, requirements and level of supervision," is eligible to have the conviction conditionally sealed.

After pleading guilty and receiving a sentence of 2 to 4 years in 2002, the defendant enrolled in the DOCCS shock incarceration program at Summit C.F. After finishing the 6 month program, the defendant was released to parole, participated in a six month aftercare program and was discharged from parole supervision in 2005.

The defendant argued that his successful completion of Shock, the aftercare program and parole, in addition to his unblemished history since then, qualified him for Article 160.58 relief. The People opposed the motion on the ground that voluntary participation in Shock does not qualify as judicial diversion or a judicially mandated drug treatment program under the law. Further, the People argued that the Shock program does not amount to a drug treatment program of similar duration, requirements and level of supervision as a judicial diversion or drug treatment program.

The defendant put into evidence documents showing that the DOCCS Shock program includes a requirement that the prisoners participate in ASAT – Alcohol and Substance Abuse Treatment – and meet regularly with a drug counselor for individual treatment. The aftercare program included group counseling to identify relapse triggers and methods to avoid those triggers.

The court concluded that Shock and its aftercare are similar in terms of duration and intensity to the drug treatment provided by the Manhattan Treatment Court, participation in which is an authorized sentence of the Criminal Court of the City of NY. The Manhattan Treatment Court offers several types of programs based on an individual's specific needs, with the number of hours, type and intensity of counseling varying from program to program. Not all of the programs require residential treatment. Finally, the court observed that as part of the Rockefeller drug law reforms, in certain situations, courts can require that defendants be placed in Shock as part of their sentences.

The court also examined the defendant's participation in Shock and his conduct post-Shock, noting that he never failed a drug test or was disciplined, voluntarily attended Narcotics Anonymous, received a master's degree in business administration from a well respected university, was employed by several real estate companies and now owns his own business. He also volunteers with an organization that provides health and home care services to disabled and chronically ill adults. He has led a law aiding life since the conviction that he is seeking to have sealed.

The court ruled that the Shock program, due to its rigor and duration, and that it may be judicially mandated as part of a defendant's prison sentence, constitutes "another judicially sanctioned drug treatment program of similar duration, requirements and level of supervision" as a judicially mandated diversion or drug treatment alternative to prison. As the defendant proved that he had successfully completed the program, the court ruled that he was eligible to have his conviction record sealed.

Turning to the merits of his motion, the court found that “defendant’s notable achievements and drug free life style . . . as well as his the impediments to further achievement attendant upon his conviction record,” warrant sealing the conviction.

Character and Fitness Committee Approves Application of Formerly Incarcerated Individual to Practice Law in New York State

In Matter of the Application of Weisner for Admission as an Attorney, 943 NY2d 410 (1st Dep’t 2012), the Committee on Character and Fitness (Committee) considered for the 10th time Mr. Weisner’s application for admission to practice law. The Committee had previously rejected Mr. Weisner’s application nine times because it “judged the passage of time to have been insufficient to evaluate the success and sincerity of his rehabilitation.”

Petitioner Weisner was convicted of “operating an illegal enterprise for the distribution of Quaaludes.” According to the Committee, the scheme was extensive and financially successful, permitting the petitioner to live a **flamboyant** (flashy) lifestyle, until his activities came to the attention of federal law enforcement agencies. As the authorities closed in, petitioner’s state of mind deteriorated. Ultimately, he held his former girl friend captive in an apartment, threatened her with a gun and as she escaped by jumping from a second floor apartment, fired the gun in her direction. After a jury trial, in 1985 petitioner was convicted of attempted murder in the second degree, unlawful imprisonment in the first degree, criminal possession of a weapon in the third degree, and criminal use of a firearm in the first degree and sentenced to 12 ½ to 25 years. He pled guilty to federal charges relating to the drug distribution network. Ultimately the state conviction was reversed and the petitioner pled guilty to attempted murder in the second degree and received a sentence of 2 to 6 years. After serving 6 years, in 1990, petitioner was released from prison. Four

years later, he had graduated from college and law school and passed the bar exam.

Beginning in 1995, each of petitioner’s 10 annual applications to the Committee was denied. The court reversed the 10th denial and remanded the case to the Committee for a hearing and recommendation. On remand, the Committee recommended petitioner’s admission.

Reviewing that decision, the court first looked at the controlling legislation. Admission to the bar is governed by Judiciary Law §90(1)(a) which provides that upon certification that a person has passed the bar exam, the Appellate Division, upon being satisfied that such person possesses the character and general fitness required for an attorney, shall admit him or her to practice to law.

In reviewing the Committee’s recommendation, the court made several noteworthy observations. First, the court noted, the statute reflects no intent to impose a continuing punishment on an applicant with a criminal past. Rather, the court’s role is to evaluate the risk that in the future the applicant will abuse the trust and responsibilities imposed by his or her professional status. Thus, the court emphasized, it must assess whether the applicant has behavioral traits that might be a threat to clients or to society in general and undermine the integrity of the legal system. Second, the court stated that “serious misconduct in the past must be considered in the context of more recent evidence; criminal history, and how it bears on an application, must be evaluated through the prism of the present since the test is whether the applicant currently possesses the character and fitness to practice law.” Third, the court concluded that because the court is unable to see inside an applicant’s head, objective evidence of the applicant’s rehabilitation should be more important than speculation about the workings of his or her thinking.

Because the statute provided no guidance on how to make this assessment with respect to bar applicants with criminal records, the court looked at the standards adopted by the American Bar Association’s “Comprehensive Guide to Bar Admission Requirements.” These standards advise looking at the applicant’s age at the time that the crime was committed, whether the crime was

recent, whether the information about the crime is reliable, the seriousness of the conduct, underlying factors, the full extent of the consequences of the crime, evidence of rehabilitation, whether the applicant has made contributions to society since the crime was committed, and the applicant's honesty during the application process, including whether he or she omitted material information or made material misrepresentations.

Here, in assessing whether there was objective evidence to show that petitioner had demonstrated adequate rehabilitation, the court found that the passage of 30 years was significant. In addition, since his initial application to the New York State Committee, the petitioner had been admitted to practice law in the state and federal courts of New Jersey, the federal district courts in New York and the Second and Third Circuit federal courts of appeal. These admissions, the court noted, showed that petitioner had met the character and fitness requirements necessary to be admitted to practice law in nine jurisdictions. Finally, nine witnesses testified about petitioner's conduct during law school and while working as a lawyer and law clerk.

The Court held that because a sufficient amount of time had passed from the time of the crime and that during that time, petitioner had conducted himself with honor and integrity, "there is no sound basis to further impede petitioner's quest to be admitted to the bar in the jurisdiction where, in an earlier life, he violated the law. Petitioner has shown that he possesses the requisite character and fitness for admission to the bar"

FEDERAL COURT DECISIONS

Second Circuit Affirms Dismissal of Inmate's First Amendment Retaliation Claim

In Dorsey v. Fischer, et al., 2012 WL 811350 (2d Cir. March 13, 2012), the United States Court of Appeals for the Second Circuit affirmed a U.S. District Court's dismissal of an inmate's civil rights

claim for First Amendment retaliation, finding that the inmate had failed to state a claim for which relief could be granted.

The inmate's original claim, which named DOCCS Commissioner Brian Fischer and 14 other employees as defendants, alleged violations of his rights under the First, Fourth, Fifth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution while he was incarcerated at Woodbourne Correctional Facility. The district court granted the defendants' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6)—failure to state a claim upon which relief can be granted. The inmate appealed only the dismissal of his claims against two sergeants and the deputy superintendent for First Amendment retaliation.

The appeals court began its analysis by stating that it reviews dismissals pursuant to Rule 12(b)(6) *de novo* (not assuming the correctness of the lower court's decisions on the law or the facts). Turning to the standard for pleadings, the court stated that to survive a motion to dismiss, a complaint must plead enough facts to state a claim to relief that is plausible on its face. In a case of First Amendment retaliation, a plaintiff must demonstrate: (1) that the speech or conduct at issue was protected by the First Amendment, (2) that the defendant took adverse action against the plaintiff, and (3) that there was a causal connection between the protected speech and the adverse action. The court also noted that it approaches prisoner retaliation claims with skepticism and particular care, because virtually any adverse action taken against a prisoner by a prison official could be characterized - by the prisoner - as a constitutionally **proscribed** (prohibited) retaliatory act.

Starting with the inmate's claim that one of the sergeants retaliated against him with verbal abuse, the court found that there were no allegations of physical abuse, nor was there enough specificity in the allegations to lead the court to believe that a "prisoner of ordinary firmness" would be deterred by the verbal abuse from exercising his constitutional rights. Similarly, the inmate's allegations that the sergeant ordered or conducted two cell searches and one search of his person in a

six-month period were insufficient to show adverse action.

The inmate also alleged that the sergeant threatened to destroy any grievance he filed, and that the sergeant was responsible when a grievance he did file “disappeared” from the prison mailbox. The court pointed out that the inmate’s complaint failed to plead anything more than the possibility that the sergeant had destroyed the grievance. Calling this allegation **conclusory** (jumping to a conclusion without providing facts to support it) and speculative, the court found that the inmate failed to state a claim against this sergeant for retaliation.

The inmate’s claims against a second sergeant and the deputy superintendent also failed, but for a different reason. The court found that the claims did not survive the third part of the retaliation analysis: causal connection between the protected speech and the adverse action. To properly allege a causal connection, an inmate’s allegations must support an inference that his protected speech or conduct was a substantial or motivating factor for the adverse action. In this case, the court found, the inmate did not provide any plausible reason why the second sergeant would file an allegedly false misbehavior report, other than the fact that the inmate had filed a grievance against the first sergeant. Similarly, the court found that the inmate’s filing a grievance against the first sergeant did not support an inference that the deputy superintendent retaliated by sentencing him to 75 days of solitary confinement. Finally, the court found insufficient the inmate’s allegation that the deputy superintendent retaliated against him because the year before he had filed a different civil rights case naming the deputy superintendent as a defendant. Without more specificity, the fact that one action followed the other in time was not enough to plead causation.

Second Circuit Finds Notice Was Adequate

In *Ayers v. Selsky*, 2012 WL 880628 (2d Cir. Mar. 16, 2012), the Second Circuit Court of Appeals considered a prisoner’s appeal from a judgment entered in favor of the defendants in a case challenging a Tier III hearing decision. The case began when the plaintiff was charged with having submitted to prison officials a call out list of inmates who were to be allowed to attend Nation of Islam (NOI) religious classes. This list was to replace a previously approved list of attendees. When the plaintiff submitted the list, he was not a DOCS-approved NOI facilitator. The new list eliminated 22 individuals whom had previously been approved to attend NOI classes.

The misbehavior report alleged that the plaintiff’s conduct violated Inmate Rule 104.12 (prohibiting inmates from organizing actions which may be detrimental to the facility) and a rule relating to gang activity. At the hearing, prison officials introduced evidence that the Plaintiff was attempting to use NOI gatherings as gang meetings and that he was introducing a “radical edge” in the NOI. The plaintiff argued that the misbehavior report did not provide him with notice that prison officials were going to introduce evidence that he intended to use NOI meetings for gang or other unauthorized purposes. The Hearing Officer found that the plaintiff had violated Rule 104.12 because he was attempting to improperly make a change in an authorized religious group which would have had the effect of preventing others from practicing their professed religion and because the plaintiff had admitted that he was not the approved NOI facilitator. The charge of gang related activity was dismissed.

The court disagreed with the plaintiff's notice argument, pointing out that the charge to which this argument was relevant had been dismissed and that the evidence in question - that the Plaintiff was attempting to use NOI gatherings as gang meetings or to introduce a radical edge into the NOI - was also relevant to the charge of organizing activities which are detrimental to the facility, i.e., the hearing officer could infer from this evidence that the plaintiff intended to organize inmates to disturb the order of the facility.

Finally, the Court ruled that in this case, where the plaintiff was not confused by the fact that the incident date on the misbehavior report was the date that the report was written and not the date upon which the misconduct took place, the plaintiff's right to notice of the charges against him had not been violated.

For these reasons, the Court affirmed the decision granting judgment to the defendants.

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